In the Missouri Court of Appeals
Eastern District

DIVISION THREE

CHRISTOPHER KLECKA, Claimant/Appellant, vs. TREASURER OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND, Respondent.	)	No. ED108721 Appeal from the Labor and Industrial Relations Commission Filed: June 22, 2021

Angela T. Quigless, P.J., Kurt S. Odenwald, J., and James M. Dowd, J.

OPINION

Introduction

Christopher Klecka appeals the decision of the Labor and Industrial Relations Commission which reversed the Administrative Law Judge's award in Klecka's favor and against the Second Injury Fund (the Fund) for permanent and total disability (PTD) benefits. The Commission held that Klecka failed to carry his burden to establish his PTD claim against the Fund under section 287.220.3's provisions applicable to this post-January 1, 2014 PTD claim.

In his first point on appeal, which is dispositive, Klecka argues the Commission misinterpreted section 287.220.3[1] when it held that Klecka's burden was to demonstrate he is PTD by considering solely the combination of one - and only one - qualifying "medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability" ("qualifying disability") together with the disability resulting from the primary work-related injury giving rise to the claim. And since Klecka's experts' opinions that Klecka was PTD relied not only on Klecka's qualifying right shoulder disability together with his primary left shoulder injury, but also considered Klecka's numerous other preexisting injuries and disabilities and other non-medical factors relevant to employability on the open labor market like his age, work experience, education, training, and trainability, the Commission rejected Klecka's experts' ultimate opinions that Klecka was PTD and instead found Klecka failed to carry the burden of proof the Commission believes section 287.220.3 creates - that Klecka's PTD resulted solely from one qualifying prior disability in combination with the disability resulting from the primary injury.

We disagree with the Commission's statutory interpretation of section 287.220.3. Our holdings and disposition here are guided in part by the Missouri Supreme Court's recent decision in *Treasurer as Custodian of Second Injury Fund v. Parker,* No. SC 98704, 2021 WL 1554726 (Mo. banc April 20, 2021), in which the Court rejected the Fund's interpretation of section 287.220.3 that only one qualifying disability may be considered in combination with the primary injury to determine PTD liability against the Fund. But, we also look to section 287.220.3's incorporation into this analysis of section 287.020.6's broad definition of permanent and total disability, which was not addressed in *Parker*, to reach our conclusion that the other medical and

[1] All references are to Mo. Rev. Stat. 2016, unless otherwise stated.

non-medical factors such as age, education, work experience, training, and physical condition[2] remain proper considerations under section 287.020.6 in a post-2014 PTD claim against the Fund so long as the claimant has satisfied the 50-week minimum pre-existing disability.[3]

Therefore, we reverse the Commission's decision and remand for the entry of an award in favor of Klecka and against the Fund for PTD benefits because Klecka satisfied the requirements of section 287.220.3 and it was proper that his experts considered, in addition to his qualifying disability and primary injury, the medical and non-medical factors relevant to Chapter 287's definition of total disability found at section 287.020.6.

Factual and Procedural Background

At the time of the April 18, 2014, primary injury to his left shoulder which gave rise to this case, Klecka worked as a welder, his trade during most of his career. This work involved handling heavy equipment and a variety of tools. Klecka settled the primary claim with his employer, J & J Welding, for 35% or 81.2 weeks of permanent partial disability or PPD of the left upper extremity and 21.5% or 60 weeks PPD of the body as a whole for the resulting psychiatric injury, namely depression.

Klecka then pursued this claim against the Fund given the following history of his work-related and non-work-related accidents and injuries:

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[2] "An employee is permanently and totally disabled if no reasonable employer in the usual course of business would reasonably be expected to employ the employee in his or her present physical condition." *Pennewell v. Hannibal Regional Hosp.*, 390 S.W.3d 919, 924–25 (Mo. App. E.D. 2013).

