BEFORE THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TREASURER OF THE STATE OF MISSOURI
CUSTODIAN OF THE SECOND INJURY FUND
ADDITIONAL PARTY/APPELLANT

v.

JAMES WITTE
EMPLOYEE/APPELLANT

Case WD74644

APPEAL FROM THE MISSOURI LABOR AND INDUSTRIAL RELATIONS COMMISSION

BRIEF OF APPELLANT SECOND INJURY FUND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

This appeal is from a final decision issued by the Labor and Industrial Relations Commission of Missouri awarding Second Injury Fund liability, reversing a decision of an Administrative Law Judge of the Missouri Division of Workers' Compensation. Pursuant to § 287.495, RSMo, appeal of the award is to the appellate court. Because the venue of this case is Jefferson City, which is not a county embraced in the jurisdiction of the eastern and southern districts of the court of appeals, jurisdiction lies with this court. §477.070, RSMo. Because this case does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, general appellate jurisdiction lies with this Court. Mo. Const., Art. V, § 3; § 512.020, RSMo.

STATEMENT OF FACTS

Employee, James Witte, was injured while working as a laborer for Employer, Show-Me Livestock Co-op. Inc. on April 18, 2007. TR, 8-9. While doing his work for Employer, Employee slipped and fell onto frozen concrete. TR, 40. Employee was diagnosed with a right hip fracture, undergoing an open reduction and internal fixation hip. TR, 236-237.

Before working for Employer, Employee worked as a corrections officer for the Missouri Department of Corrections for more than three years at an all-male facility. TR, 27. Employee was able to perform all of his job duties, which included restraining prisoners at least once a month. TR, 27, 29. Employee has also worked as a security officer and as a hired hand/farmer. TR, 10-11. He had no permanent restrictions from his doctors at any of his jobs prior to working for Employer. TR, 27, 28.

Dr. Robert Poetz performed an independent medical evaluation of Employee on April 23, 2009. TR, 75. Dr. Poetz determined that the workplace injury of April 18, 2007, resulted in a 30% permanent partial disability to the right hip and a 20% permanent partial disability to the body as a whole measured at the lumbar spine. TR, 64.

Dr. Poetz also provided ratings regarding Employee's pre-existing conditions. Dr. Poetz determined that prior to April 18, 2007, Employee had

a 15% permanent partial disability to the body as a whole due to diabetes, a 20% permanent partial disability to the left eye, a 15% permanent partial disability to the right leg, a 15% permanent partial disability to the body as a whole at the gastrointestinal system due to spastic colon, a 20% permanent partial disability to the body as whole based on depression and anxiety, and 10% permanent partial disability to the body as a whole referable to the lumbar spine. TR, 66. He also stated that Employee's primary and pre-existing disabilities result in a total that exceeds their simple sum by 15%. TR, 66. Dr. Poetz was not aware of any restrictions that Employee was under prior to his April 2007 injury. TR, 75.

Prior to the hearing, Employee and Employer settled the primary claim from the April 18, 2007, injury for 20% disability to the body as a whole and 30% disability to the right hip. The sole issue to be resolved at final hearing was the nature and extent of Second Injury Fund liability.

Administrative Law Judge (ALJ) Hannelore Fischer found Employee failed to sustain his burden of proof that he was entitled to permanent partial disability (PPD) benefits from the Second Injury Fund (Fund). Award at 6, Appendix at 13. While Employee had multiple complaints from his diabetes, colon, mental health, left eye, right leg, and back, the ALJ determined that there was very little evidence that any of these complaints were significant enough at the time of the April 18, 2007, injury to constitute a hindrance or

obstacle to employment or to reach the thresholds set out in § 287.220.1, RSMo, for Fund liability for PPD. Award at 6; Appendix at 13.

The Labor and Industrial Relations Commission (Commission) reversed the ALJ Award and assessed PPD benefits from the Fund for Employee's 10% body as a whole (BAW) (40 weeks) diabetes, 10% BAW (40 weeks) gastrointestinal condition, 10% BAW (40 weeks) psychiatric problems, 10% of the right leg at the 207-week level (20.7 weeks), and 5% of the BAW (20 weeks) lumbar spine. Appendix at 4, 6.

