IN THE COURT OF APPEALS
EASTERN DISTRICT
STATE OF MISSOURI

TREASURER OF THE STATE OF MISSOURI
CUSTODIAN OF THE SECOND INJURY FUND
APPELLANT

v.

JOSEPH SALVICCIO
RESPONDENT

APPEAL NO. ED97862

BRIEF OF RESPONDENT JOSEPH SALVICCIO

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JURISDICTIONAL STATEMENT

This is an appeal of an Order of the Labor and Industrial Relations Commission ("Commission") in a Workers Compensation matter. The Missouri Eastern District Court of Appeals has jurisdiction of this matter pursuant to Section 287.495 RSMo., and Article V, Section 18 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

The Respondent was 56 years of age at the time of trial. The Respondent worked for the Employer Western Supplies as a machine operator for approximately 25 years [Tr. 12]. His claim against the Employer and Insurer had previously been settled by Compromise Lump Sum Settlement for 20 percent of the left knee [Tr. 83]. The sole issue for determination at trial was the liability of the Second Injury Fund for permanent partial disability [Tr. 6].

Primary Injury

On November 21, 2008, the Respondent sustained an acute twisting injury to his left knee while attempting to move metal at his station [Tr. 13]. He experienced immediate pain and swelling in the knee, and eventually underwent surgery of the left knee with Dr. Strickland. According to Dr. Strickland, "his arthroscopic findings did show chronic problems involving the lateral joint line but he did have an acute flap tear on the medial femoral condyle...He also had a chronic tear of his lateral meniscus and a chronic ACL insufficient knee..." [Tr. 87].

Preexisting Conditions

Left hand

Prior to the accident of November 21, 2008, the Respondent suffered traumatic injury to his left hand while at work on April 20, 1995. The Respondent testified that while moving bars of steel, he cut his left hand in the area of the left fifth finger, severing a tendon [Tr. 18]. Treatment records indicate that the Respondent underwent surgery by Dr. William Strecker at Barnes-Jewish Hospital to repair the digital nerve and severed flexor tendon. Records at that time also indicate that the Respondent was diagnosed with non-insulin dependent diabetes [Tr. 124, 126]. On November 6, 1996, Dr. William Hart wrote a report on behalf of the then insurance company, wherein he described the flexion contracture, loss of mobility and decreased feeling in the ulnar aspect of the left small finger [Tr. 131]. Currently, the Respondent has a permanent flexion contracture, which is frozen at a 90 degree angle at the PIP joint of his left fifth finger [Tr. 17, 80]. The Respondent credibly testified at trial that he had to "learn how to do everything differently" with his left hand, as the finger would end up getting caught on material he handled at work. He indicated he "learned the hard way several times" to keep that contracted finger from getting caught and ripped [Tr. 19-20]. The Respondent testified he cannot physically straighten out the finger, and that he now has nodules in the palm below the fifth finger that he attributes to the contracture. He indicated that the ulnar side of his left hand cramps on occasion [Tr. 20].

The Respondent, as a pro se claimant, compromised his 1995 left hand injury with the Employer and Insurer for 59 percent of the left finger at the 22 week level [Tr. 157].

Dr. Musich opined that the Respondent sustained a 25 percent permanent partial disability to the left hand as a result of the 1995 tendon laceration and repair [Tr. 58, 82].

Multiple Hernias/Abdominal Wall Reconstruction

The Respondent suffered two work related hernias, one on or about July 27, 1999 and the other on or about October 18, 2005. Both events occurred after the Respondent was lifting heavy material at work. Both accidents resulted in surgery performed by Dr. Kenneth Bennett. According to the Respondent and Dr. Bennett's findings, the hernia from 1999 was a ventral hernia repaired with Marlex mesh [Tr. 21, 145, 156]. In 2005, Dr. Bennett suspected that the Respondent had a recurrent hernia, but found the Respondent sustained a separate incarcerated hernia near the area of the first. Dr. Bennett performed a reduction with Marlex mesh repair and abdominal wall reconstruction. The operative note described the surgeon's decision to "reconstruct his abdominal wall" after the Marlex mesh had been installed. The Respondent credibly testified at trial that as a result of the two hernia repairs, he no longer has a belly button, and is left with an 11 inch scar [Tr. 24]. The Respondent explained that since the surgeries, he has never felt the same, is much more careful in how he lifts and developed lever systems at work to avoid lifting as much as he had

done in the past. The Respondent complains of increased abdominal wall pressure since the surgeries [Tr. 25, 80].