[3] In addition to distinguishing the present case from *Parker,* we also distinguish this case from this Court's decision in *Bennett v. Treasurer as Custodian of the Second Injury Fund*, 607 S.W.3d 251 (Mo. App. E.D. 2020) because here the Fund conceded that considerations outside of section 287.220.3's dictates (the qualifying preexisting disability and the primary injury) such as the employee's age, skills, education, and training are properly part of the PTD analysis in claims against the Fund and such a concession was not present in *Bennett.*

a. 1981 head injury sustained in motor vehicle accident;

b. 1982 left knee surgery to correct frequent dislocations;

c. 2005 right thumb work-related injury which claim settled for 15% or 9 weeks PPD;

d. 2006 hernia which settled for 7.5% or 30 weeks of body-as-a-whole PPD;

e. 2007 right shoulder injury which Klecka settled for 35% or 81.2 weeks of body-as-a-whole PPD;

Klecka's claim against the Fund was heard before the ALJ on January 29, 2019. On May 2, 2019, the ALJ issued an award in favor of Klecka and against the Fund for PTD benefits finding Klecka to be "unable to return to any normal or reasonable employment and that no employer in the ordinary course of business would reasonably be expected to hire [Klecka] in his current physical condition."

The Fund timely filed an appeal of the award to the Commission claiming that the ALJ misapplied section 287.220.3 by including Klecka's multiple conditions and disabilities in the analysis when she should have limited her consideration to whether or not Klecka was PTD solely as a result of the combination of one qualifying 50-week preexisting disability together with the disability resulting from the primary injury.

The Commission, for its part, addressed each of Klecka's prior injuries and made the following findings as to the degree of PPD resulting from each:

a. 1981 head injury: No PPD.

b. 1982 left knee surgery: No PPD.

c. 2005 right thumb injury: 15% or 9 weeks PPD.

d. 2006 hernia: 7.5% or 30 weeks of body-as-a-whole PPD.

e. 2007 right shoulder injury: 35% or 81.2 weeks of body-as-a-whole PPD.

With respect to the April 18, 2014 primary injury to his left shoulder, the Commission found that Klecka had a 35% PPD of the left shoulder and 15% PPD of the body-as-a-whole for the resulting psychiatric injury referable to depression. Based on these findings, Klecka had one preexisting disability "equaling a minimum of fifty weeks of permanent partial disability" - the 2007 right shoulder injury.

The Commission then addressed the expert opinion evidence regarding Klecka's claim for PTD against the Fund. Klecka relied primarily on the expert medical opinions of Dr. David Volarich, and the expert vocational opinions of Ms. Dolores Gonzalez and Mr. James England. Dr. Volarich opined that Klecka was PTD as a result of the primary left shoulder injury in combination with Klecka's prior injuries and medical conditions including the 1981 head injury, the 2005 thumb injury, the 2006 hernia, and the 2007 right shoulder injury. Likewise, Ms. Gonzalez and Mr. England, for their part, opined that as a result of the same combination of primary injury and prior injuries, medical conditions, and restrictions, along with the non-medical considerations such as his age, work experience and history, education, and training, Klecka was not capable of any competitive work in the open job market.

The Commission reversed the award based on its interpretation of section 287.220.3 that to establish Fund liability for PTD benefits, Klecka's burden was to prove that the combination of (1) one qualifying preexisting disability equaling a minimum of 50 weeks of PPD and (2) the disability resulting from the primary injury rendered him PTD. And since Klecka's experts and the ALJ additionally considered Klecka's other injuries and disabilities as well as the foregoing non-medical considerations, he failed to carry his burden of proof.

Standard of Review

Pursuant to article V, section 18 of the Missouri Constitution, our review of the Commission's decision is to determine whether it is "supported by competent and substantial evidence upon the whole record." Mo. Const. art. V, § 18. Additionally, section 287.495.1 provides that this Court "shall review only questions of law and may modify, reverse, remand for rehearing, 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."

