No. SD35115

In the Missouri Court of Appeals Southern District

DOUGLAS COSBY,

Appellant,

v.

TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND INJURY FUND,

Respondent.

Appeal from the Labor and Industrial Relations Commission

RESPONDENT'S BRIEF

JOSHUA D. HAWLEY
Attorney General

DAVID L. McCAIN, JR.
Assistant Attorney General
Missouri Bar No. 64010
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1024
Fax: (573) 751-2921
david.mccain@ago.mo.gov
ATTORNEYS FOR RESPONDENT MISSOURI STATE TREASURER

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SUPPLEMENTAL JURISDICTIONAL STATEMENT

This case involves an appeal from the final award of the Labor and Industrial Relations Commission (Commission). The Appellant, Douglas Cosby (Mr. Cosby), filed a Claim for Compensation on February 24, 2014, for a work injury that occurred in Crawford County, Missouri. LF. 2.[1] The Final hearing was held in Phelps County, Missouri in accordance with § 287.640.2.[2] Phelps County lies within the territorial jurisdiction of the Missouri Court of Appeals, Southern District. See § 487.050.

Nevertheless, Mr. Cosby challenges the constitutionality of § 287.220 arguing that the statute violates Missouri's Open Courts Rule, Due Process Clause, and Equal Protection Clause. Under Article V, Section 3 of the Missouri Constitution, the Missouri Supreme Court has "exclusive appellate jurisdiction in all cases involving the validity of a . . . statute . . . of this state." If any point on appeal involves a constitutional challenge, the entire case must be transferred to the Supreme Court. *Estate of Wright*, 950 S.W.2d 530, 534 (Mo. App. W.D. 1997).

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[1] The transcript will be cited as "Tr." and the legal file as "LF."

[2] All statutory references are to RSMo Cumm.Supp.2013, unless otherwise indicated.

Even so, the court of appeals does not lose jurisdiction simply because a case involves a constitutional challenge. Rather, the Supreme Court's "exclusive appellate jurisdiction is invoked when a party asserts that a state statute directly violates the constitution either facially or as applied." *McNeal v. McNeal-Sydnor*, 472 S.W.3d 194, 195 (Mo. 2015). Indeed, jurisdiction of appeals involving the validity of a state statute vests exclusively in the Supreme Court only if the claim has been properly preserved and the allegation is real and substantial and not merely colorable. *Sharp v. Curators of Univ. of Mo.*, 138 S.W.3d 735, 737 (Mo. App. E.D. 2003).

A constitutional challenge is real and substantial if, "upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy[.]" *Estate of Potasknick*, 841 S.W.3d 714, 718 (Mo. App. E.D. 1992). "One clear indication that a constitutional challenge is real and substantial and made in good faith is that the challenge is one of first impression with this Court." *Sharp*, 138 S.W.3d at 738 *citing Rodriguez v. Suzuki Motor Corp.,* 996 S.W.2d 47, 51 (Mo. banc 1999). Nevertheless, a finding that the constitutional challenge is a matter of first impression does not end the inquiry. "While the fact that the constitutional challenge is one of first impression indicates that the issue is real and substantial and made in good faith," the constitutional challenge

still must be more than merely colorable to deprive the appellate court of jurisdiction. *Accident Fund Ins. Co. v. Casey*, WD 80470, 2017 WL 6453636, at *4 (Mo. App. W. D. Dec. 19, 2017). "The challenge will be deemed merely colorable if it "is so legally or factually insubstantial as to be plainly without merit." *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 634 (Mo. App. W.D. 2011).

In this case, the Supreme Court's exclusive appellate jurisdiction is not invoked by Mr. Cosby's constitutional challenge to § 287.220. Mr. Cosby did properly preserve his constitutional challenge by raising it before the Division of Workers' Compensation and Commission, and his challenge is a matter of first impression. Nevertheless, Mr. Cosby's challenge is so insubstantial as to be plainly without merit.[3] Because Mr. Cosby's constitutional challenge is merely colorable, the Supreme Court does not have exclusive jurisdiction over this appeal.

FACTUAL AND PROCEDURAL HISTORY

The material facts regarding Mr. Cosby's Second Injury Fund (Fund) claim are undisputed and are outlined in the Commission's final award. Consequently, this brief will focus on the procedural history of the case.

