



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

WILLIAM WILSON,	)	
	)	
Appellant,	)	
v.	)	WD84420
	)	
	)	
TREASURER OF THE STATE OF	)	OPINION FILED:
MISSOURI - CUSTODIAN OF THE	)	September 28, 2021
SECOND INJURY FUND,	)	
	)	
Respondent.	)	

Appeal from the Labor and Industrial Relations Commission

Before Division Three: Edward R. Ardini, Jr., Presiding Judge, and
Mark D. Pfeiffer and W. Douglas Thomson, Judges

Mr. William Wilson (“Employee”) appeals from the final award (“Final Award”) of the Labor and Industrial Relations Commission (“Commission”) denying his workers’ compensation claim, which sought permanent total disability benefits from the Second Injury Fund (“SIF”). The Commission concluded that SIF was not liable because Employee failed to sustain the burden of proof set out in section 287.220.3(2): that his permanent total disability (“PTD”) resulted solely from *one* qualifying preexisting disability in combination with the disability resulting from the primary injury.¹ In *Treasurer as Custodian of Second Injury Fund v. Parker*, 622 S.W.3d 178

¹ All statutory references are to the REVISED STATUTES OF MISSOURI 2016 as supplemented through November 8, 2017, the date of Wilson’s compensable workplace injury, unless otherwise indicated.

(Mo. banc 2021), the Missouri Supreme Court rejected SIF'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 SIF. Because the Commission erroneously interpreted and applied the law, we reverse the Commission's Final Award and remand with instructions to the Commission to enter a final award in favor of Employee and against SIF for PTD benefits.

Factual and Procedural Background²

Employee (born 8/19/63) has a ninth-grade education and suffers from dyslexia. Employee was employed as a truck driver for Jack's Truck Rental ("Employer") at the time of his primary injury in 2017. His duties with Employer consisted of driving a trailer truck in Jefferson City, Missouri. Each delivery trip lasted approximately fifteen minutes. Employee was required to climb in and out of the trailer truck, drive to a designated destination, and open and close the door on the back of the trailer truck.

The Last (i.e., Primary) Injury

On November 8, 2017, as Employee was opening the doors on a trailer truck to unload pallets of cardboard boxes, the top pallet of two stacked pallets fell on him, hitting him first on the right shoulder, knocking him down to the ground, and then falling on his right foot. Employee sustained four broken bones in his right foot requiring surgical open reduction and internal fixation. Unfortunately, the right foot did not heal as anticipated and Employee suffers from severe pain, numbness in his toes, and he uses a brace and a cane when he is outside of his home.

Employee and Employer entered into a stipulation for compromise lump-sum settlement of the primary injury claim based upon a permanent disability of 42.5% of the right ankle (150 weeks of permanent partial disability).

² In reviewing the Commission's decision, we view the evidence objectively and not in the light most favorable to the award. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

Preexisting Medical Conditions

Employee's history of work-related and non-work-related accidents, injuries, and diseases are as follows:

Right knee

1979	surgery to repair ligaments in right knee injured while playing football;
1987	reconstruction surgery on right knee injured after falling sixteen feet off of a second-story roof while hanging a long piece of guttering for his then employer, Capital City Home Maintenance;
1988	reconstruction surgery on right knee due to continued weakness and swelling;
2011	right knee replacement due to continued pain and instability;

Left knee

1992	surgery to clean out cartilage and ligaments in left knee after he "blew out" left knee while pouring concrete for Hagemeyer Concrete, his employer at that time;
1994	left knee surgery due to ongoing problems;
2011 (October)	left knee replacement;
2011 (November)	left knee surgery to clean out staph infection;
2011 (December)	left knee surgery;
2012 (January)	remove prosthetic in left knee;
2012 (March)	second left knee replacement along with skin grafting;
2012 (November)	third left knee replacement due to bacterial infection;
2012 (December)	muscle transplant surgery in left knee;

Cardiovascular

1999	diagnosed with coronary artery disease;
between 2000 and 2017	two heart attacks and eight stent placements.

Permanent Total Disability

The undisputed and only medical expert to testify as to the cause of Employee's PTD was Dr. David Volarich. Both the Administrative Law Judge ("ALJ") and the Commission expressly noted that Dr. Volarich's testimony was credible.³

³ "The question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." *Van Winkle v. Lewellens Pro. Cleaning*, 258 S.W.3d 889, 897 (Mo. App. W.D. 2008) (quoting *Elliott v. Kansas City, Mo., Sch. Dist.*, 71 S.W.3d 652, 658 (Mo. App. W.D. 2002)).

Dr. Volarich testified that Employee's primary injury, the right foot injury, combined with his preexisting injuries to his right knee, his left knee, and his cardiovascular condition rendered Employee permanently and totally disabled.

