

**IN THE MISSOURI COURT OF APPEALS**  
**SOUTHERN DISTRICT**

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DOUGLAS COSBY,	)	
	)	
Appellant,	)	
	)	Appeal No: SD35115
V.	)	
	)	
TREASURER OF MISSOURI AS	)	
CUSTODIAN FOR THE SECOND INJURY	)	
FUND,	)	
	)	
Respondent.	)	
	)	

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APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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BRIEF OF APPELLANT, DOUGLAS COSBY  
\_\_\_\_\_

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29, 32

## JURISDICTIONAL STATEMENT

This matter involves statutory interpretation and constitutional issues pertaining to the combinational disability liability of the Second Injury Fund (Fund) under § 287.220 RSMo<sup>1</sup>, as amended in 2013 by Senate Bill 1 (SB1), effective January 1, 2014, for permanent partial disability (PPD) workers' compensation claims.

Mr. Douglas Cosby (Employee), the Employee/Claimant in the underlying workers' compensation case, appeals the final award issued on August 16, 2017, by the Labor and Industrial Relations Commission (Commission). The Commission affirmed the award of the Administrative Law Judge (ALJ) denying Employee's claim for PPD benefits against the Fund. Pursuant to § 287.495, the Employee is mandated to file his appeal from the Commission to the Missouri Court of Appeals. The injury in the underlying workers' compensation claim occurred in Crawford County, Missouri (L.F. 55) Therefore, this case falls within the territorial jurisdiction of the Missouri Court of Appeals, Southern District, pursuant to § 477.060.

Provisional jurisdiction is proper in this Court. However, the Supreme Court of Missouri has exclusive jurisdiction involving the constitutionality of a statutory provision of this State. *See* Mo. Const. Art V, § 3. Thus, this case should be transferred to the Missouri Supreme Court.

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<sup>1</sup> Unless otherwise indicated, all statutory references in this brief are to Revised Statutes of Missouri 2013 as amended by SB1, effective January 1, 2014

## STATEMENT OF FACTS

### Procedural History

On August, 20, 2015, prior to Hearing, Employee settled his January 22, 2014 (primary injury) claim with the Employer for 20% PPD of the left knee. (Tr. 155) The Fund claim was left open. *Id.*

On May 11, 2016, a Hearing was held on this workers' compensation claim before ALJ David Zerrer. The issues were: (1) the liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability, and (2) whether amendments to Section 287.220 RSMo set out in Senate Bill 1, passed by the legislature effective January 1, 2014 are constitutional. (L.F. 33, Tr. 3-4, 59, 525) The Employee argued that strict construction of § 287.220 as amended by SB1 supports an award of PPD benefits against the Fund and a finding otherwise would render SB1's amendments to § 287.220 unconstitutional. The Fund argued that there are no longer PPD benefits against the Fund after January 1, 2014. The Employee first raised the constitutional arguments in his claim for compensation. (L.F. 25) The Fund was the only defendant at Hearing and did not call any witnesses and offered no exhibits.

On July 28, 2016, the ALJ issued his award denying Employee's claim against the Fund. (L.F. 64) The ALJ found that Employee's primary work injury occurred after January 1, 2014 and therefore Employee was barred from receiving PPD benefits from the Fund under § 287.220.3 as amended by the legislature in SB1. (L.F. 63-64)



Employee appealed and filed his Application for Review of the denial of Fund benefits to the Commission citing multiple errors in the ALJ's award, including the constitutional issues. (L.F. 41-43) Employee also submitted a supplemental brief to the Commission citing *Gattenby v. Treasurer*, 516 S.W.3d 859 (Mo. App. W.D. 2017)(Denied transfer to Missouri Supreme Court) in support of Employee's statutory interpretation arguments because *Gattenby* became final after Employee filed his Application for Review to the Commission. (L.F. 44-51)

On August 16, 2017, the Commission issued a final award denying compensation and affirming and adopting the ALJ's award. (L.F. 52) The Commission agreed with the ALJ that since the Employee's claim for PPD benefits against the Fund arose from a primary injury that occurred on January 22, 2014, and because § 287.220.3(2), as amended by SB1, provides that "[n]o claims for permanent partial disability occurring after January 1, 2014, *shall be filed* against the second injury fund," that Employee's claim is denied. (L.F. 52-53) The Commission acknowledged that § 287.220.3 does not address how benefits "*shall be compensated*", only that no claim "*shall be filed*" against the Fund for PPD benefits after January 1, 2014. (L.F. 53)