Although we defer to the Commission on issues concerning witness credibility and the weight given to conflicting evidence, we review de novo the Commission's interpretation of the workers' compensation statute and its application of the law without deference to the Commission's findings. *Thompson*, 545 S.W.3d at 893; *Williams v. Treasurer of Missouri*, 598 S.W.3d 180, 186 (Mo. App. E.D. 2020).

Relevant Rules of Statutory Construction

"Workers' compensation law is entirely a creature of statute, and when interpreting the law, the court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible." *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014) (quoting *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo. banc 2006)). While we review the issue of statutory construction before us de novo, we strictly construe the provisions of the workers' compensation statute. Section

287.800.1; *see also Cosby v. Treasurer of State – Custodian of Second Injury Fund*, 579 S.W.3d 202, 206 (Mo. banc 2019).

In determining legislative intent, no portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions. *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) (citing *Util. Serv. Co., Inc. v. Dep't of Labor & Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011)). Under the principle of construction known as *ejusdem generis,* context is important "in determining the scope and extent of more general words." *Circuit City Stores, Inc. v. Director of Revenue*, 438 S.W.3d 397, 401 (Mo. banc 2014) (quoting *Standard Operations, Inc. v. Montague,* 758 S.W.2d 442, 444 (Mo. banc 1988)). Where one provision of a statute contains general language and another provision in the same statute contains more specific language, the general language should give way to the specific. *Brandsville Fire Protection Dist. v. Phillips*, 374 S.W.3d 373, 378 (Mo. App. S.D. 2012). A statute as amended should be construed on the theory that the lawmaker intended to accomplish something by the amendment and that the legislature had in mind the construction placed upon it by the appellate courts of the state prior to the amendment. *Wigand v. State Dept. of Public Health and Welfare*, 454 S.W.2d 951, 956 (Mo. App. E.D. 1970) (internal citations omitted). But, construction of a statute should avoid unreasonable or absurd results. *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) (citing *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010)).

Section 287.220.3

In the amended statute, the legislature distinguished between permanent disability cases arising before January 1, 2014 to which subsection 2 of the amended statute applies, and those

arising after that date, to which subsection 3 applies. It is undisputed here that subsection 3 of section 287.220 applies to this case.[4]

Section 287.220.3 provides, in relevant part:

> (1) All claims against the second injury fund for injuries occurring after January 1, 2014, . . . shall be compensated as provided in this subsection.
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> (2) No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund. Claims for permanent total disability under section 287.200 against the second injury fund shall be compensable only when the following conditions are met:
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> (a) a. An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is:
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> (i) A direct result of active military duty in any branch of the United States Armed Forces; or
> (ii) A direct result of a compensable injury as defined in section 287.020; or
> (iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or
> (iv) A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear; and

[4] "The standards for determining the Fund's liability for permanent partial and permanent total disability benefits vary depending on which subsection applies." *Dubuc*, 597 S.W.3d at 378. The Supreme Court of Missouri clarified that "[section] 287.220.3 applies to all PTD or PPD claims against the [F]und in which any injury arising out of or in the course of employment, including the subsequent compensable injury, occurred after January 1, 2014." *Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. banc 2019) (emphasis added). In the present case, Claimant's primary injury that precipitated his PTD claim against the Fund occurred after 2014; therefore, the Commission correctly applied section 287.220.3 to the present case.

> b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph, results in a permanent total disability as defined under this chapter[.]

Discussion

Klecka brings this appeal in two points. In point one he claims the Commission misinterpreted section 287.220.3. In point two, he asserts the Commission ignored the overwhelming weight of the evidence in finding he failed to prove he was PTD under section 287.220.3. We need not address point two because we agree with Klecka that the Commission misinterpreted section 287.220.3. Therefore, we reverse the Commission and award Klecka PTD benefits against the Fund based on what we consider the correct interpretation of section 287.220.3 - that once Klecka proved he had at least one preexisting disability equaling at least 50 weeks PPD, which he did through his 81-week right shoulder injury from 2007, Klecka's experts properly considered that disability in combination with the 141-week left shoulder/depression disability resulting from the primary claim along with his other past medical and non-medical facts that were relevant and proper to the consideration under section 287.020.6 of whether Klecka was PTD.