ALJ's and Commission's Conclusion⁴

Wilson's claim against SIF was heard before the ALJ on June 23, 2020. Wilson gave in-person testimony; no witnesses were called by SIF. Dr. David Volarich was the only medical expert to testify. On July 21, 2020, the ALJ issued an Award denying Employee's claim for PTD benefits against SIF.

Finding that Dr. Volarich testified credibly, the ALJ concluded that Employee demonstrated that his preexisting disability from the right knee injury was 35 percent of the knee (56 weeks of permanent partial disability), his preexisting disability from the left knee was 55 percent of the knee (88 weeks of permanent partial disability), and his preexisting disability from his cardiovascular condition was 35 percent to the body as a whole (140 weeks of permanent partial disability).

While the ALJ concluded that Employee was permanently and totally disabled as a result of the primary injury combined with the preexisting left knee injury, the preexisting right knee injury, and the preexisting cardiovascular condition, the ALJ denied PTD benefits against SIF, concluding that Employee did not meet the requirements of section 287.220.3(2) because Employee failed to sustain his burden of proof that his PTD was the result of his primary injury in combination with a *single* preexisting disability that met the 50-week threshold requirement set out in section 287.220.3(2).

⁴ This Court reviews the findings and award of the Commission, not the ALJ. *Austin v. AM Mech. Servs.*, 604 S.W.3d 665 (Mo. App. W.D. 2020). However, where the Commission affirms the ALJ's Award and incorporates it by reference into the Commission's Final Award, as is the case here, we review for error the ALJ's findings and conclusions as adopted by the Commission. *Hayes v. Ginger C, LLC*, 582 S.W.3d 140, 146 (Mo. App. W.D. 2019).

On July 24, 2020, Employee filed a Motion to Modify Award with the ALJ which was denied on July 28, 2020. Thereafter, Employee filed a timely administrative appeal to the Commission and, on March 19, 2021, the Commission affirmed and adopted the ALJ's Award in its Final Award Denying Compensation.⁵

Employee timely appealed.

Standard of Review

Our review of the Commission's decision is governed by article V, section 18, of the Missouri Constitution and section 287.495.1. Article V, section 18, provides for judicial review of the Commission's Final Award to determine whether the decision is authorized by law and whether it is "supported by competent and substantial evidence upon the whole record." Under section 287.495.1, we must affirm unless the Commission acted without or in excess of its powers, the award was procured by fraud, the facts found by the Commission do not support the award, or there was insufficient competent evidence in the record to warrant the making of the award. Although we defer to the Commission's factual findings, including those findings about the credibility of witnesses, we review *de novo* the Commission's determinations of law. *Hayes v. Ginger C, LLC*, 582 S.W.3d 140, 146-47 (Mo. App. W.D. 2019). "Decisions involving statutory interpretation . . . are reviewed *de novo*." *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 338 (Mo. banc 2017).

⁵ One member of the Commission filed a dissenting opinion stating that "the administrative law judge in this case improperly applied § 287.220.3," in that "[e]ach of employee's preexisting conditions satisfy § 287.220.3(2)(a), and meet the 50-week threshold." The dissent also stated, "Dr. Volarich, the only medical expert to testify in employee's case, opined that employee's [primary] injury combined with his preexisting injuries to his right knee, left knee and his cardiovascular system to render him permanently and totally disabled." The dissenting member of the Commission concluded that Employee is entitled to have all of his qualifying preexisting disabilities considered when evaluating SIF responsibility for PTD benefits. For reasons explained herein, we agree.

Analysis

“Section 287.220 imposes liability on the Second Injury Fund in certain cases of permanent disability where there has been previous disability.” *Glasco v. Treasurer of State-Custodian of Second Injury Fund*, 534 S.W.3d 391, 397 (Mo. App. W.D. 2017). “The Fund was created to encourage the employment of individuals who are already disabled from a pre-existing injury, regardless of the type or cause of that injury.” *Id.* “To accomplish that goal, the statutory scheme limits the employer’s liability, in the event of a work-related injury, to only that part of the disability that is attributable to the work injury.” *Id.* “Any disability attributable to the combination of the work injury with pre-existing disabilities is compensated, if at all, by the Fund.” *Id.*

Subsection 3 of section 287.220 applies to all PTD claims against SIF for injuries that occurred after January 1, 2014. Employee’s primary injury that precipitated his PTD claim against SIF occurred on November 8, 2017; therefore, the Commission correctly applied section 287.220.3 in Employee’s case. Under subsection 3, claims for PTD benefits against the Fund are compensable only when two conditions are met. First, an employee must have a “medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation,” (“PPD”) which meets one of the following criteria:

- (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[.]

§ 287.220.3(2)(a)a(i)-(iv). Second, the employee must show that he or she “thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability . . . results in a permanent total disability.” § 287.220.3(2)(a)b.