The Commission held the Division of Workers' Compensation and Commission does not possess statutory authority to resolve Employee's argument that the 2013 amendments to § 287.220 are unconstitutional. *Id.* However, the Commission recognized these constitutional arguments were timely raised and properly preserved for any appellate purposes. *Id.*

The Commission expressed their view that the 2013 amendments to § 287.220 are not unconstitutional, because the Commission believed no rights were extinguished. (L.F. 53-54) The Commission stated that:

“in our view, the 2013 amendments to § 287.220 work the effect that employers and their insurers are now liable for any enhanced permanent partial disability that results from the synergistic combination of pre-existing disability and primary injuries *occurring after January 1, 2014*, as the legislature has clearly removed from employers the prior protections of the Second Injury Fund for these kind of synergistic injuries.” *Id.*

By the same token, the Commission stated that permanent total disability (PTD) claims that do not qualify for Fund benefits under the SB1 amendments are also now the liability of Employers. *Id.*

The Commission concluded that in this case, “because Employee’s claim cannot be accepted *as filed* pursuant to the plain and unambiguous language of § 287.220.3(2), we must deny the claim.” *Id.*

### **Factual Background**

The Fund stipulated to many facts and did not produce any evidence to dispute the rest. (L.F. 3-4, Tr. 524-525) The main issues in this Appeal are the interpretation and constitutionality of §287.220 as amended in 2013 by SB1, effective January 1, 2014.

On January 22, 2014, Employee was injured while working for Drake Carpentry as a carpenter in Cuba, Missouri when he fell from a ladder hurting his left knee and leg.

(L.F. 59) He underwent arthroscopic surgery, excision of loose body, partial lateral meniscectomy, and excision of plica of the patellofemoral joint of the left knee performed by Dr. Kostman.. *Id.* Dr. Kostman assessed 1% PPD of the left knee. (Tr. 293-296, 313)

Evidence was also produced pertaining to four previous disabilities: (1) 1974 football injury that required left knee arthrotomy and lateral meniscectomy surgery, (2) 2002 bilateral inguinal hernia injury incurred while lifting heavy concrete form and finishing machine at work requiring surgery, (3) 2004 left shoulder rotator cuff tear and surgery when he fell from a tree stand, and (4) 2008 right rotator cuff tear and surgery after moving a heavy motorcycle. (L.F. 60-61, Tr. 26-54, 246-249)

Employee was evaluated by Dr. Poetz on 10/23/2014. (Tr. 245) He is the only expert to rate and evaluate all disabilities. His opinions as to pre-existing injuries, ratings, combination and synergy are uncontradicted. (Tr. 245-255) Dr. Poetz provided the following ratings: (1) 30% PPD at the left knee for the 1/22/2014 primary injury, (2) 15% PPD at the left knee for 1974 injury, (3) 25% PPD body as a whole (BAW) for the inguinal injury in 2002, (4) 25% PPD at the left shoulder for the 2004 injury, and (5) 25% PPD at the right shoulder for the 2008 injury, and a 15% load. (Tr. 251-252)

*All of Employee's previous disabilities arose before the effective date of SB1's amendments to § 287.220.* (L.F. 60) Employee's primary injury occurred and the Claim for Compensation was *filed after* the effective date of the SB1. (L.F. 63) The parties stipulated to an average weekly wage (AWW) of \$718.51 yielding a PPD rate of \$446.85. (L.F. 58, Tr. 3) The Employee submitted evidence and testified credibly as to his

symptoms and problems from each disability and how all his disabilities were a hindrance and obstacle to work and combined with his primary injury. (L.F. 60-61, Tr. 26-54)

The Division file contains documentation of Employee's prior workers' compensation settlements. (L.F. 61) The records show Employee settled his pre-existing 2002 bilateral hernia work injury for 12.5% and 2.5% body as a whole (BAW) against the Employer. (L.F. 61, Tr. 188, 218) On 5/11/2006, Employee settled his 2002 bilateral hernia enhanced PPD against the Fund with a previous disability of 20% of the left knee. (L.F. 61, Tr. 215)

Employee testified at trial that he recalled the settlement with the Fund for his 2002 bilateral hernia injury for the combinational PPD with his left knee. (Tr. 54-56) He also testified that after reading §287.220 with SB1's changes, it doesn't make sense and is confusing because there are portions in SB1 where it says he got compensation and another part said he didn't. *Id.*

**POINTS RELIED ON**

- I. The Commission erred in finding the Fund not liable for permanent partial disability benefits, because Employee met his burden of proof that he is entitled to benefits under § 287.220.2, in that the Commission misinterpreted and misapplied § 287.220.3 as amended by SB1 effective January 1, 2014.