POINT RELIED ON

The Commission erred in including Employee's pre-existing disability of 10% of the body as a whole (BAW) referable to diabetes (40 weeks), 10% BAW referable to employee's gastrointestinal condition (40 weeks), 10% BAW referable to his psychiatric problems (40 weeks), 10% of the right leg at the 207-week level (20.7 weeks) and 5% BAW referable to the lumbar spine (20 weeks) in calculating the liability of the Fund because none of these disabilities are to be considered in determining the liability of the Fund in that § 287.220.1, RSMo, requires a disability to the body as a whole to be at least 50 weeks, or a disability to a major extremity to be at least 15%, to qualify for Fund consideration, and Employee's disabilities met neither standard.

Cardwell v. Treasurer of the State of Mo., 249 S.W.2d 902 (Mo.App. 2008)

Shipp v. Treasurer of the State of Mo., 99 S.W.3d 44 (Mo.App. 2003)

Motton v. Outsource Int'l., 77 S.W.3d 669 (Mo.App. 2002)

Pierson vs. Treasurer, 126 S.W. 3d 387 (Mo. banc 2004)

ARGUMENT

Standard of Review

The Court's review in this case involves questions of law, and as such, the Commission's decision is given no deference, but instead this Court has de novo review. *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo. banc 2002); *Bunker v. Rural Elec. Co-op.*, 46 S.W.3d 641, 643 (Mo.App. 2001); *Walsh v. Treasurer of the State of Mo.*, 953 S.W.2d 636 (Mo.App. 1997).

Introduction

Under the Missouri Workers' Compensation Act, Chapter 287, RSMo,[1] all permanent partial disabilities are compensated based on a percentage of disability which is then converted to a number of weeks by multiplying the percentage of disability by the number of weeks assigned to the whole body part. § 287.190, RSMo. The Chapter sets forth a "Schedule of Losses," which lists the entire number of weeks assigned to different body parts. *Id* at .1. However, if a person has a work injury that causes disability to a body part not specifically enumerated in the "Schedule of Losses," the disability is determined based on §287.190.3. This section allows for disability "for permanent injuries other than those specified in the schedule of losses," and is based on 400 weeks. *Id*. This paragraph is intended to cover and include any and every kind of permanent injury other than those on the enumerated

[1] All statutory references are to RSMo, unless otherwise indicated.

list. *Betz v. Columbia Tel. Co.* 24 S.W.2d 224, 227 (Mo. 1930). These are the injuries that in workers' compensation practice are commonly known and referred to as "body as a whole" injuries.

"Body as a whole" is a term of art, used repeatedly in the day-to-day practice of workers' compensation law as well as in workers' compensation case law. And while there is no definition of "body as a whole" anywhere in the workers' compensation statutes, the term is actually well defined by case law. In *Carenza v. Vulcan-Cincinnati, Inc.*, 368 S.W.2d 507 (Mo. 1963), the Court used the term, stating "extent of injury from the 'catchall' provision now in paragraph 3 of Section 287.190, i.e. body as a whole . . . ." *Id. at 514. See, e.g., Haggard v. Synder Const. Co.*, 479 S.W. 2d 142, 144 (Mo. 1972) (an injury to the neck, which is a non-scheduled injury, is properly expressed in terms of the body as a whole); *Gordan v. Chevrolet-Shell Div. of Gen. Motors*, 269 S.W.2d 163, 170 (Mo. 1954) (20 percent body as a whole for a low back injury); *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830, 835 (Mo.App. 2001) (80 percent body as a whole as a result of asthma).

This same schedule and percentage formula is used in determining the extent of permanent partial disabilities when assessing the liability of the Fund. § 287.220.1; § 287.190. To qualify for Fund benefits, both a pre-existing and a compensable disability must meet certain thresholds. The Fund statute reads in 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 . . . .

§ 287.220.1

Point Relied On

The Commission erred in including Employee's pre-existing disability of 10% of the body as a whole (BAW) referable to diabetes (40 weeks), 10% BAW referable to employee's gastrointestinal condition (40 weeks), 10% BAW referable to his psychiatric problems (40 weeks), 10% of the right leg at the 207-week level (20.7 weeks) and 5% BAW referable to the lumbar spine (20 weeks) in calculating the liability of the Fund because none of these disabilities are to be considered in determining the liability of the Fund in that § 287.220.1, RSMo, requires a disability to the body as a whole to be at least 50 weeks, or a disability to a major extremity to be at least 15%, to qualify for Fund consideration, and Employee's disabilities met neither standard.

In a complete deviation from prior case law and indeed its very own prior holdings, the Commission held that the threshold requirements set out in § 287.220.1 require that a disability that does not meet the minimum threshold of 50 weeks if to the body as a whole, nor the threshold of 15% if to a major extremity, may nonetheless be considered in determining the liability of the Fund if the sum of all the various disabilities together, body as a whole plus major extremity, meet the 50-week threshold. Such a change should be

made by the legislature, not by the Commission – nor by the courts.