The Respondent, as a pro se claimant, compromised his 1999 and 2005 hernia injuries with the Employer and Insurer for 4 percent and 3.5 percent of the body as a whole respectively [Tr. 158-159].

Dr. Musich opined that the Respondent sustained a 15 percent permanent partial disability to the body as a whole referable to the hernia repairs [Tr. 58, 82].

Diabetes

The Respondent testified at trial that he was diagnosed with diabetes about 15 years ago [Tr. 27]. The medical records indicate that the Respondent was diagnosed with non-insulin dependent diabetes as early as 1995 [Tr. 124]. On April 20, 1995, the Barnes-Jewish records note that the Respondent took Glipizide, 5mg in the morning, and 2.5 mg at night. On November 4, 1996, Dr. William Hart again noted the Respondent took Glipizide for diabetes mellitus. On November 28, 2005, the Respondent was taking Gloucophage 500 mg [Tr. 69, 70, 154]. On December 22, 2008, Dr. Strickland noted that the Respondent had a history of insulin dependent diabetes [Tr. 84, 98]. Dr. Thomas Musich, who evaluated the Respondent for the purposes of an Independent Medical Evaluation on November 2, 2009, noted that the Respondent had been insulin dependent for "over 24 months" [Tr. 80]. Although the Respondent did not complain of any retinal symptoms, he did complain of "episodes of polyuria, polydipsia, polyphagia and stocking and glove paresthesia of all extremities." [Tr. 80]

On physical examination, Dr. Musich noted that the Respondent demonstrated paresthesia to light touch and pin prick over his hands and feet [Tr. 81]. At trial, the Respondent testified that he takes two different types of insulin, one twice daily, and one in the evening only. Additionally, he takes three pills called Metformin for the diabetes [Tr. 27]. Dr. Musich agreed that a person who takes both insulin and oral medication for diabetes would indicate poor control of the disease [Tr. 65]. Dr. Musich opined that the Respondent's insulin dependent diabetes resulted in a permanent partial disability of 20 percent of the body as a whole [Tr. 58, 82].

STANDARD OF REVIEW

"Our standard of review is governed by section 287.495.1, RSMo 2000, which provides: The court, on appeal, 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." Seifner v. Treasurer of Mo., WD74192, page 6 (March 27, 2012). "However, we defer to the Commission on issues involving credibility of witnesses and the weight given to their testimony. Id.

POINT RELIED ON

The Commission did not err in awarding permanent partial disability benefits to the Respondent from the Second Injury Fund because the Commission acted within its statutory power by applying the plain language of the statute; the award was not procured by fraud; the facts found by the Commission support the award; and there was sufficient competent and substantial evidence to support the award.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902 (Mo. App. E.D. 2008)

Griggs v. A.B. Chance Co., 503 S.W.2d 697 (Mo. App. W.D. 1973)

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003)

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

Pierson v. Treasurer of Mo., 126 S.W.3d 386 (Mo. 2004)

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

Tiller v. Auto Auction, 941 S.W.2d 863 (Mo. App. S.D. 1997)

White v. Hendersen Implement Co., 879 S.W.2d 575 (Mo. App. W.D. 1994)

Section 287.220.1 RSMo.

ARGUMENT

In this case, the Commission acted within its statutory power and applied the plain language of the statute, Section 287.220.1 RSMo., which states 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 of 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..." Section 287.220.1 RSMo.

The Commission relied upon the legislative history and legislative intent referable to 287.220 in its decision herein. The Commission cited Pierson v. Treasurer of Missouri, 126 S.W.3d 386, 390 (Mo. 2004) to describe the purpose of the Second Injury Fund, which is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury."

The Commission explained that the statute was amended in 1993 to include the thresholds contained within Section 287.220.1 in order to limit claims against the Second Injury Fund for de minimis disabilities [A-3].

In reaching its decision, the Commission first determined whether the Respondent's injuries met the threshold requirements prescribed by 297.220.1.