*Gattenby v. Treasurer of MO*, 516 S.W.3d 859 (Mo. App. W.D. 2017)

§ 287.220.2 RSMo

§ 287.800 RSMo

- II. The Commission erred in finding Employee not eligible for permanent partial disability benefits against the Fund, because § 287.220 as amended by SB1 effective January 1, 2014 and as interpreted and applied by the Commission is unconstitutional, in that it violates Missouri Open Courts Rule, Due Process under Missouri and U.S. Constitution, and Equal Protection under Missouri and U.S. Constitution.

Mo. Const. Art I, § 14

Mo. Const. Art I, § 10

Mo. Const. Art I, § 2

## SUMMARY OF THE ARGUMENT

This appeal is a matter of first impression in regards to the statutory interpretation and constitutionality of portions of § 287.220, as amended in 2013 by Senate Bill 1 (SB1) effective January 1, 2014, as it pertains to Employee's permanent partial disability (PPD) claim against the Second Injury Fund (Fund). The Employee avers strict construction of § 287.220 supports an award of PPD benefits against the Fund for his post SB1 claim for compensation. A finding otherwise would render SB1's amendments to § 287.220 unconstitutional for violation of the Open Courts Rule, Due Process, and Equal Protection.

On August 16, 2017, the Commission denied the Employee's claim for PPD benefits against the Fund because it could not be accepted *as filed* pursuant to § 287.220.3(2). Employee argues the Commission misinterpreted the statute and applied the wrong section because all of Employee's pre-existing injuries arose before January 1, 2014, thereby qualifying the Employee for PPD Fund benefits under § 287.220.2. In the alternative, Employee argues that the amendments to § 287.220 as interpreted and applied by the Commission are unconstitutional and Employee is entitled to benefits under § 287.220.2 as it existed before it was amended.

## STANDARD OF REVIEW

The Court's standard of review is set forth in section § 287.495.1, which states: "the court on appeal, shall review only questions of law and may modify, reverse, remand for Hearing or set aside the award upon any of the following grounds and no other: (1) That the commission acted without or in excess of its powers; (2) That the award was procured by fraud; (3) That the facts found by the commission do not support the award; (4) That there was not sufficient competent evidence in the record to warrant the making of the award." On appeal this Court must determine whether the Labor and Industrial Commission's award is authorized by law and supported by competent and substantial evidence. Mo. Const. Art. V, §18.

The standard of review for questions of fact was established in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Under that decision, the reviewing court should make "a single determination whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." *Id.* at 223 Questions of law are reviewed de novo. *Rector v. Gary's Heating and Cooling*, 293 S.W.3d 143, 145 (Mo. App. S.D. 2009)

## ARGUMENT

- I. The Commission erred in finding the Fund not liable for permanent partial disability benefits, because Employee met his burden of proof that he is entitled to benefits under § 287.220.2, in that the Commission misinterpreted and misapplied § 287.220.3 as amended by SB1 effective January 1, 2014.**

The initial issue this Court must decide is whether § 287.220.2 or § 287.220.3 applies. This is a question of law and is to be reviewed de novo. *Rector v. Gary's Heating and Cooling*, 293 S.W.3d 143, 145 (Mo. App. S.D. 2009) It is Employee's position that he is entitled to PPD benefits against the Fund pursuant to § 287.220.2 as amended by SB1 in 2013 by the Missouri Legislature, effective January 1, 2014, because all of Employee's pre-existing disabilities arose before January 1, 2014. This argument was preserved for appellate review.

The Commission incorrectly held § 287.220.3, specifically subsection 3(2), applies to this case. The Commission did not strictly construe § 287.220 subsections 2 and 3 to determine if they conflict, did not consider legislative intent, and did not determine whether the sections needed to be harmonized as required by the rules of statutory construction.

Pursuant to § 287.800, the provisions of Chapter 287 of the Missouri Workers' Compensation statute shall be construed strictly. Strict construction means that the statute can be given no broader an application than is warranted by its plain and unambiguous



terms. *Pannewell v. Hannibal Reg'l Hosp.*, 390 S.W.3d 919, 923 (Mo. App. E.D. 2013)(Citing *State ex rel. KCP & L of Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 20 (Mo. App. W.D. 2011). The strict construction of a statute presumes nothing that is not expressed. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014).