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[3] See Respondent's Point II.

Mr. Cosby sustained a work related injury on January 22, 2014. Tr. 2-3. Mr. Cosby filed a claim against the Fund, alleging the Fund was liable to him for permanent partial disability (PPD) benefits based on his work related injury of January 22, 2014, in combination with his pre-existing disabilities. LF. 3. On May 11, 2016, a final hearing was held to resolve his workers' compensation claim. Tr. 2. Mr. Cosby's claim arose out of his employment with Drake Carpentry, Inc. (Employer). Tr. 2. Mr. Cosby settled his claim against Employer before the May 11, 2016, hearing. Tr. 2. Two issues were raised at the hearing: (1) Fund liability; and (2) whether amendments to RSMo Chapter 287[4] effective January 1, 2014, are unconstitutional. Tr. 3.

On July 28, 2016, the Administrative Law Judge (ALJ) issued an award denying Mr. Cosby's claim for Fund benefits. LF. 29-40. The ALJ held that "Section 287.220.3 (1) prohibits any claim against the Second Injury Fund for injuries occurring after January 1, 2014." LF. 38. Because Mr. Cosby's injury occurred on January 22, 2014, the ALJ denied benefits. LF. 39.

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[4] This brief will refer to Chapter 287 as "The Workers' Compensation Law" pursuant to § 287.010.

The ALJ declined to address Mr. Cosby's constitutional challenges to the Workers' Compensation Law. LF. 39.

Mr. Cosby appealed to the Commission. LF. 41-43. The Commission affirmed and adopted the ALJ's decision with a supplemental opinion. LF. 52-54. The Commission determined that because Mr. Cosby's claim for PPD benefits against the Fund arose from a primary injury that occurred on January 22, 2014, the ALJ correctly denied Mr. Cosby's claim for benefits. LF. 52.

SUPPLEMENTAL STANDARD OF REVIEW

§ 287.495.1 sets forth the court's standard of review:

> "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."

"Decisions involving statutory interpretation, however, are reviewed de novo." *White v. ConAgra Packaged Foods, LLC*, SC 96041, 2017 WL 6460352 (Mo. 2017)

Because the issues raised in this appeal involve statutory interpretation, this Court has de novo review. *Id.*

ARGUMENT

I. THE COMMISSION DID NOT ERR IN DENYING MR. COSBY'S CLAIM FOR PPD BENEFITS BECAUSE THE LEGISLATURE ELIMINATED PPD FUND LIABILITY FOR COMPENSABLE INJURIES OCCURRING AFTER JANUARY 1, 2014, WHEN IT AMENDED THE WORKERS' COMPENSATION LAW THROUGH SENATE BILL 1. – RESPONDING TO APPELLANT'S FIRST POINT RELIED ON

The Commission correctly found that Mr. Cosby cannot recover PPD benefits from the Fund because the legislature eliminated PPD Fund liability for compensable injuries after January 1, 2014, when it amended the

Workers' Compensation Law through S.B. 1, 97th Leg., 1st Sess. (Mo 2013).[5] Mr. Cosby argues that the Commission erred because it failed to "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." Appellant's Brief, 15. Appellant argues that "a strict reading of § 287.220.2 allows PPD Fund benefits where the 'previous disability' was due to 'injuries' before January 1, 2014." Appellant's Brief, 18.

Mr. Cosby's argument is misplaced. Subsections 287.220.2 and 287.220.3 state in pertinent part as follows:

> 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. . . .
>
> No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund.

Determining whether subsection 2 or 3 of § 287.220 applies to Mr. Cosby's PPD claim requires statutory construction. "The primary rule of statutory

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[5] The amendments to the Workers' Compensation Law will be referred to as Senate Bill 1 unless otherwise indicated.

construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *State ex rel. Unnerstall v. Berkemeyer,* 298 S.W.3d 513, 519 (Mo 2009). Indeed, "[a]ll canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent." *Williams v. Nat'l Cas. Co.,* 132 S.W.3d 244, 249 (Mo. banc 2004) (quoting *Budding v. SSM Healthcare Sys.,* 19 S.W.3d 678, 682 (Mo. banc 2000)). *Meyers v. Wildcat Materials, Inc.,* 258 S.W.3d 77, 82 (Mo. App. S.D. 2008). "Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ. of St. Louis,* 217 S.W.3d 301, 305 (Mo 2007). "This Court should never construe a statute in a manner that would moot the legislative changes, because the legislature is never presumed to have committed a useless act. To amend a statute and accomplish nothing from the amendment would be a meaningless act." *Kolar v. First Student, Inc.,* 470 S.W.3d 770, 777 (Mo. E.D. 2015) (internal citations omitted)