1. Who pays when an employee becomes permanently and totally disabled after a work-related injury – the employer or the Fund?

In large measure, this case and the meaning of the 2013 amendments to section 287.220.3 present a simple choice: Which entity, the employer[5] at the time of the last injury or the Fund, should be responsible for an employee's PTD benefits. This question fundamentally embodies the worker's compensation bargain. *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809

[5] We recognize that Klecka's settlement with his employer precludes any finding of liability against the employer here but we include the employer for purposes of our analysis.

S.W.2d 384, 388 (Mo. banc 1991) (The worker's compensation law is the product of a trade-off: the employer forfeits his common law defenses to suits against him for his employee's injuries and assumes automatic liability; the employee forfeits his right to a potentially lucrative common law judgment in return for assured compensation.). When viewed in this context, it is more readily discernible what the legislature was trying to accomplish by the amendments to section 287.220.3. Because if an employee establishes he or she is PTD as a result of a work-related injury, either the employer or the Fund is liable, not neither.

Our Supreme Court described this core principle which remains binding today in *Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955, 957 (Mo. 1963):

> [I]t is well to note certain established general rules relating to the workmen's compensation law. In the absence of a special statute in some manner, for some specific reason, limiting or cutting down his liability the employer and his insurer are obligated by law to pay the totally and permanently injured employee the full compensation benefits . . . "for life." RSMo 1959, Sec. 287.200, V.A.M.S. And this entire liability and this general rule is not affected by the fact that the employee may have had some physical handicap or the fact that he may have sustained a previous loss or permanent mutilation in some other employment resulting in partial disability. Annotations, 30 A.L.R. 979, 67 A.L.R. 794; 99 C.J.S. Workmen's Compensation § 298, p. 1047. The purpose of second injury fund legislation is to encourage the employment of the partially handicapped (2 Larson, Workmen's Compensation, Sec. 59.31, p. 58) but it does not follow as a matter of course from the mere enactment of the legislation that the employer of the partially disabled is relieved of all obligations under the compensation law to an employee who in the course of his last employment becomes totally and permanently disabled. As stated, 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 and this of course may include lifelong medical payments. 2 Larson, Workmen's Compensation, Sec. 61.14, p. 85.

With the 1943 enactment of section 287.220, the Fund was established. The legislature had two main principles in mind, one an aspirational goal and the other a financial incentive to achieve that goal. The overarching goal was and is to encourage employers to hire disabled citizens. *Garibay v. Treasurer of State of Missouri as Custodian of Second Injury Fund*, 964 S.W.2d 474, 479 (Mo. App. E.D. 1998); *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455, 460 (Mo. banc 2013) ("The purpose of the fund is 'to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury.'"). To accomplish that goal, the Fund relieves an employer or his insurer of liability for the employee's preexisting disability and limits the employer's liability to the amount of disability resulting from the last injury. *Harris v. Treasurer of State*, 192 S.W.3d 531, 538 (Mo. App. E.D. 2006) (citing *Stewart v. Johnson,* 398 S.W.2d 850, 853 (Mo. banc 1966)).

In that context, section 287.200, the general statute governing PTD claims, and section 287.220, the provision that determines when the Fund is liable for such claims, are the principal provisions we look to in order to answer the question posed by this case and any other PTD case in which it is alleged that the employee's PTD status is the result in part of disability that preexists the last injury – who pays? If the claimant is PTD and satisfies the requirements of section 287.220.3, the Fund pays. If not, the employer pays.

And these sections are to be read together. The legislature has made that clear here in its 2013 amendments to section 287.220.3. With its fundamental declarative statement in subparagraph (2), "Claims for permanent total disability under section 287.200 against the second injury fund shall be compensable only when the following conditions are met: . . . ," the legislature has expressed its intent that PTD claims against the Fund are still governed by the

general provisions of section 287.200 which govern all PTD claims including, of course, claims brought only against the employer in which it is alleged that the employee is PTD solely as a result of the primary injury alone.