The primary rule of statutory construction is legislative intent. *Cook v. Newman*, 142 S.W.3d 880, 886 (Mo. App. W.D. 2004). First we consider the plain language of the statute. *Richard v. Missouri Dept. of Corrections*, 162 S.W.3d 35, 39 (Mo. App. E.D. 2005). No construction is necessary if the meaning of the statute is clear. *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126 (Mo. App. E.D. 2007).

Missouri legislative intent regarding the Fund was clear and had been established for nearly three quarters of a century since the creation of the Fund in 1943. *The Fund was created by the Legislature to encourage employers to hire handicapped persons. Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955 (Mo. 1963). When the law was amended in 1993, courts focused on the purpose and policies of the Fund when interpreting the statute. The focus of the Fund is to *compensate for the potential that a "previous injury" would give rise to prospective employer's incentive to discriminate. Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D. 1995).

The legislative intent and policy regarding the Fund has not changed. SB1 is silent in this regard. The legislature is presumed to know its historical precedent and case law when it acts. Since the legislature did not expressly overrule this declared purpose, it is

still the legislative policy with respect to Fund claims. *Kolar v. First Student Inc.*, 470 S.W.3d 770, 777 (Mo. App E.D. 2015).

The first step is to review § 287.220.2, which is the enabling provision that establishes Fund benefits. Prior to the enactment of SB1, § 287.220.2 had been the only enabling provision in § 287.220 that established Fund PPD benefits. Section 287.220.2 remains the same after SB1 *except* the first sentence has now been changed to read:

“All cases of permanent disability, where there has been *previous disability* **due to injuries occurring prior to January 1, 2014**, shall be compensated as provided **in this subsection**.” (Boldface language denotes changes made by SB1)

It is important to note that SB1 did not remove “*previous disability*” from this section. Prior to the enactment of SB1, courts interpreted this section in regards to Fund PPD liability for “*previous disability*” as follows:

“If the Second Injury Fund is to serve its acknowledged purpose, ‘*previous disability*’ should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition.” *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D. 1995).

A strict reading of §287.220.2 allows PPD Fund benefits where the “*previous disability*” was due to “*injuries*” before January 1, 2014. All of Employee’s pre-existing injuries occurred before January 1, 2014. Therefore, Employee’s claim falls under subsection 287.220.2 and he is entitled to PPD benefits against the Fund for the combination of his (1) 1974 left knee, (2) 2002 inguinal injury, (3) 2004 left shoulder, and (4) 2008 right shoulder with his primary injury.

The next step in the analysis is to determine if there are any other potentially conflicting provisions and whether they can be harmonized. SB1 added a completely new subsection, § 287.220.3(1), which provides:

“All claims against the second injury fund for *injuries* occurring *after January 1, 2014*... shall be compensated as provided in this subsection.”

The qualifying language of § 287.220.3(1) is also potentially applicable to this claim since Employee has made a claim against the Fund for the primary *injury* (singular) that occurred on January 22, 2014, after the effective date of SB1. However, § 287.220.3(1) refers to “*injuries*” (plural) and not “*previous disability*.”

Both § 287.220.2 and § 287.220.3 cannot apply to Employee because of their very different standards of imposing Fund liability. Where two statutory provisions covering the same subject matter are unambiguous standing separately, but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them

both effect. *South Metro. Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009).

This Court must therefore construe the law in some fashion *harmonizing* the two sections considering the legislative intent. Strict construction applies to harmonizing the law. As always, the goal of construction, strict or otherwise, is to ascertain the legislative intent. One analysis suggests the legislature's intent was to change the standard for Fund claims effective January 1, 2014. However, legislative intent is determined by the actual language used by the legislature, not the popular understanding of current events involving the Fund. Furthermore, a popular understanding may explain the effective date of the change, but not necessarily what specifically is covered in the change, or when it would, as a legal matter, take effect.

Another analysis suggests that since the facts of this case fit within both subsections, then they both apply. Given that policy regarding the Fund's purpose was not changed by the legislature, then the Fund ought to be obligated to provide benefits here since finding Fund coverage limits Employers' liability for the Employee's disability, thus encouraging Employers to hire handicapped employees. In other words, if both sections apply, the legislative policy previously enunciated in *Wuebbeling*, 898 S.W.2d at 620, dictates Fund liability.