A. Until now, courts and the Commission read the thresholds in § 287.220.1 in the alternative.

The statutory language at issue requires that a "pre-existing 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." § 287.220.1. For many years, the Commission and the courts have read the two phrases or tests that are divided by "or" as alternatives; to qualify, the injured worker must have either a "body as a whole" disability (as defined in the Introduction) at or above 50 weeks, OR the worker must have a 15% disability to a major extremity. In other words, the 15% major extremity disability was an alternative to the 50 weeks threshold, not a subset.

Thus in *Cardwell v. Treasurer of the State of Missouri,* 249 S.W.2d 902 (Mo. App. 2008), the Court affirmed the decision of the Commission awarding permanent partial disability benefits to Cardwell based upon a single pre-existing disability to his body as whole of 25% referable to his neck. *Id.* The court affirmed the holding of the Commission excluding from the Fund's liability calculation Cardwell's pre-existing disabilities of 10% to his right knee, 5% to his right shoulder, 7.5% to each wrist, 5% to the body as a whole for his low back and 2.5% to the body as a whole for his psychiatric condition.

Both the court and the Commission excluded these below threshold disabilities despite the fact there were multiple pre-existing disabilities that would have cumulatively met the 50-week threshold. Using the Commission's analysis in *Witte,* Appendix at 4-7, the Commission and the court in *Cardwell* then should have included all of Cardwell's pre-existing disabilities existing at the time of the primary injury, even those which both tribunals specifically excluded: the 10% to the knee, the 5% to the shoulder, the 7.5% to each wrist, the 5% to the body as a whole for the back, and the 2.5% to the body as a whole for the psychiatric condition. The court noted that the Commission excluded these pre-existing disabilities because the Commission determined that they were not a hindrance or obstacle to employment, and because of the low amounts of disability attributable to those conditions. *Cardwell*, 249 S.W.3d at 907.

In affirming the award of the Commission, the court in *Cardwell* recited that the amount or percentage of disability attributable to disabilities is a finding of fact within the province of the Commission. *Id.* The court specifically noted that "the Commission determined *each* injury did not meet the statutory threshold requirement." *Id.* at 908 (emphasis added). Given the holding in *Cardwell*, the Commission is incorrect in its present statement that the ALJ's action of assessment of whether each individual disability meets the statutory threshold has no basis in Missouri workers'

compensation law or in Missouri case law. The ALJ followed what both the Commission and the Court of Appeals did in *Cardwell*.

In *Shipp v. Treasurer of the State of Missouri,* 99 S.W.3d 44 (Mo.App. 2003), the court read the statute just as it did in *Cardwell.* In *Shipp* the claimant alleged pre-existing disabilities to her back, right wrist, ribs, chest and body as a whole for psychiatric issues. *Id.* at 47. She offered medical testimony that her preexisting disabilities were 25% to the body as a whole for depression, 20% to the body as a whole for hypertension, 15% to the body as a whole for left chest wall syndrome, 20% to the right elbow and 30% to the right wrist. *Id.* at 48.

For purposes of the Fund's liability, both the ALJ and the Commission found the claimant to have pre-existing disability of 20-25% to the body as a whole for depression and 15% to the right shoulder. *Id.* at 49. The Court of Appeals noted "[w]ith regards to all other preexisting injuries and disabilities alleged by claimant, the ALJ found that she failed to prove the 'PPD threshold element' which would trigger potential SIF liability." *Id.* at 49. The Court later noted that the Commission "'attached and incorporated' the decision of the ALJ" which would include this finding. *Id.* at 54.

The holding by both the Commission and the Court of Appeals in *Shipp* is in direct conflict with the Commission's holding in this present case, such that if there are disabilities to more than one body part *all* disabilities, no

matter what their individual percentages might be, are to be calculated to the week of disability and combined to see if all together they reach the 50-week threshold. In *Shipp*, the pre-existing disability found by the Commission alone reached the 50-week threshold (20% to the body as a whole for depression = 80 weeks); therefore, under its holding as applied to this case, no pre-existing disability should have been excluded for failing to meet the threshold requirement. Yet, the ALJ, Commission, and Court of Appeals did not include the other disabilities in the Fund calculation, having found they did not meet the "PPD threshold element." *Id.* at 49.

