



**In the Missouri Court of Appeals  
Eastern District  
DIVISION FOUR**

ERIC BUHLINGER,	)	No. ED97864
	)	
Respondent,	)	
	)	
vs.	)	
	)	
TREASURER OF MISSOURI AS	)	Appeal from the Labor and Industrial
CUSTODIAN OF SECOND INJURY	)	Relations Commission
FUND,	)	
	)	
Appellant.	)	FILED: October 2, 2012

***Introduction***

The Second Injury Fund (Fund) appeals from a decision of the Labor and Industrial Relations Commission (Commission) finding that the Fund was liable to Eric Buhlinger (Claimant) for 16.76 weeks of permanent partial disability (PPD) enhancement. The Fund contends the Commission erred by including Claimant's primary disabilities of five percent to his right elbow and five percent to his body as a whole in calculating Fund liability because, considered individually, these disabilities fall below the statutory thresholds set forth in Section 287.220.1.<sup>1</sup> We reverse and remand to the Commission but, because of the general interest and importance of the issues, we transfer to the Missouri Supreme Court pursuant to Rule 83.02.

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<sup>1</sup> All statutory references are to RSMo 2000 as supplemented unless otherwise indicated.

### ***Factual and Procedural Background***

On August 4, 2008, Claimant was working for Sherrell Construction, Inc. (Employer) as a laborer and driver when the skid loader on which he was working “bucked,” causing Claimant to hit his head on a crossbar and lose consciousness. As a result of the accident, Claimant suffered a concussion and sustained injuries to his neck, back, and left elbow. On July 6, 2009, Claimant underwent surgery to repair a C7-T1 cervical disc herniation and a C6-7 cervical spondylosis and stenosis. Claimant continued to suffer headaches, difficulty sleeping, pain in his neck, and pain, numbness, and tingling in his left arm.

Claimant sustained one work-related injury prior to the injury of August 4, 2008. While working as an iron worker in 1990 or 1991, a truck stabilizer “crushed” Claimant’s foot, injuring his left foot and ankle. Claimant underwent foot surgery in 1991. As a result of that injury, Claimant continued to suffer pain in his left foot and ankle and had difficulty standing for extended lengths of time.

Claimant filed a claim for workers compensation benefits with respect to the August 4, 2008 injury.<sup>2</sup> On March 2, 2011, the Administrative Law Judge (ALJ) held a hearing to determine whether Claimant was entitled to PPD benefits from the Fund. The ALJ found that, as a result of the August 4, 2008 injury, Claimant sustained PPDs of 27.5% of the body as a whole referable to the neck, 5% of the body as a whole for the concussion, and 5% of the left elbow. With regard to Claimant’s 1990-91 foot injury, the ALJ found that Claimant had a pre-existing PPD of 17.5% at the left ankle. When calculating Claimant’s overall disability, the ALJ included the following disabilities: 27.5% of the body as a whole, cervical spine; 5% of the body as a whole, concussion; 5% at the left elbow; 17.5% left ankle. The ALJ then applied a 10%

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<sup>2</sup> Claimant settled his claim against Employer for 27.5% of the body as a whole referable to his neck, 5% of the body as a whole for the concussion, and 5% of the left elbow.

enhancement factor to the overall disability and ordered the Fund to pay Claimant \$6,782.10 for his PPD.

The Fund appealed the ALJ's award to the Commission, arguing that the ALJ erred by including Claimant's concussion and left elbow injuries in his calculation of the Fund's liability because neither of these disabilities, standing alone, met the thresholds set forth in Section 287.220.1. The Commission affirmed the award of the ALJ and issued a supplemental opinion stating:

The Second Injury Fund seems to be operating under a common misperception; to wit, that we must exclude from our calculation of Second Injury Fund liability any disability that does not individually meet one of the thresholds in § 287.220.1 RSMo. This proposition has no support in the Missouri Workers' Compensation Law or in Missouri case law.

The thresholds spelled out in § 287.220.1 are used at the first step of the Second Injury Fund inquiry to determine if employee has sustained disabilities significant enough to implicate the Second Injury Fund. Once we have determined the Second Injury Fund is implicated, *all* disabilities are considered in the calculation of the Second Injury Fund liability.