In addition to the requirements of ascertaining the legislature's intent to avoid unreasonable or absurd results, statutory construction also requires that each provision in a statute "be read in harmony with the entire section." *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248

S.W.3d 101, 107 (Mo. App. W.D. 2008). But when two statutory provisions covering the same subject matter conflict when read together, the reviewer must attempt to harmonize them and give effect to both. *Anderson*, 248 S.W.3d at 107.

Here, both the strict construction of Senate Bill 1, and the intent of the General Assembly is clear. The ability of an employee to recover PPD benefits from the Fund changed with the enactment of Senate Bill 1. Under Senate Bill 1, the legislature eliminated PPD claims filed after January 1, 2014, by clearly and unambiguously stating that "*no claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund*." § 287.220.3(2) (Emphasis added).

Mr. Cosby does not dispute the fact that the court must ascertain the legislature's intent when analyzing the amendments to the Workers' Compensation Law. Rather, Mr. Cosby argues, without citation, that the "legislature's intent and policy regarding the Fund has not changed," even with the enactment of Senate Bill 1. Appellant's Brief, 16. Mr. Cosby maintains that the policy regarding the Fund has always been and continues to be to "*encourage employers to hire handicapped persons*." (emphasis in original) Appellant's Brief, 16.

Mr. Cosby's argument fails to note that when construing statutes to ascertain legislative intent, "it is presumed the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts, and that in amending a statute or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law."*Kilbane v. Dir. of Dept. of Revenue*, 544 S.W.2d 9, 11 (Mo. 1976) *quoting Wright v. J. A. Tobin Construction Co.,* 365 S.W.2d 742 (Mo. App. W.D. 1963); *State ex rel. M. J. Gorzik Corp. v. Mosman*, 315 S.W.2d 209. (Mo. 1958).

It is undisputed that Senate Bill 1 and the legislative amendments to the Workers' Compensation Law came during a period when the Fund was insolvent. A recent opinion of the Western District acknowledges and discusses the Fund's financial status in 2013 and seriously calls into question Mr. Cosby's theory that the legislative intent of the Fund was not changed by Senate Bill 1. *State ex rel. Deckard v. Schmitt*, 532 S.W.3d 170 (Mo. App. W.D. 2017). This Court should look to *Deckard* for guidance.

In *Deckard,* the Western District held that Senate Bill 1's statutory amendment that created a priority for payments for Fund liabilities[6] applied

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[6] § 287.220.15

retroactively to bar payments of interest on claimants' awards issued before the statutory provision's effective date. *Id.* at 178. In reaching its decision, the *Deckard* court noted that portions of Senate Bill 1 were in direct response to the issues raised by the Fund's insolvency. The court wrote that portions of Senate Bill 1 "appear to be in direct response to issues raised in *Skirvin*." *Id.*

The *Deckard* court noted that Mr. Skirvin was deemed permanently and totally disabled (PTD) in 2006. *Id.* at 177. Because of his total disability, Mr. Skirvin was awarded weekly payments from the Fund to be paid for the remainder of his life. *Id.* In 2011, Skirvin was notified that although his award was scheduled for payment, the Fund "would be unable to make that payment due to its current balance and projections for the remainder of the fiscal year." *Id.* Mr. Skirvin filed a writ of mandamus to force the Fund to pay him his benefits. 532 S.W.3d at 177. His writ was granted by the Circuit Court but reversed by the Court of Appeals. *Id.* The case was transferred to the Supreme Court, which heard oral arguments but did not issue an opinion, because Mr. Skirvin was paid by the Fund before issuance of an opinion.

After noting issues surrounding the Fund's insolvency, the *Deckard* court held that "[i]n light of the plain language of § 287.220.15 and the circumstances surrounding the addition of § 287.220.15 to Chapter 287, we

conclude that the words 'any liabilities' evinces a legislative intent to make § 287.220.15 applicable to both pre and post-amendment SIF obligations." *Deckard*, 532 S.W.3d at 178.

