MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES SWAFFORD,

Appellant,

v.

TREASURER OF MISSOURI AS CUSTODIAN OF SECOND INJURY FUND,

Respondent.

DOCKET NUMBER WD84562

Date: February 15, 2022

Appeal from:
Labor and Industrial Relations Commission

Appellate Judges:
Division One: W. Douglas Thomson, P.J., and Alok Ahuja and Karen King Mitchell, JJ.

Attorneys:
Benjamin S. Creedy, St. Joseph, for appellant
Ashley S. Grace, Kansas City for respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JAMES SWAFFORD, Appellant,
v.
TREASURER OF MISSOURI AS CUSTODIAN OF SECOND INJURY FUND, Respondent.

WD84562 Labor and Industrial Relations Commission

Before Division One Judges: W. Douglas Thomson, P.J., and Alok Ahuja and Karen King Mitchell, JJ.

James Swafford suffered an injury to his right shoulder in October 2017, while working for Waller Truck Company. Swafford contended that this primary injury combined with his preexisting disabilities to render him permanently and totally disabled.

Swafford settled his workers' compensation claim for the primary injury with Waller. He then sought to recover additional benefits for his permanent and total disability from the Second Injury Fund. The Labor and Industrial Relations Commission rejected Swafford's claim against the Fund, on the basis that Swafford had failed to prove that any of his preexisting disabilities satisfied the thresholds contained in § 287.220.3(2)(a)a, RSMo.

Swafford appeals.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Division One holds:

The evidence established that Swafford's preexisting cardiac conditions and ankylosing spondylitis satisfied the 50-weeks-of-disability threshold of § 287.220.3(2)(a)a. The only remaining question was whether those preexisting conditions "directly and significantly aggravate[d] . . . the subsequent work-related injury," as required by § 287.220.3(2)(a)a(iii).

In deciding the aggravation-of-primary-injury question, the Commission erroneously discounted or ignored the opinions of two physician-experts concerning Swafford's preexisting medical conditions. Dr. Erich Lingenfelter, an orthopedic

surgeon, opined that Swafford's preexisting cardiac conditions made him a "very poor candidate" for surgical treatment of his primary right shoulder injury. Further, Dr. Lingenfelter testified that Swafford's preexisting ankylosing spondylitis bore an "equal share of the blame" and was an "equal contributing factor" in causing the disability associated with Swafford's right shoulder. In addition, Dr. Brent Koprivica testified that Swafford's preexisting disabilities had a "significant synergistic effect" with the primary injury, in causing Swafford's overall level of disability.

The Commission rejected Dr. Lingenfelter's opinions as "vaguely worded," and wholly ignored Dr. Koprivica's relevant opinion. The Commission's characterization of Dr. Lingenfelter's opinions was not supported by substantial evidence, because the Commission relied on an overly narrow interpretation of his testimony. The Commission acted arbitrarily in wholly disregarding Dr. Koprivica's testimony concerning the contested issue whether Swafford's preexisting conditions aggravated the primary injury.

On remand, Swafford should be permitted to present additional testimony concerning his preexisting conditions. After Swafford's trial, the Missouri Supreme Court held in *Treasurer v. Parker*, 622 S.W.3d 178 (Mo. 2021), that a claimant seeking compensation from the Second Injury Fund for a post-2014 injury must establish that his preexisting disabilities which satisfy the thresholds in § 287.220.3(2)(a)a combined with the primary injury to cause permanent and total disability. Because Swafford did not have the benefit of this clarification of the law at the time of his trial, justice requires that he be permitted an opportunity to present additional evidence to satisfy the governing legal standard as clarified by *Parker*.

Opinion by: Alok Ahuja, Judge February 15, 2022

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