We conclude the administrative law judge correctly considered *all* of employee's disabilities when calculating the liability of the Second Injury Fund.

The Fund appeals.

### ***Standard of Review***

On appeal from a decision in a workers' compensation proceeding, this court reviews only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon finding that: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award. Mo. Rev. Stat. § 287.495.1. We defer to the Commission on issues of fact, but we review *de novo* questions of law, including issues of statutory interpretation. Endicott v. Display Techs.,

\_\_\_, 77 S.W.3d 612, 615 (Mo. banc 2002); Herschel v. Nixon, 332 S.W.3d 129, 133 (Mo.App.W.D. 2010). “Decisions of the [C]ommission that are clearly interpretations of law are reviewed for correctness without deference to the [C]ommission’s judgment.” Pierson v. Treasurer of State, 126 S.W.3d 386, 387 (Mo. banc 2004).

### *Discussion*

In its sole point on appeal, the Fund claims that the Commission erred by including Claimant’s primary disabilities of five percent to his left elbow and five percent to his body as a whole for a concussion in calculating the Fund’s liability because these disabilities individually fall below the statutory threshold set forth in Section 287.220.1. Claimant counters that the Commission correctly interpreted the statute to require a two-step process in which the Commission first determines “whether a claimant qualifies to make a claim against the [Fund] through means of the ‘thresholds’” and then calculates Fund liability based on all of the claimant’s disabilities, no matter how small.

Section 287.220 governs the Fund’s liability in “[a]ll cases of permanent disability where there has been previous disability.” Section 287.220.1; see also Pierson, 126 S.W.3d at 388.

The statute provides, in relevant part:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if

the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

Section 287.220.1. Accordingly, to recover PPD compensation from the Fund, a claimant must show that he or she has a preexisting PPD that: (1) is a hindrance or obstacle to his or her employability and (2) was present at the time the claimant sustained his or her current work-related injury. Id.; Hutson v. Treasurer of Mo., 365 S.W.3d 269, 272 (Mo.App.E.D. 2012). Additionally, the preexisting disability must, at minimum, equal 50 weeks of compensation for injuries to the body as a whole or 15% of a major extremity. Section 287.220.1; Hutson, 365 S.W.3d at 272. Finally, the primary injury, which also must cause the same minimum degree of disability, must combine with the preexisting disability to create a synergistic effect of substantially greater disability than the sum of the two disabilities. Section 287.220.1; Hutson, 365 S.W.3d at 272. Fund liability does not exist unless the preexisting injury and primary injury both meet the minimum threshold requirements. Fletcher v. Second Injury Fund, 922 S.W.2d 402, 407 (Mo.App.W.D. 1996) (overruled on unrelated grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003)).

To determine whether the Commission erred when it included Claimant's below-threshold primary injuries in its calculations of Fund liability, we analyze the provisions of Section 287.220.1. In construing the statutory provisions at issue, we adhere to the general rules

of statutory construction. Motton v. Outsource Int'l, 77 S.W.3d 669, 673 (Mo.App.E.D. 2002). “The cardinal rule of statutory construction is that the intention of the legislature in enacting the statute must be determined and the statute as a whole should be looked to in construing any part of it.” Richards v. Treasurer of State, 179 S.W.3d 299, 304 (Mo.App.W.D. 2005) (quotation omitted). We must “ascertain the intent of the legislature from the language used, considering the words in their plain and ordinary meaning.” Herschel, 332 S.W.3d at 134. Pursuant to Section 287.800, we construe strictly the provisions of the workers’ compensation law. Mo. Rev. Stat. § 287.800.1.