Decisions by the Commission have, in the past, given the statutory language the same reading as in *Cardwell* and *Shipp*. Thus recently in the case of *Steve Penrod,* Injury No. 06-109748 (Aug. 12, 2011), the ALJ found that the claimant had pre-existing disabilities of 5% to the right elbow (5% x 210 = 10.5 weeks) and 10% to the body as a whole for sleep apnea (10% x 400 = 40 weeks). *Penrod,* ALJ Award at 9, Appendix at 26. The ALJ denied PPD benefits to the claimant from the Fund, finding his pre-existing disabilities did not meet the statutory thresholds for Fund liability. *Id.* The Commission affirmed the denial of Fund benefits to the claimant by affirming and incorporating the ALJ Award. *Penrod,* Commission Award at 1; Appendix at 15.

Similarly, in the case of *George Moore,* Injury No. 00-117396 (Aug. 5,

2011), the Commission applied its longstanding reading of the statute. Appendix at 27. Both the Commission and the ALJ awarded the claimant permanent partial disability benefits based on pre-existing disabilities of 25% to his left knee, 25% to his right knee, 20% to his right elbow and 20% to his right wrist. *Moore,* Commission Award at 1; ALJ Award at 8; Appendix at 27, 38. As mentioned in the dissenting opinion of Commissioner Chick, Dr. Cohen also rated a pre-existing low back injury at 2-3% to the body as a whole, which neither the ALJ or the Commission included in the Fund calculation. *Moore*, Commission Award, Dissenting Opinion at 1, Appendix at 29.

B. The Commission departed from the established reading of the statute finding that Employee met the threshold requirement for Fund liability.

Using the traditional reading of § 287.220.1, the Commission would have affirmed the Award of the ALJ in this case finding no Fund liability, excluding from the Fund calculation the 10% BAW disability (diabetes), 10% BAW disability (gastrointestinal), 10% BAW disability (psychiatric), 10% right leg, and 10% BAW disability (lumbar spine). Instead, the Commission found that these disabilities should be included in the Fund benefit calculations, having met the statutory thresholds by combining all pre-existing body as a whole and major extremity disabilities.

The Commission held that the 15% disability to a major extremity threshold is used only "when a claimant has preexisting or primary permanent partial disability of a single major extremity ('if a major extremity injury only'). In all other circumstances, the first threshold applies." Commission Award at 5; Appendix at 6. The Commission held that once you know which threshold to use, you must consider "all" injuries existing at the time of the injury together to see if the threshold is met. *Id.*

After noting that the ALJ did not include certain disabilities that were individually less than the threshold amounts, the Commission wrote:

> These comments suggest the administrative law judge was of the opinion that if none of a worker's preexisting or primary disabilities, considered in isolation, meet one of the thresholds in §287.220.1, then there can be no Second Injury Fund liability. Such an approach has no support in the Missouri Workers' Compensation Law or in Missouri case law.

Commission Award at 3; Appendix at 4. In reality it is this comment by the Commission that lacks support.

The courts and Commission have consistently held that when evaluating a disability to see if it meets the thresholds of § 287.220.1, each disability is evaluated singularly, not in combination. The Commission and courts have given the "a" in the statute just prior to "disability" meaning, and

have never combined several disabilities together to reach the 50-week threshold. In fact, just months ago, the Commission that issued this award issued the awards in *Penrod* and *Moore,* which were consistent with long-standing precedent.

In addition to the Commission being wrong in stating that excluding individual disabilities less than the statutory thresholds has no basis in law, the Commission is also wrong in its holding that the legislature intended extremity disabilities to be converted to a number of weeks if either the pre-existing or primary injury consists of more than one single major extremity disability. Commission Award at 5; Appendix at 6.

The Commission cites *Motton v. Outsource International*, 77 S.W.3d 669, 675 (Mo.App. 2002), as support for its statement that the 15% threshold is used when "a claimant has only a pre-existing or primary disability to a major extremity." Commission Award at 5; Appendix at 6. The Commission in *Motton* held that the term "major extremity" is ambiguous and that a 12.5% permanent partial disability to the shoulder at the 232-week level meets the threshold necessary for Fund liability. The Commission converted the 12.5% to the shoulder to weeks (29) and held that because 29 was greater than 15% to the wrist (175 week level x 15% = 26.25) a 12.5% disability to the shoulder met the threshold. *Motton,* 77 S.W.3d at 671.