The same analysis applies to the facts of this case. The legislature knew that the Fund was insolvent when it added § 287.220.3 to the Workers' Compensation Law with the enactment of Senate Bill 1. Given the insolvency of the Fund, including specifically those issues raised in *Skirvin*, the legislature intended to limit the obligations of the Fund by eliminating PPD liability. Mr. Cosby seems to concede that the insolvency of the Fund can be considered in determining the legislative intent regarding the enactment of Senate Bill 1. Essentially Mr. Cosby maintains that the intent of the legislature may have been to eliminate certain claims against the Fund due to the Fund's insolvency, but that the elimination of those benefits does not actually apply until many years in the future. Appellant's Brief, 19. Mr. Cosby's contrary argument in that regard carries little weight and must fail.

A finding that § 287.220.3 applies to all PPD claims filed after January 1, 2014, is the only way to harmonize subsections 2 and 3 and therefore give effect to the legislature's intent. Mr. Cosby's construction of Senate Bill 1 presents several problems. First, Mr. Cosby misinterprets the phrase "injuries" used in subsections 2 and 3. The only injury that the Workers'

Compensation Law has ever required when analyzing Fund liability is the work-related injury, which generally has been referred to as the primary injury. See *e.g*, *Blackshear v. Adecco*, 420 S.W.3d 678, 680 (Mo. App. E.D. 2014) ("The administrative law judge (ALJ) noted that [the parties] disagreed on the question of whether her disability was the result of the August 2005 injury (primary injury) alone . . ."). If Mr. Cosby's interpretation of Senate Bill 1 were correct, then the word "injuries" would encompass any injury (regardless of how insignificant) even if that injury were not disabling.

The more appropriate interpretation of Senate Bill 1 is that the word "injuries" refers to primary injuries. In this case, the claim against the Fund did not exist until Mr. Cosby suffered his primary left knee injury at work on January 22, 2014. The date of Mr. Cosby's alleged preexisting disabilities is irrelevant. The argument that Mr. Cosby is entitled to Fund benefits simply because his alleged preexisting disabilities occurred before January 1, 2014, is a red herring.

Indeed, a finding that the use of the word "injuries" in Senate Bill 1 refers to the primary injury is supported by our Supreme Court's decision in *Witte v Treasurer*. In *Witte*, our Supreme Court acknowledged that Senate Bill 1 amended § 287.220 "to change eligibility for benefits for *injuries* occurring after January 1, 2014." *Treasurer v. Witte*, 414 S.W.3d 455, 461

(Mo. 2013), footnote 3 (emphasis added). It was under that context that the *Witte* Court applied what would become subsection 2 to the cases before it as all of those primary *injuries* had occurred before January 1, 2014. This Court should follow the same path as the Supreme Court in *Witte* and find that subsection 3 applies to Mr. Cosby's claim because his primary injury occurred after January 1, 2014.

Another problem with Mr. Cosby's interpretation is that it leads to an unreasonable or absurd result. If § 287.220.3 applies only to cases where *all* injuries (both preexisting and primary) occur after January 1, 2014, most claims will not fall under that subsection for decades. Similarly, If § 287.220.2 applies whenever *any* of a claimant's preexisting disabilities occurred before January 1, 2014, then a teenager who suffered a torn ligament in 2013 would qualify for PPD benefits using § 287.220.2 for the rest of his or her life. Similarly, a child born with a disabling congenital defect on December 31, 2013, would be eligible for PPD benefits under § 287.220.2 for the rest of his or her life. Applying Mr. Cosby's argument, assuming that child has a work-related injury in the year 2053, the forty-year-old 2014 amendments to § 287.220.2 and 3, would still not be applicable to the claim. That certainly would lead to a situation which fits the definition of absurd and completely fails to "apply [the] statute in a manner consistent with the

legislative intent" of addressing the solvency of the Fund in 2013. *Williams v. Nat'l Cas. Co.,* 132 S.W.3d 244, 249 (Mo. banc 2004) (quoting *Budding v. SSM Healthcare Sys.,* 19 S.W.3d 678, 682 (Mo. banc 2000).