The plain and ordinary language of Section 287.220.1 directs the Commission to evaluate individually each disability to determine whether it satisfies the statutory thresholds and thereby implicates Fund liability. In regard to the primary disability, the statute states the minimum thresholds for triggering Fund liability in terms of a single, individual “subsequent compensable injury.” Mo. Rev. Stat. § 287.220.1; see also Treasurer of State v. Witte, Case No. WD 74644, 2012 WL 3791686 at \*4 (Mo.App.W.D. Sept. 4, 2012). The third sentence of Section 287.220.1 provides that a claimant is entitled to compensation from the Fund if he has a preexisting disability that satisfies the statutory thresholds and he “receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability . . . .” Mo. Rev. Stat. § 287.220.1 (emphasis added). Accordingly, in giving meaning to every word found within the minimum threshold provision, it follows that the legislature intended each primary disability to be considered in isolation when determining whether the 50-week or 15% PPD minimum thresholds are satisfied. See Witte, 2012 WL 3791686, at \*4 (holding that, under

the plain and ordinary language of Section 287.220.1, the Commission is to consider each preexisting disability in isolation).

The fourth sentence of Section 287.220.1<sup>3</sup> “provides the mechanics by which compensation is to be determined *after* the minimum thresholds have been satisfied.” Witte, 2012 WL at \*7 (emphasis in the original). Specifically, this provision provides that, once the Commission determines which, if any, preexisting and primary disabilities satisfy the statutory thresholds, the Commission calculates the Fund’s liability by subtracting the amount of disability caused by the primary injury from the amount of the increase in disability caused by the synergistic effect of the primary injury and preexisting disability. Mo. Rev. Stat. § 287.220.1; see also Pierson, 126 S.W.3d at 389. When read together and in context, it is clear that the disabilities that satisfy the thresholds set forth in the third sentence are the disabilities referred to in the fourth sentence’s instructions for calculating Fund liability. Because Claimant’s primary disabilities of five percent to his left elbow and five percent to his body referable to the concussion do not meet the initial threshold for injuries to trigger Fund liability, they are not included in the final calculation of Fund liability to which Claimant is entitled. See e.g., Dyson v. Treasurer of State, Case No. ED 97865, 2012 WL 4077288, at \*9 (Mo.App.E.D. Sept. 8, 2012) (holding that only preexisting disabilities that satisfy the statutory thresholds may be

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<sup>3</sup> The fourth sentence of Section 287.220.1 provides:

the degree or percentage of employee’s disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of . . . the second injury fund . . . .

Mo. Rev. Stat. § 287.2201.

considered when calculating the Fund's liability); Salvuccio v. Treasurer of State, Case No. ED 97862, 2012 WL 3938948, \*9 (Mo.App.E.D. Sept. 11, 2012) (same).

Contrary to the Commission's interpretation of the statute, the statutory language does not authorize consideration of below-threshold disabilities when calculating Fund liability. Dyson, 2012 WL 4077288, at \*9. As this court explained in Salvuccio, "[f]ollowing the Commission's interpretation would undermine the entire purpose of the thresholds by allowing the inclusion of otherwise insufficient preexisting PPDs in the calculation of Fund liability." Salvuccio, 2012 WL 3938948, at \*9. We will not read the statute to, in one sentence, limit those disabilities eligible for compensation to specific levels of PPD, and then, in the next sentence, reopen the eligibility for benefits to all disabilities, no matter how insignificant, without specific language expressing such legislative intent. See Id. We therefore conclude that, when calculating Fund liability, the Commission may consider only those disabilities that alone satisfy the minimum thresholds set forth in Section 287.220.1.

Applying the statutory thresholds to each subsequent injury is consistent with the purpose of the statute. The Legislature added the 15% and 50-weeks thresholds to Section 287.220.1 in 1993 "to establish a more objective standard by which Second Injury Fund liability is to be determined." Palazzolo v. Joe's Delivery Serv., Inc., 98 S.W.3d 645, 648 (Mo.App.E.D. 2003). "The threshold for both the pre-existing disability and the subsequent disability must be of sufficient significance as to be susceptible of measurable rating at least equal to the minimums set forth in the statute." Id. (internal quotation omitted). In other words, the legislature amended Section 287.220.1 "to limit PPD awards against the Fund to cases where both the preexisting disabilities and primary work injury are more than *de minimis*." Salvuccio, 2012 WL at \*5. Given the purpose behind the 1993 amendments and the plain and ordinary language of Section

287.220.1, the statute can only be construed to entitle a claimant to compensation for disabilities that are sufficiently significant to trigger Fund liability. Witte, 2012 WL 3791686, at \*7.