This unequivocal language erodes the foundation of the edifice the Fund has sought to build – that in adjudicating PTD claims against the Fund we should look nowhere else but within the strict confines of section 287.220.3. Instead, we must look to section 287.200 because that is the statute under which "[c]laims for permanent total disability . . . against the second injury fund" are brought according to section 287.220.3 itself.[6]

In enacting its 2013 amendment, the legislature certainly could have abrogated section 287.200 as it relates to the Fund by making section 287.220.3 the exclusive subsection pursuant to which all issues pertaining to Fund liability were to be controlled and determined including compensability, compensation calculation, and the terms of any pay-out. But the legislature chose not to do so.

2. The 2013 amendment to section 287.220.

The legislature amended section 287.220 effective January 1, 2014. *Dubuc v. Treasurer of State - Custodian of Second Injury Fund*, 597 S.W.3d 372, 377 (Mo. App. W.D. 2020). At the time of the 2013 amendments, the Fund was insolvent. *Cosby*, 579 S.W.3d at 210. The 2013

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[6] While the Fund has raised the strict statutory construction mandate of section 287.800.1 in support of its interpretation of section 287.220.3, it is actually unhelpful to the Fund. "Strict construction of a statute presumes nothing that is not expressed... [E]verything shall be excluded from its operation which does not clearly come within the scope of the language used." *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. S.D. 2009) (internal quotations omitted). Again, these important strict construction principles are not helpful to the Fund's position. What "is not expressed" is that section 287.220.3 is designed to be a tidy, self-executing legislative packet to adjudicate all issues relevant to a PTD claim against the Fund. What is expressed is that PTD claims against the Fund continue to be governed by section 287.200 and the ultimate question of total disability continues to be governed by section 287.020.6.

amendment to section 287.220 is not the first time the legislature has sought to address the solvency of the Fund by limiting Fund liability. In *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455, 467 (Mo. banc 2013), the Missouri Supreme Court recognized that the General Assembly has at various times changed or tightened the thresholds to be met to establish Fund liability for claims by imposing more precise standards and by excluding *de minimus* injuries as triggers of Fund liability. Prior injuries that may not have significantly hindered the employee from finding future employment were excluded and more serious disabilities were statutorily required as a threshold to trigger Fund liability. *Id.*

We find that the 2013 amendments to section 287.220 in which the legislature implemented additional threshold restrictions to Fund liability are consistent with this historical framework but do not alter the fundamental purpose and operation of the Fund – which is to encourage the hiring of disabled workers. Again, it is about who pays when a claimant is PTD following a primary injury and the tighter the restrictions on Fund liability, the more PTD liability falls back on employers.

3. By referencing and incorporating Chapter 287's definition of total disability in its 2013 amendment to section 287.220.3, the legislature expressed its unequivocal intent that in PTD claims against the Fund, the consideration of relevant medical and non-medical facts (beyond the qualifying disability and the primary injury) remains proper.

We now turn to the crux of the Commission's decision – that even though it was undisputed that Klecka was PTD and had a qualifying preexisting disability under section 287.220.3(2), Klecka's experts' consideration of other medical and non-medical facts (beyond the qualifying disability and the primary injury) meant that Klecka failed to carry his burden of proof for PTD liability against the Fund. This is in error and we need to look no further than the

language of the 2013 amendment. In the operative phrase of subsection 3, specifically § 287.220.3(2)(b), the legislature reiterates its intent that the PTD analysis extend beyond the limited approach advocated by the Fund and imposed by the Commission here:

> "b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph, results in a permanent total disability as defined under this chapter. . . ." (Emphasis added.)