The Court of Appeals reversed the holding of the Commission in

Motton. Despite the citation by the Commission as support for its opinion in this case, *Motton* does not hold that the 15% threshold applies only when a claimant has "only a preexisting or primary disability to a major extremity." Commission Award at 5; Appendix at 6. In fact, the Court of Appeals decision in *Motton* specifically contradicts that statement as follows:

> Had the legislature intended to set the threshold for disability for a major extremity on a minimum number of 'weeks,' rather than a minimum percent of disability, it could have done so as it did when it set the threshold for disability to the body as whole. (citations omitted) Rather, the legislature premised liability on a percentage of disability. The legislature's decision not to measure disability to a major extremity by weeks of compensation indicates that it did not intend to do.

Motton, 77 S.W.3d at 674, 675.

The Commission's decision attempts to thwart the intention of the legislature by converting major extremity disabilities, that do not meet the 15% threshold, into a number of weeks and combining those weeks with other disabilities to determine if the total of weeks reaches the 50-week body as a whole threshold. As recognized in *Motton,* the legislature did not intend major extremity disabilities to be analyzed based on a number of weeks, but instead specifically wrote that a major extremity disability must be at least a 15% permanent partial disability to be considered for Fund purposes. *Id.* at

674, 675.

Once again the Commission erred in its holding that a major extremity disability should be converted to a number of weeks for Fund calculations as neither the statute nor case law allows for such a conversion under any scenario. The court in *Motton* summarized its holding as follows:

> The use of the disability percentage rather than the weeks standard does not make the statute ambiguous. The legislature's intent was to impose liability on the Second Injury Fund for permanent partial disability when a claimant has a preexisting partial disability of 15% to a major extremity. The Commission erred as a matter of law in finding that the reference to 'fifteen percent permanent partial disability' of a major extremity, as used in section 287.220.1, was ambiguous and in finding that a 12.5% disability to the arm at the shoulder satisfied the 15% requirement.

Id. at 675.

Despite the Commission's statement in this case that the decision of the ALJ to exclude pre-existing disabilities that do not meet the thresholds of § 287.220.1 has no basis in the statute or case law, it is the Commission that has deviated from long-standing established law regarding the threshold requirements of §287.220.1. The Commission included in the Fund calculation disabilities to an extremity of even less than 12.5% when it

included Employee's preexisting disability to his right leg of 10%. The right leg disability should not have been included in the Fund calculation, because it is a disability to a major extremity of less than 15%.

The ALJ was correct, in making her award, to consider only those disabilities both pre-existing and compensable that individually met the statutory threshold of either 15% to a major extremity or 50 weeks if to the body as a whole. Section 287.220.1 does not allow for combining together a litany of de minimus disabilities to reach these thresholds. The statute states an employee must have "a pre-existing disability" that meets certain requirements including the thresholds and "a subsequent compensable injury resulting in additional permanent partial disability" that also meets certain requirements including the thresholds, to be considered for Fund liability. §287.220.1 (emphasis added). With this ruling the Commission has failed to give meaning to the use of the word "a," which requires that each individual disability not all disabilities be considered to see if they meet the statutory criteria, including the thresholds.

The Commission's current interpretation of § 287.220.1 is a stark change from how not only the courts, but the Commission itself interpreted the statute previously. It is the General Assembly, not the Commission, which would be charged with changing the well-established law on this statute. The Supreme Court has held that long term, consistent judicial

decisions must be given deference. "The Court's decision, however, has been followed these past 21 years; the judicial interpretation has become woven into the fabric of the statute, its interpretation has been incorporated into the director's taxation forms, the statutory provision has been left untouched by the General Assembly." *Medicine Shoppe International, Inc. v. Dir. of Revenue,* 156 S.W.3d 333, 333 (Mo. banc 2005).

CONCLUSION

For the foregoing reasons, the Commission's award should be reversed.

Respectfully submitted,

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Certificate of Service and Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on this Monday, March 26, 2012, true and correct copies of the foregoing brief and one CD-ROM containing the brief were sent postage prepaid via the United Postal Service to:

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The undersigned further certifies that the brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 4,738 words.

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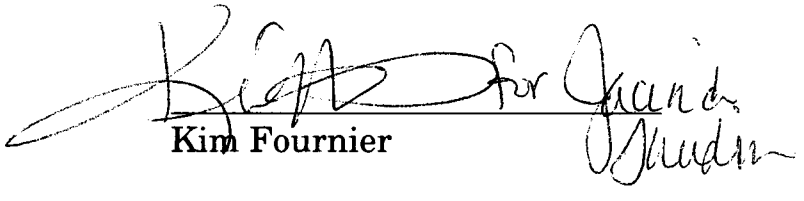

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