Alternatively, if subsection 3 applies only to claims where *both* the pre-existing and primary injury occur *after* January 1, 2014 then subsection 3 covers a different set of *injuries* than subsection 2 and the two do not conflict, which in turn harmonizes and gives

meaning to both sections. The language of subsection 3 bolsters this interpretation. Section 287.220.3(1) specifically states, “All claims against the second injury fund for *injuries* occurring after January 1, 2014 ...shall be compensated as provided in this subsection.” The plural term “*injuries*” may refer to the panorama of claims against the Fund, but it equally could refer to the panorama of injuries within a claim. In other words, “injuries occurring after January 1, 2014” applies to all relevant injuries of any given claim, not just the claim for the primary injury.

This claim against the Fund is based in part on injuries occurring before January 1, 2014. Consequently, it cannot be a claim against the Fund for injuries occurring after the effective date, as the statute requires. Employee’s injuries straddle the effective date of §287.220 as amended.

The interpretation that §287.220.2 continues to allow benefits against the Fund for PPD for pre-existing injuries before January 1, 2014 without regard for the date of the primary injury while §287.220.3 only pertains to pre-existing and primary injuries after January 1, 2014 gives meaning to both subsections 2 and 3, differentiating when they apply. Both have meaning and apply to different factual circumstances, thereby harmonizing the provisions. Utilizing this interpretation, § 287.220.2 applies to this case.

On February 28, 2017, the Missouri Western District Court of Appeals issued an opinion in *Gattenby v. Treasurer of MO*, 516 S.W.3d 859 (Mo. App. W.D. 2017) for the first time interpreting the statutory provisions of SB1. The Court’s statutory interpretations in regards to § 287.220 subsections 2 and 3 as amended by SB1 supports

Employee's interpretation. Although *Gattenby* involved a claim for permanent total disability (PTD) benefits against the Fund, the same initial analysis the Court did in *Gattenby* must be done regardless as to whether it is a claim for PPD or PTD against the Fund.

In *Gattenby*, Mr. Gattenby claimed PTD benefits against the Fund for pre-existing injuries that occurred *before* January 1, 2014 in combination with a primary injury that occurred *after* January 1, 2014. *Id.* at 860. Identical to the task of this Court, the Western District Court of Appeals had to first decide whether § 287.220 subsections 2 or 3 applied. *Id.* at 861. The Court in *Gattenby*, explained “287.220.3 applies only where both the preexisting and primary injuries occur after January 1, 2014.” *Id.* at 862. In support of its analysis, they stated, § 287.220.2 plainly refers to “previous disability,” whereas 287.220.3 *does not*. *Id.* They go on to state that with an eye towards harmonizing the provisions, this result gives meaningful effect to all the language chosen by our legislature, and is consistent with the strict construction mandate. *Id.*

The Court in *Gattenby* held that “because Mr. Gattenby’s claim against the [Fund] involves a preexisting injury or injuries that resulted in disability *before* January 1, 2014, subsection 287.220.2 is the controlling statute guiding Second Injury Fund liability.” *Id.* They did not make a distinction between PPD versus PTD benefits. Here, like Mr. Gattenby, Employee claims benefits against the Fund for pre-existing injuries that resulted in disability *before* January 1, 2014 in combination with a primary injury that

occurred *after* January 1, 2014. Therefore, like Mr. Gattenby, Employee is entitled to benefits pursuant to § 287.220.2.

Having found §287.220.2 applies, Employee need only meet the threshold on at least one of Employee's pre-existing injuries in order to trigger Fund liability. *Witte v. Treasurer of Missouri*, 414 S.W.3d 455 (Mo. banc 2013). Employee has submitted uncontradicted evidence that at least one of Employee's pre-existing disabilities meets the statutory threshold. Therefore, Employee qualifies for PPD benefits against the Fund. Since the Commission made no findings in regards to the percentages of disability for Fund liability, this case should be remanded to the Commission with instructions to apply § 287.220.2 to determine the amount in PPD benefits against the Fund that should be awarded to the Employee.

**II. The Commission erred in finding Employee not eligible for permanent partial disability benefits against the Fund, because § 287.220 as amended by SB1 effective January 1, 2014 and as interpreted and applied by the Commission is unconstitutional, in that it violates Missouri Open Courts Rule, Due Process under Missouri and U.S. Constitution, and Equal Protection under Missouri and U.S. Constitution.**

It is Employee's position that § 287.220, as amended by SB1 effective January 1, 2014, is unconstitutional as interpreted and applied by the Commission, in that it violates the Open Courts Rule, Due Process under Missouri and U.S. Constitution, and Equal