"[T]his chapter" is Chapter 287 and at section 287.020.6 the legislature has defined PTD as the "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." This definition has been repeatedly and consistently construed as a "test . . . whether, given the claimant's situation and condition, he is competent to compete in the open labor market." *City of Columbia v. Palmer*, 504 S.W.3d 739, 745 (Mo. App. W.D. 2016) (quoting *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo. App. E.D. 1990)).

This is a real-world inquiry from the perspective of whether a reasonable employer would hire the claimant or not. As this Court pointed out in *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195, 199 (Mo. App. E.D. 1990), the critical question is whether, in the ordinary course of business, any employer would reasonably be expected to hire her in her present physical condition and reasonably expect her to perform the work for which she is hired. *See also Pennewell*, 390 S.W.3d at 924–25 ("An employee is permanently and totally disabled if no reasonable employer in the usual course of business would reasonably be expected to employ the employee in his or her present physical condition."); *Williams v. Treasurer of Mo.*, 598 S.W.3d 180, 187 (Mo. App. E.D. 2020) ("[T]he Commission is able to

rely on both testimony from medical experts about the underlying physical (and, where applicable, psychological) condition of the claimant as well as non-medical experts in assessing whether, in light of his medical condition and functional ability, the claimant is employable." (internal quotations omitted)); *Grauberger v. Atlas Van Lines, Inc.*, 419 S.W.3d 795, 802 (Mo. App. S.D. 2013) (stating that the question of whether a claimant is permanently and totally disabled is not solely a medical question, therefore employee's age and potential for retraining were considered); *Treasurer of State-Custodian Second Injury Fund v. Cook*, 323 S.W.3d 105, 111 (Mo. App. W.D. 2010) (finding that there was substantial evidence to support the Commission's determination that the claimant was permanently and totally disabled, including evidence from the vocational expert that employee was not a good candidate for retraining due to his age, physical restrictions, lack of a high school diploma, and limited educational skills); *Brown,* 795 S.W.2d at 483 ("Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert.").

In fact, at oral argument in this case, the Fund conceded that in a PTD claim against the Fund, it is proper to consider an employee's skills, training, education, and age "because those are factors that are used in the analysis of whether or not a person is permanently and totally disabled which is defined in a different portion of this statute." Indeed.

These authorities are highly relevant to our analysis given that a statute as amended should be construed on the theory that the lawmaker intended to accomplish something by the amendment and that the legislature had in mind the construction placed upon it by the appellate courts of the state prior to the amendment. *Wigand*, 454 S.W.2d at 956.

In sum, the legislature instructs us in section 287.220.3 to look through the lens of qualifying injuries when deciding who pays for a disabled employee's PTD, the Fund or the

employer. The Fund has to pay *only* when the employee is PTD and has a qualifying injury. In section 287.020.6 the legislature instructs us to look through the lens of "a reasonable employer" deciding whether the disabled employee *is* PTD. Section 287.020.6 and its longstanding case law require us to consider whether "a reasonable employer in the usual course of business would reasonably be expected to employ the employee in his or her *present physical condition.*" Furthermore, the legislature instructs us to read these sections together in 287.220.3. The only way to harmonize and give both sections their full meaning is to look at all of the employee's physical conditions as well as other considerations such as age, education, and transferable work skills when analyzing whether an employee is PTD. Section 287.220.3 simply tells us who is responsible for payment of the PTD, the Fund or the employer, when such is proven.

Conclusion

Our foregoing interpretation honors the plain and ordinary meaning of section 287.220.3 and harmonizes it with the related and referenced sections 287.200 and 287.020.6 while continuing to uphold the goals the legislature has set for itself in this context (1) to encourage employers to hire disabled workers by limiting employers' liability to that from the last injury only, and (2) to bolster the financial solvency of the Fund by triggering Fund liability only in those cases involving at least one significant 50-week disability.

For the foregoing reasons, we reverse the Commission's decision and remand for the entry of an award in favor of Klecka and against the Fund for PTD benefits.

JAMES M. DOWD, Judge

Angela T. Quigless, P.J., concurs.
Kurt S. Odenwald, J., concurs.