Furthermore, this court has affirmed Commission awards excluding from the calculation of Fund liability a claimant's below-threshold disabilities. See Cardwell v. Treasurer of State, 249 S.W.3d 902, 907-08 (Mo.App.E.D. 2008). In Cardwell, we affirmed the Commission's award based on the claimant's primary injury and preexisting disability of 25% PPD of the body as a whole referable to the neck and found that the Commission did not err in excluding from its calculations the claimant's preexisting disabilities of 10% of the right knee, 7.5% of each wrist, and 2.5% of the body as a whole for a psychiatric condition. Id.; see also Hutson, 365 S.W.3d at 272 n.1, 273 (Mo.App.E.D. 2012) (noting that the ALJ found that the claimant's 7.5% PPD of the body as a whole did not meet the threshold for Fund liability and reversing for a finding regarding the percentage of the claimant's PPD to his shoulder because evidence suggested the shoulder PPD could meet the threshold to trigger Fund liability); Suarez v. Treasurer of Mo., 924 S.W.2d 602, 603 (Mo.App.W.D. 1996) (acknowledging that the claimant's preexisting PPDs of 2.385% to the body as a whole, 10% PPD to his right thumb, and 5.5% PPD to his right shoulder clearly "[did] not meet the threshold requirements established by the 1993 amendments.").

Claimant contends that, under this court's decision in Shipp v. Treasurer of State, the Commission properly "stacked" or combined Claimant's below-threshold disabilities when it calculated the Fund's liability. 99 S.W.3d 44 (Mo.App.E.D. 2003) (overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003)). The Shipp court held that the Commission did not err in stacking the claimant's preexisting, below-threshold disabilities to her right elbow and right wrist to meet the required fifteen percent PPD of a major extremity. Id. at 53. The court explained: "If a claimant has multiple injuries to a major

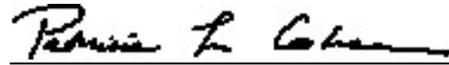
extremity at various levels, it may be appropriate, depending on the facts and circumstances, to rate the percentage of disability to the entire major extremity.” Id.

This court’s holding in Shipp is inapplicable in the present case, as the Shipp court addressed only the stacking of separate disabilities at different levels to the same major extremity to satisfy the statutory thresholds. Witte, 2012 WL 3791686, at \*8. Contrary to Claimant’s argument, Shipp does not stand for the proposition that all of a claimant’s primary injuries or preexisting PPDs, regardless of whether they are injuries to the body as a whole or injuries to a major extremity, can be stacked when calculating Fund liability.

In this case, only Claimant’s primary injury to his neck satisfied the threshold and only those 110 weeks of compensation attributable to the neck injury may be carried forward into the calculation of the Fund’s liability to Claimant. The first step in calculating the Fund’s liability requires addition of the 27.12 weeks attributable to Claimant’s preexisting PPD to the 110 weeks of compensation attributable to Claimant’s primary neck injury. The sum is 137.12 weeks. We next consider whether Claimant’s preexisting condition combined with the effects of his primary injury to result in a greater disability than their simple sum. The Commission found that Claimant’s primary injury had a synergistic effect on his preexisting PPD and assigned a load factor of 10%. When the 137.12 total weeks is multiplied by the 10% load factor, the result is 13.712 weeks of PPD enhancement due from the Fund, not 16.76 weeks, as awarded by the Commission. Accordingly, we grant the Fund’s point on appeal and remand to the Commission for entry of an award consistent with this opinion.

*Conclusion*

We reverse the award and remand to the Commission. However, because of the general interest and importance of the issues, we transfer to the Missouri Supreme Court pursuant to Rule 83.02.

A handwritten signature in black ink, reading "Patricia L. Cohen". The signature is written in a cursive style with a horizontal line underneath.

Patricia L. Cohen, Judge

Lawrence E. Mooney, P.J., and  
Kurt S. Odenwald, J., concur.