Protection under Missouri and U.S. Constitution. This is a question of law and is to be reviewed de novo. *Rector v. Gary's Heating and Cooling*, 293 S.W.3d 143, 145 (Mo. App. S.D. 2009). The Commission recognized these constitutional arguments were timely raised and properly preserved for any appellate purposes. (L.F. 53)

### **A. Open Courts Rule**

In this case, the Commission interpreted and applied subsection 3(2) of § 287.220 for the first time since SB1 became effective on January 1, 2014. Employee maintains § 287.220.3(2) violates the Missouri Open Courts Rules, as interpreted and applied by the Commission, because it does not abolish the right to PPD *benefits* against the Fund, but rather only removes the right of “*filing*” to access those certain benefits against the Fund. Section § 287.220.3(2) states:

“No claims for permanent partial disability occurring after January 1, 2014 shall be *filed* against the Second Injury Fund.”

These words when strictly construed do not abolish PPD Fund *benefits* post January 1, 2014 because the words “*filed*” and “*benefits*” are not legally synonymous. Any employee can file a Claim for Compensation but that does not mean that employee will be entitled to benefits. An employee may even choose to receive benefits without formally filing their claim. Here, the legislature did not deny benefits; rather the legislature denied Employee’s the right to “*file*” to access those benefits. This arguably contradicts the right to Fund benefits in § 287.220.2. If the legislature wanted to abolish PPD Fund benefits then they would have said that instead.



The Commission did not explicitly find Employee is disqualified for Fund benefits. Instead, the Commission found, “Because Employee’s claim cannot be accepted *as filed* pursuant to the plain and unambiguous language of § 287.220.3(2), we must deny the claim.” (L.F. 54)

The question then turns to whether or not the legislature can provide for a benefit and at the same time restrict an employee’s right to file a claim in court to seek those benefits- or more generally, forbid an individual from the right to file a claim in court.

Article 1, Section 14 of the Missouri Constitution states: “That the Courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice shall be administered without sale, denial or delay.” This is referred to as the Open Courts Rule. For the legislature to create a benefit and then forbid an employee to file to collect that benefit is a violation of the Missouri Open Courts Rule. Employee has submitted evidence of injury to his person and is conferred benefits under § 287.220 of the Missouri Workers’ Compensation Act. Therefore, § 287.220.3(2) is unconstitutional in barring Employee to file a claim to collect those benefits.

Employee also contends that § 287.220.3(2) affected a substantive right and therefore cannot be applied retrospectively. Employees suffering from pre-existing disabilities prior to the amendment’s effective date of January 1, 2014 already had a vested reasonable expectation in their right to receive Fund *benefits* in the future should they incur a new compensable injury. To then pass a law that states those employees cannot “*file*” for these *benefits* affects a substantive right by stripping them of all access

to enforce benefits. This expectation of benefits is rooted in the legislature's policy regarding Fund liability- to compensate for the potential that a "*previous disability*" would give rise to prospective employer's incentive to discriminate. That policy has not changed.

Recently, the Missouri Supreme Court rejected the Director of Revenue's argument that a breathalyzer regulation simply sets out a procedural rule governing admissibility of breath test results and should retrospectively validate an otherwise improperly conducted calibration. *Stiers v. Dir. Revenue*, 477 S.W.3d 611 (Mo. 2016). Similarly, a § 287.220.3(2) denial of the right to file a claim for PPD benefits cannot retrospectively invalidate Employee's otherwise valid right to those workers' compensation benefits.

Employee's pre-existing injuries all occurred prior to the effective date of SB1. Employee settled one of his pre-existing injuries with the Fund in 2006. Therefore, he was aware of the benefits then and had a vested expectation for future combinational benefits. Since the application of § 287.220.3(2) cannot be applied retrospectively, Employee qualifies for benefits pursuant to § 287.220.2.

The Commission suggested another alternative is to find § 287.220.3(2) prevents benefits against the Fund for combinational PPD and shifts the liability back to the Employer thereby allowing an employee to file for combinational PPD against employers now instead. However, this interpretation is in contrast to the purpose and policy of the Fund as expressed by the Missouri legislature and the courts.

A brief review of Missouri's workers' compensation history places this alternative in context. In 1925, Missouri adopted its first Workers' Compensation Law. In *Goebel v. Missouri Candy Co.*, 50 S.W.2d 741 (Mo. App 1932), this law was found to provide that the employer was responsible for disability caused by the combination effect of the last injury and pre-existing disabilities in addition to the disabilities from the last injury. In other words, additional benefits were paid by the employer because of the combination affect.