Based on the two examples above, a claimant could be eligible for PPD benefits for the next 70-plus years if Mr. Cosby's interpretation is accepted. Certainly the General Assembly did not intend—in the light of the insolvency of the fund—that claimants would continue to be eligible for PPD benefits for the next 70 years when it amended the Workers' Compensation Law to read that "[n]o claims for permanent partial disability occurring after the effective date of this section shall be filed against the second injury fund." § 287.220.3. Instead, the General Assembly intended that claimants would no longer be eligible for PPD benefits from the Fund after January 1, 2014. Simply put, § 287.220.2 applies to PPD claims where the claimant's primary work related injury occurred before January 1, 2014, and § 287.220.3 applies when the primary injury occurs after January 1, 2014. In fact, as amended § 287.220.2 essentially restates the requirements for Fund liability as they existed before the 2013 legislative amendments. Consequently, Mr. Cosby's assertion that he is entitled to PPD benefits fails.

Finally, Mr. Cosby also directs the court's attention to the recent decision of *Gattenby v. Treasurer*, 516 S.W.3d 859 (Mo. App. W.D. 2017). Mr.

Cosby argues that *Gattenby* supports his position that he is entitled to PPD benefits because all of his preexisting injuries occurred before the effective date of Senate Bill 1. Appellant's Brief, 20-22. Mr. Cosby's argument fails because the facts here are distinguishable from *Gattenby*.

The Court of Appeal's recent decision in *Gattenby* involved a claim for PTD benefits, whereas Mr. Cosby's claim in this case is a claim for PPD benefits. Chapter 287 does not treat claims for PPD benefits the exact same as claims for PTD benefits. For example, when analyzing a claim for PTD benefits, our Court of Appeals has stated that § "287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities." (internal citations and quotation omitted). *Dierks v. Kraft Foods*, 471 S.W.3d 726, 740 (Mo. App. W.D. 2015), *reh'g and/or transfer denied* (Sept. 1, 2015), *transfer denied* (Oct. 27, 2015). Instead, a claimant seeking PTD benefits simply "must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability." *Dierks*, 471 S.W.3d at 740.

Conversely, when an injured worker is seeking PPD benefits, Chapter 287 requires that at least one of the injured workers' preexisting disabilities

"equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury." *Witte*, 414 S.W.3d at 462. Because the Workers' Compensation Law treats PPD and PTD claims differently, Mr. Cosby's argument that *Gattenby* controls the outcome of this case carries little weight and must fail. *Gattenby* involved a PTD claim and does not address PPD claims.

Furthermore, *Gattenby* did not address at all the most relevant portion of § 287.220.3 which states "*no claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund*." § 287.220.3(2) (Emphasis added). As a result, the Western District's opinion in *Gattenby* does not prevent the court from applying § 287.220.3 to Mr. Cosby's PPD claim.

II. THE GENERAL ASSEMBLY'S ELIMINATION OF FUND PPD BENEFITS FOR CLAIMS FILED AFTER JANUARY 1, 2014, DOES NOT VIOLATE THE MISSOURI OR UNITED STATES CONSTITUTIONS – RESPONDING TO APPELLANT'S SECOND POINT RELIED ON

Mr. Cosby argues that § 287.220 as amended by Senate Bill 1, is unconstitutional because it violates "the Open Courts Rule, Due Process under Missouri and U.S. Constitution, and Equal Protection under Missouri

and U.S. Constitution." Appellant's Brief, 22-23. "A statute is presumed to be valid, and the Court will uphold it unless it 'clearly and undoubtedly' conflicts with the constitution. The Court 'resolve[s] all doubt in favor of the [statute's] validity.'" *Ambers-Phillips v. SSM DePaul Health Ctr.,* 459 S.W.3d 901, 905 (Mo. 2015) (internal citations omitted). Each of Mr. Cosby's constitutional arguments will be address in turn.

A. OPEN COURTS PROVISION

Mr. Cosby first argues that Senate Bill 1 violates the open courts provision of the Missouri Constitution. Appellant's Brief, 23-27. Specifically, Mr. Cosby argues that § 287.220.3(2) is unconstitutional 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." (emphasis omitted) Appellant's Brief, 23.

Mr. Cosby's argument is misplaced. The open courts provision of the Missouri Constitution guarantees 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." Mo. Const. art. I, Section 14. The party asserting an open courts provision violation must prove the following: "(1) a party has a recognized cause of action; (2) . . . the cause of action is being

restricted; and (3) the restriction is arbitrary or unreasonable." *Ambers-Phillips*, 459 S.W.3d at 909.

