MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND

APPELLANT,

v.

JONATHAN PARKER

RESPONDENT.

DOCKET NUMBER WD83030

DATE: July 14, 2020

Appeal From:

Labor and Industrial Relations Commission

Appellate Judges:

Division Two: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

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Attorneys:

Eric W. Lowe, Kansas City, MO, for appellant.

Steffanie L. Stracke, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
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TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND, APPELLANT,
v.
JONATHAN PARKER, RESPONDENT.

WD83030 Labor and Industrial Relations Commission

Before Division Two Judges: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

The Treasurer of the State of Missouri as Custodian of the Second Injury Fund ("Fund") appeals the final award of the Labor and Industrial Relations Commission ("Commission") finding that Jonathan Parker ("Parker") is permanently and totally disabled in part due to preexisting disabilities, triggering Fund liability.

Parker is a 46-year-old man who has performed manual labor throughout his career. Parker was employed as a tree trimmer for most of his career, and in the course of his employment sustained various injuries. First, in May of 2012, Parker sustained a back injury, which ultimately required the fusion Parker's C3-C4 vertebrae, and in November of 2012, Parker sprained one of his knees. On March 8, 2014, Parker injured his right elbow. Finally, on June 18, 2014, Parker filed a claim against his employer and the Fund for an injury to his neck resulting in disability to his body as a whole due to repetitive use ("Primary Injury"). The claim for his Primary Injury against his employer was settled for 40% permanent partial disability to his body as a whole, and the case proceeded to trial against the Fund.

The Commission found that Parker was permanently and totally disabled using the statutory framework contained in section 287.220.2, RSMo. However, the parties agree the Commission was required to apply section 287.220.3, RSMo, because the Primary Injury occurred after January 1, 2014, as held by *Cosby v. Treasurer*, 579 S.W.3d 202 (Mo. banc 2019).

The Fund argues that if Subsection 3 is applied, Parker failed to meet his burden to prove he has a subsequent compensable work-related injury that when combined with a preexisting injury meets the criteria of section 287.220.3(2)(a)a(i)-(iv), RSMo. Parker argues in response that based upon the Commission's factual findings he met his burden to establish Fund liability and that he is permanently and totally disabled under section 287.220.3. The Commission found that Parker's March 8, 2014 work related injury to his right shoulder resulted in compensable disability of 25% of the arm at the 232-week level. The Commission found that Parker's Primary Injury to his cervical spine resulted in 40% permanent partial disability to his body as a whole, the 400-week level. The Commission found that based upon these injuries when considered with

Parker's work history, education, age, potential for retraining and problems with his knees and lumbar spine resulted in him being permanently and totally disabled.

In Point 3, the Fund argues that the Commission erred in admitting into evidence and considering the records of Dr. Harold Hess ("Dr. Hess"). Parker was treated by Dr. Hess and later evaluated by Dr. James Stuckmeyer ("Dr. Stuckmeyer"). Dr. Stuckmeyer relied in part on Dr. Hess's medical records in evaluating Parker. Parker offered Dr. Stuckmeyer's complete medical report into evidence pursuant to section 287.210.7, RSMo, which included Dr. Hess's medical records regarding his treatment of Parker. The Fund objected asserting that Parker's statutory notice only indicated his intention to admit Dr. Stuckmeyer's complete medical report rather than Dr. Hess's medical records. Parker argued that because Dr. Stuckmeyer relied on Dr. Hess's medical records in evaluating Parker, Dr. Hess's records were properly incorporated into Dr. Stuckmeyer's compete medical report. The Commission admitted the records of both Dr. Stuckmeyer and Dr. Hess's records contained therein.

AFFIRMED.

Division Two Majority holds:

(1) The Commission erred in applying the statutory framework contained in section 287.220.2 rather than the framework contained in section 287.220.3 as mandated by *Cosby v. Treasurer*, 579 S.W.3d 202 (Mo. banc 2019).

(2) Parker satisfied the threshold criteria contained in section 287.220.3(a)-(b) because his March 8, 2014 injury, was a work-related compensable injury that resulted in a minimum of fifty weeks of partial disability, and he sustained a second compensable work injury on June 18, 2014, his Primary Injury.

(3) Section 287.220.3 provides Fund liability to claimant's who are permanently and totally disabled, and Fund liability is triggered when a claimant has a preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation if the preexisting disability is a direct result of (1) active military duty, (2) compensable workers compensation injury, (3) non-compensable injury that is significantly aggravated or accelerated by a subsequent work-related injury, or (4) preexisting permanent partial disability of an extremity combined with a subsequent compensable work-related injury to the opposite extremity that results in a permanent total disability. Once the claimant has established that two or more injuries satisfy the threshold criteria contained in section 287.220.3(2)(a)-(b), the determination of whether a claimant is permanently and totally disabled requires consideration of all of the claimant's unique characteristics including other preexisting conditions, physical limitations, age, level of education, previous work experience, and potential for retraining. The Commission correctly determined Parker was permanently and totally disabled when considering that Parker had a ninth-grade education, limited potential for retraining, his age, work restrictions, his compensable injuries, and previous back and knee injuries, even if the back and knee injuries did not fall within the threshold criteria of section 287.220.3(2)(a).

(4) The Commission did not err in admitting Dr. Hess's medical records in that section 287.210.5 defines "complete medical report" to include the patient's history, all other technical examinations, and diagnoses; therefore, because Dr. Stuckmeyer relied on Dr. Hess's medical records in evaluating Parker, Dr. Hess's medical records were incorporated in Dr. Stuckmeyer's complete medical report and were therefore admissible pursuant to the statute.

Judge Ahuja's Dissenting Opinion states:

The dissent would hold that, under § 287.220.3, RSMo, in determining whether Parker was permanently and totally disabled, the Commission was only authorized to consider pre-existing disabilities which met the statutory thresholds found in § 287.220.3(2)(a)a, RSMo. Because the Commission considered pre-existing disabilities which did not satisfy the statutory criteria in finding Parker to be permanently and totally disabled, Judge Ahuja would reverse the Commission's Final Award, and remand the case to the Commission for reconsideration under the governing legal standards.

Majority Opinion by: Gary D. Witt, Judge July 14, 2020
Mark D. Pfeiffer, Presiding Judge, concurs
Dissenting Opinion by: Alok Ahuja, Judge

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