The Fund did not come into existence until 1943. James B. Slusher, *The Second Injury Fund*, 26, Mo. L. Rev. 328 (1961). Employers were still responsible for the combinational affect for permanent partial disability (PPD) but were relieved from the combination affect for permanent total disability (PTD), assuming it was not caused by the last injury alone. *See* § 287.220 RSMo 1949. By 1959, Section 287.220 was amended and made the Fund responsible for enhanced PPD payments due to the combination of injuries. It provided in pertinent parts that the employer was responsible for the "last injury considered alone and of itself". Substantial changes were made to § 287.220 in 1993, which remained in substantial effect until SB1.

The leading case that discusses the employer's liability in absence of the Fund is *Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955 (Mo. 1963). The Missouri Supreme Court stated that in the absence of an apportionment statute or Second Injury Fund legislation, the employer is liable for the entire disability resulting from a compensable injury. *Federal*, 371 S.W.2d at 957. In considering this interpretation by the Supreme Court, bear in mind that the language "considered alone and of itself" existed prior to the

adoption of the present Second Injury Fund laws in 2013. It is now also contained in the present version of § 287.220.3(3).

In short, in absence of the Fund, the employer is potentially responsible for combination affect. However, this is against purpose of the Fund that was enunciated in *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D. 1995). In the absence of an alternative interpretation, § 287.220.3(2) violates the Missouri Open Courts Rules because it does not abolish the right to PPD *benefits* against the Fund

### **B. Due Process**

It is Employee's position that § 287.220 as amended by SB1 in 2013 by the Missouri Legislature, effective January 1, 2014, as interpreted and applied by the Commission is unconstitutional because it violates the right to due process. Additionally, if this Court finds § 287.220 subsections 2 and 3 are not capable of being harmonized then they violate due process because such overlap does not inform the public of what rules govern their particular circumstances. Employee avers the only way to harmonize the statutes is to find that § 287.220.2 applies to this case because §287.220.3 can only meet constitutional due process requirements if it applies to Fund claims where both the primary disability and the pre-existing disability occur after January 1, 2014.

A statute must give notice of its requirements. Where "a person of ordinary intelligence does not receive fair notice from the language employed in the law what conduct that law requires or forbids", then the statute violates due process. *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 105 (Mo 1997), *Psychiatric Healthcare Corp of Missouri v. Dept. of Soc. Services*, 100 S.W.3d 891, 901 (Mo. App.

W.D. 2003). Both Article 1, Section 10 of the Missouri Constitution and Section 1 of the 14<sup>th</sup> Amendment of the Constitution of the United States requires due process.

Employee contends that lawyers, Commissioners, and Judges all have different interpretations of § 287.220 subsections 2 and 3, so we cannot expect the Employee and other injured workers of ordinary intelligence to understand this law. The case of *Gattenby v. Treasurer*, 516 S.W.3d 859 (Mo. App. W.D. 2017) illustrates this point. In *Gattenby*, the Commission attempted for the first time to interpret SB1's amendments to § 287.220 subsections 2 and 3. Although that case involved PTD and not PPD, the Court had to initially determine whether subsection 2 or 3 applied to pre-existing injuries that arose before January 1, 2014. *Id.* at 861. This is no different than the initial analysis that must be performed in this case. After reviewing the statute, the Commission held the newly created subsection 3 applied. *Id.* However, on appeal, the Western District Court of Appeals interpreted subsection 2 applied. *Id.* at 862.

This is not Employee's first Fund claim. He previously settled a claim against the Fund in the past for his pre-existing injuries. This 2006 prior settlement was admitted in evidence. Employee understood the law regarding Fund liability then. However, Employee testified he read the new amended section § 287.220 and he doesn't understand it and is confusing. Furthermore, based on the above discussion in this brief, Employee's injuries straddle the effective date of SB1 and both subsections 2 and 3 are potentially applicable. This violates due process because persons of ordinary intelligence don't know what law applies to determine the outcome of their workers' compensation claim.

### C. Equal Protection

It is Employee's position that § 287.220 as amended by SB1 in 2013 by the Missouri Legislature, effective January 1, 2014, as interpreted and applied by the Commission is unconstitutional as interpreted and applied by the Commission because it violates the right to equal protection under the law. Both Article 1, Section 2 of the Missouri Constitution and Section 1 of the 14<sup>th</sup> Amendment of the Constitution of the United States requires equal protection under the law.

Article 1, Section 2 of the Missouri Constitution states:

“...that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.”