Mr. Cosby's argument fails because he cannot overcome part 1 of the test. The crux of Mr. Cosby's argument is that § 287.220.3 does not restrict an injured worker from receiving Fund benefits, but rather prevents them the ability to file for those benefits. Appellant's Brief, 23. Mr. Cosby contends that "[a]ny 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." Appellant's Brief, 23.

The problem with Appellant's argument is that he confuses the procedural process of obtaining workers' compensation benefits for a primary work related injury from an employer, with the process of receiving Fund benefits. An overview of the procedural process of obtaining workers' compensation benefits shows the flaw in Mr. Cosby's argument.

If a worker suffers an injury that requires medical aid, other than immediate first aid with no lost time from employment, then the employer (or its insurer or third party administrator) must report the injury to the Division of Workers' Compensation (Division). § 287.380; 8 CSR 50-2.010(1). Once reported, the injured worker receives treatment "to cure and relieve

from the effects of the injury." § 287.140. After the injured worker has received the appropriate treatment to cure and relieve the effects of the injury, any part may request a conference to resolve the workers' compensation matter. 8 CSR 50-2.010(6). No formal Claim for Compensation[7] is required before the parties may enter into a stipulation for compromise settlement. *Treasurer of the State of Missouri–Custodian of the Second Injury Fund v. Cook,* 323 S.W.3d 105 (Mo. App. W.D. 2010); *Grubbs v. Treasurer of Missouri as Custodian of Second Injury Fund*, 298 S.W.3d 907, 911 (Mo. App. E.D. 2009).

Although an injured worker may resolve his or her primary work related injury without filing a claim against the employer or its insurer, it cannot do the same against the Fund; a claim must be filed against the Fund before an injured worker can receive Fund benefits. The requirement for an injured worker to file a claim against the Fund before receiving benefits is made clear by 8 CSR 50-2.010(7):

> A claim against the Second Injury Fund *must be asserted affirmatively by the claimant* and cannot be made by any other party to the claim, on motion or

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[7] The Division promulgated form WC—21 pursuant to its power under 8 CSR 20-3.010 for the filing of claims.

> otherwise. Naming the state treasurer as a party is not, in itself, sufficient to make a claim against the fund. *Injuries which are claimed to create fund liability must be specifically set forth in the Claim for Compensation*. (A) The filing of a claim initiates a contested case. (B) A claim against an employer/insurer and the Second Injury Fund are against two (2) separate parties and the assertion of a claim against one is not an assertion of a claim against the other. (emphasis added).

Because an injured worker must file a claim against the Fund before being eligible for benefits, § 287.220.3 does not "provide for a benefit and at the same time restrict an employee's right to file a claim in court to seek those benefits" as asserted by Mr. Cosby. Rather, § 287.220.3 eliminates an injured workers' ability to recover PPD benefits from the Fund. The legislature's elimination of PPD benefits for claims filed after January 1, 2014, eliminated Mr. Cosby's cause of action. Because the substantive statutory law extinguished any right Mr. Cosby might have had for receiving PPD benefits from the Fund, he had no cause of action to bring when he suffered his January 22, 2014, work related injury. Consequently, the open courts provision is inapplicable and Mr. Cosby's assertion that § 287.220.3 violates Mo. Const. art. I, Section 14 fails.

B. DUE PROCESS

Mr. Cosby next argues that § 287.220.3 violates the due process clause 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." Appellant's Brief, 27. Although Mr. Cosby's due process challenge is not entirely clear, he seems to argue that § 287.220.3 is unconstitutionally vague because "persons of ordinary intelligence don't know what law applies to determine the outcome of their workers' compensation claim." Appellant's Brief, 28.

Mr. Cosby's argument confuses ambiguity with vagueness. Although the Fund maintains the language used in § 287.220.3 is clear, any potential "[a]mbiguity in a law does not violate due process." *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 105 (Mo. 1997). Consequently, § 287.220.3 does not violate the due process clause of the Missouri and United States Constitutions.