Section 287.220.3(2)(a)b provides that an employee must show that he or she is permanently and totally disabled as a result of the combination of the primary injury and “*the preexisting disability*, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph.” (Emphasis added.) The Supreme Court of Missouri clarified in *Parker*, that “[a]lthough section 287.220.3(2)[(a)]b refers to the preexisting disability in the singular form—‘when combined with *the preexisting disability*’—section 1.030 instructs that the singular form should be interpreted to include the plural form. Therefore, section 287.220.3(2)[(a)]b should be read to include ‘when combined with *the preexisting disabilities*.’” *Parker*, 622 S.W.3d at 182 (footnote omitted). In determining which preexisting conditions should be considered under subparagraph b, the Supreme Court explained that:

By specifying that the preexisting disability must qualify under one of the four eligibility criteria in the first condition, the legislature excluded disabilities that are not the primary injury and that do not qualify under the first condition from being considered when determining if the claimant meets the second condition. Therefore, an employee satisfies the second condition by showing the primary injury results in PTD when combined with *all* preexisting disabilities *that qualify* under one of the four eligibility criteria listed in the first condition.

Id.

The ALJ found, based on Dr. Volarich’s testimony, that Employee’s PPD to his right foot was 42.5% of the right foot or 150 weeks PPD from the November 8, 2017 injury; 35% or 56 weeks PPD at the right knee from the prior right knee injury of August 5, 1987; 55% or 88 weeks PPD at the left knee from the August 4, 1992 injury; and 35% or 140 weeks PPD of the body from

his preexisting cardiovascular condition. The ALJ also found that Employee’s preexisting cardiovascular condition aggravated and accelerated his November 8, 2017 injury to the right foot and found credible Dr. Volarich’s opinion that Employee’s right foot did not heal as anticipated in part as a result of diminished blood flow stemming from his cardiovascular condition. Each of Employee’s preexisting conditions satisfies section 287.220.3(2)(a) and meets the 50-week PPD threshold. Consequently, as Employee argues and as SIF concedes, we conclude that the Commission erroneously declared and applied section 287.220.3 when it found that Employee “failed to sustain his burden of proof that he is permanently and totally disabled as the result of his November 8, 2017 injury to his right foot in combination with a single preexisting disability that meets the 50-week requirement set out in section 287.220.3(2).”

However, the parties disagree as to the appropriate remedy. SIF argues that Employee did not meet his burden of persuasion and that the Commission has not made findings upon which to support an award of benefits; therefore, this Court should remand to the Commission for additional findings.⁶ On the other hand, Employee argues that the Commission has already made all the findings necessary for an award to be entered against SIF.

Section 287.490.1 authorizes this Court to modify, reverse, remand for rehearing, or set aside an award. It is the Commission’s role to apply the statutory scheme to the facts it finds in the case and, then, to make or deny an award based on those findings and conclusions. *Parker*, 622 S.W.3d at 183. The Commission performed its fact-finding and law-applying role. As the Commission noted, Dr. Volarich was the only medical expert to testify in Wilson’s case, and there

⁶ Notably, SIF does not identify what additional findings are necessary, but suggests that this is the remedy reflected in *Treasurer as Custodian of Second Injury Fund v. Parker*, 622 S.W.3d 178, 184 (Mo. banc 2021). The difference in *Parker* is that the Commission had erroneously applied the wrong subsection of section 287.220 for evaluating SIF liability—applying subsection 287.220.2 instead of 287.220.3. *Id.* at 180. The reason for remand in *Parker* was so that the Commission could consider SIF liability under the appropriate subsection of section 287.220. *Id.* at 184. Here, however, SIF concedes that the Commission did, in fact, apply the correct subsection of section 287.220; hence, there is no similar procedural posture as *Parker* necessitating a remand on that basis.

was no conflicting medical evidence presented. The Commission concluded that “Dr. Volarich testified credibly to the permanent and total disability resulting from the combination of the 2017 right foot injury with the 1992 left knee, 1987 right knee, and preexisting cardiovascular condition.” The Commission’s factual determinations, based primarily upon Dr. Volarich’s testimony, required an award of benefits; the Commission’s denial of benefits was solely an error in interpreting and applying the law. Under *Parker*, Employee met his burden to establish that he is permanently and totally disabled from the combination of his November 8, 2017 primary injury and all of his qualifying preexisting disabilities. Considering the voluminous factual record supporting an award, no additional factual findings are required before applying the correct legal standard to the undisputed facts in the record and entering an award against SIF.

Point granted.

Conclusion

The Commission’s final award is reversed and the cause is remanded with instructions to the Commission to enter a final award of PTD benefits in favor of Employee and against SIF.

/s/ *Mark D. Pfeiffer*

Mark D. Pfeiffer, Judge

Edward R. Ardini, Jr., Presiding Judge, and W. Douglas Thomson, Judge, concur.