Employee contends that there is no such restriction in the statute against *filing* for permanent total disability (PTD) benefits but there is for permanent partial disability (PPD) benefits against the Fund. Employees with pre-existing injuries and primary injuries from *before* January 1, 2014 are not treated equally with employees with pre-existing injuries and primary injuries that arise *after* January 1, 2014. Section 287.220 treats certain pre-existing injuries and individuals differently for PTD against the Fund. Specifically, the Act places no restrictions on pre-existing injuries for those injured while working for a sheltered workshop under § 287.220.3(2)(b). Nor do the amendments

discriminate between whether the pre-existing injury was a direct result of active military duty. *See* § 287.220.3(2)(a)(i).

In order to determine whether the statute violates equal protection, one must perform a rational basis analysis. A statute will withstand constitutional challenge if it bears some rational relationship to a legitimate state purpose. *State v. Young*, 362 S.W.3d 386, 397 (Mo. banc 2012); *Mo. Prosecuting Attorneys & Circuit Attorneys Ret. Sys. v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008). The Court presumes statutes have a rational basis, and the party challenging the statute must overcome this presumption by a "clear showing of arbitrariness and irrationality." *Foster v. St. Louis County*, 239 S.W.3d 599, 602 (Mo. banc 2007).

Excluding injured workers from benefits for pre-existing injuries, thereby providing an employer incentive to discriminate against that worker, has no rational basis in promoting a legitimate state objective. Disallowing benefits would give employers incentives to discriminate against an employee with a previous injury and not hire workers with pre-existing disabilities- a direct contradiction of the Fund's legislative purpose. This is not a rational basis.

It also makes no sense why persons with previous disabilities before 2014 are entitled to Fund PPD benefits but those after are not. Similarly, persons with a primary injury that occurred on New Year's Eve are not barred from *filing* for PPD benefits against the Fund but a person injured after January 1, 2014 is barred from *filing*. The date is arbitrary. There is no difference in the goal of promoting potential employers to hire

them. Furthermore, it makes no sense that the date of pre-existing injuries matter for PPD but not PTD. For instance, a veteran who is hurt during active duty in 2015 and then gets hurt on the job in 2016 is precluded from *filing* for PPD Fund benefits for the combination of those injuries under § 287.220.3(2). However, that same veteran is eligible for PTD benefits for the combination of that 2015 injury. This sends a signal to employers that they have more incentive to discriminate against those persons with pre-existing disabilities who can actually work than those that can't. This is not a rational basis.

At some point there is no longer the economic relief bargained for by injured workers and Employers. At that point, the legitimate state interest no longer bears any rational relationship to the legislation. The abovementioned illustrates this rational relationship no longer exists. Therefore, § 287.220 is unconstitutional as interpreted and applied by the Commission because it is in violation of equal protection under the law. Having found this statute unconstitutional, Employee qualifies for PPD fund benefits pursuant to § 287.220.2 as existed before § 287.220 was amended.



## CONCLUSION

Missouri was originally recognized as having one of the best workers' compensation systems in the United States. Robert J. Domrese & Stephen L. Graham, *Workmen's Compensation in Missouri*, 19 St. Louis U.L.J. 1, 1 (1974-75). Before SB1, for nearly three quarters of a century, the citizens, employers, legislatures, and injured workers of Missouri have understood § 287.220.2 as providing combinational benefits against the Fund. For the past three years our workers' compensation system has attempted to make sense of the newly added subsection 3. Appellant has offered the only way to harmonize and make sense of these sections. The alternative is to find § 287.220 unconstitutional as interpreted and applied by the Commission.

For the reasons set forth in this brief, Employee respectfully requests that the Award of the Commission entered August 16, 2017 be reversed and the case remanded to the Commission with instructions that § 287.220.3 does not apply and to issue an award that is consistent with the finding that the Employee qualifies for PPD benefits against the Fund pursuant to § 287.220.2, and such other and further relief as this Court may deem to be just and proper. Alternatively, should this Court find § 287.220.3 applicable, Employee requests this Court find § 287.220 as amended by SB1 unconstitutional and remand this case to the Commission with instructions to issue an award consistent with the findings that the Employee qualifies for PPD benefits against the Fund pursuant to § 287.220.2 as it existed prior to SB1, and further relief as this Court may deem to be just and proper.

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on December 13, 2017, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet to:

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I further certify that this brief contains 6497 words in compliance with the limitation in Rule 84.06(b), it contains the signature and required information in compliance with Rule 55.03, and I have signed the original.

/s/ Ronald D. Edelman  
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/s/ Marshall B. Edelman  
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