To the extent that Mr. Cosby contends § 287.220.3 violates the due process clause because he has a vested property interest in receiving benefits from the Fund because he has received benefits in the past[8], that argument

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[8] See Appellant's Brief, 28.

fails too. Simply because an injured worker received PPD Fund benefits in the past does not mean that the injured worker is entitled to PPD Fund benefits in the future. At most, an injured worker has a mere expectancy in Fund benefits that could be eliminated at any time before a settlement is reached or a final award issued. To construe § 287.220 as creating a protected-property interest would wreak havoc with the legislature's power of statutory amendment and modification. If Mr. Cosby has a vested property interest in receiving PPD Fund benefits then every statute of benefit to some group or individual would remain absolute and forever preserved as long as a beneficiary could assert reliance on it. Because Mr. Cosby never acquired a vested property interest to which due process could apply, his argument that § 287.220.3 violates the due process clause must be rejected.

C. EQUAL PROTECTION

Finally, Mr. Cosby argues that § 287.220.3 violates the equal protection clause of the Missouri[9] and United States Constitutions.[10] Appellant's Brief, 29-31. The first step in considering whether a statute violates the Equal Protection Clause is to determine whether the "challenged statutory classification 'operates to the disadvantage of some suspect class or impinges

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[9] Mo. Const. art I, Section 2.

[10] U.S. Const. amends. XIV.

upon a fundamental right explicitly or implicitly protected by the Constitution. . . .'" *In re Marriage of Kohring*, 999 S.W.2d 228, 231–32 (Mo. 1999). If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. *In re Kohring*, 999 S.W.2d at 232. In most other instances, the statute is presumed constitutional and Missouri courts apply a rational basis test. *Ambers-Phillips*, 459 S.W.3d at 909.

Under the rational basis test, "the statute will be [held] valid as long as it bears a reasonable relationship to a legitimate state purpose." *Ambers-Phillips*, 459 S.W.3d at 909. (internal quotations omitted). Missouri courts presume that statutes have a rational basis and the party challenging the constitutionality of a statute must overcome this presumption by "clear showing of arbitrariness and irrationality." *Foster v. St. Louis County*, 239 S.W.3d 599, 602 (Mo. 2007) citing *Fust v. Attorney General for the State of Missouri,* 947 S.W.2d 424, 432 (Mo. banc 1997); *quoting Hodel v. Indiana,* 452 U.S. 314, 331–32, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981).

Here, Mr. Cosby concedes that the rational basis test applies to his equal protection challenge. Appellant's Brief, 30. Nevertheless, he maintains that § 287.220.3 violates the Equal Protection Clause because the statute treats injured workers with primary injuries that occurred before January 1,

2014, different than injured workers with primary injuries occurring after January 1, 2014. Appellant's Brief, 29.

Mr. Cosby's argument carries little weight and must fail. As discussed in more detail under point I, Senate Bill 1 and the legislative amendments to the Workers' Compensation Law came during a period when the Fund was insolvent. The legislature decided to amend the law to limit the number of injured workers that are eligible for Fund benefits. This was done for financial reasons. The Fund did not exist at common law and is not in the Missouri constitution. As Mr. Cosby notes, the Fund became responsible for enhanced PPD benefits when the Workers' Compensation Law was amended in 1959. Appellant's Brief, 26.

The General Assembly has the power to amend the Workers' Compensation Law. Indeed, "the legislature that creates a statutory entitlement [ ] is not precluded from altering or terminating the entitlement by a later enactment." *Delay v. Missouri Bd. of Prob. & Parole*, 174 S.W.3d 662, 665 (Mo. App. W.D. 2005). Due to concern about the financial future of the Fund, the legislature enacted § 287.220.3 to change the eligibility requirements of Fund liability. In that light, § 287.220.3 is rationally related to a legitimate state interest. Accordingly, it does not violate the Equal Protection Clause of the Missouri or United States Constitution.

CONCLUSION

The Missouri State Treasurer respectfully asks that this Court affirm the Commission's Award denying all benefits.

Respectfully submitted,

JOSHUA D. HAWLEY
Attorney General

/s/ David McCain
DAVID McCAIN
Assistant Attorney General
Missouri Bar No. 64010

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1024
Fax: (573) 751-2921
david.mccain@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,144 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 8th day of February, 2018, to:

Ronald D. Edelman
9510 Gravois Rd.
St. Louis, MO 63123

Marshall B. Edelman
9510 Gravois Rd.
St. Louis, MO 63123

/s/ David McCain
DAVID McCAIN
Assistant Attorney General