Insomuch as the Respondent had multiple preexisting injuries and conditions to various body parts, it found that the 50 week threshold requirement applied as opposed to the 'fifteen percent of a major extremity only' threshold. Respondent met the 50 week minimum threshold requirement and triggered Second Injury Fund liability on the basis of the disability attributed to his preexisting diabetes. As the Commission explained in its decision, after making a finding that the 50 week threshold was reached, it then considered "all disabilities that exist at the time of the work injury" as is required by Section 287.220.1. Id. When all of the preexisting conditions were taken in the aggregate, the Commission determined that Respondent suffered a total of 91 weeks of preexisting disability.

The court interprets the workers' compensation law according to the general rules of statutory construction. Motton v. Outsource Int'l., 77 S.W.3d 669, 673 (Mo. App. E.D. 2002). It will not create an ambiguity in a statute, where none exists, in order to depart from a statute's plain and ordinary meaning. Id. The court's primary goal is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms used. Id. In determining legislative intent, we give an undefined word used in a statute its plain and ordinary meaning. Id.

In this case, the Commission applied the plain language of Section 287.220.1 in determining first that the Respondent met the 50 week threshold for his preexisting diabetes, and then determined the amount of disability of all preexisting disabilities that existed at the time of the primary injury.

A respondent is required to show the nature and extent of his injury by a reasonable degree of medical certainty and such proof may not rest on surmise and speculation Griggs v. A.B. Chance Co., 503 S.W.2d 697, 703 (Mo. App. W.D. 1973). A disability is deemed "permanent" if shown to be of indefinite duration in recovery or substantial improvement is not expected. Tiller v. Auto Auction, 941 S.W.2d 863, 865 (Mo. App. S.D. 1997).

With respect to the left hand, the Respondent visually demonstrated how the permanent 90 degree contracture of the left fifth finger caused an ongoing hindrance an obstacle to his employment. The operative note submitted into evidence without objection confirmed a severing of the tendon, resulting in the permanent contracture. The Respondent credibly testified that he had to relearn how to use his left hand to lift, grab and move material at work [Tr. 20]. Dr. Musich, the Respondent's expert, evaluated and testified that the Respondent sustained 25 percent permanent partial disability of the left hand.

With respect to the two work-related hernias and two hernia repairs, the Respondent credibly testified that his abdomen was never the same after the two surgeries, and that had to learn different ways to lift heavy items at work with the assistance of levers. Dr. Bennett's operative note documents the decision of the surgeon to reconstruct the abdominal wall after two Marlex mesh repairs. The Respondent no longer has a belly button, and has an 11 inch scar from the procedures. Dr. Musich found that the Respondent suffered a 15 percent permanent partial disability referable to the body as a whole.

With respect to the diabetes, the credible medical evidence demonstrated the clear progression of the Respondent's disease over an approximate 15 year period. Treatment notes from various physicians document the Respondent from 1995 wherein he was noninsulin dependent, through the time of his Independent Medical Evaluation with Dr. Musich in 2009 wherein he took two types of insulin as well as oral medication on a daily basis for the diabetes. Dr. Musich described the insidious symptoms experienced by the Respondent as a result of the diabetes, and opined that the Respondent suffered 20 percent permanent partial disability as a result of the disease. No evidence was submitted by the Second Injury Fund to rebut or impeach the Respondent's evidence described herein.

"The determination of a specific amount or percentage of disability awarded to a claimant is a finding of fact within the unique province of the Commission." Cardwell v. Treasurer of Missouri, 249 S.W.3d 902, 907 (Mo. App. E.D. 2008). As the ultimate finder of fact in a Workers' Compensation matter, the "Labor and Industrial Relations Commission is sole judge of witness credibility and weight and value of evidence." White v. Hendersen Implement Co., 879 S.W.2d 575 (Mo. App. W.D. 1994).

In the case at hand, the Commission found all of the Respondent's preexisting conditions "constituted hindrances or obstacles to employment at the time he sustained the November 2008 primary injury" and further credited Dr. Musich's opinion that of all of the Respondent's preexisting injuries combined with the primary injury which resulted in a greater disability than the simple sum [A-4]. In so

finding, the Commission was within its discretion to award benefits based upon the preexisting diabetes, hernias and left finger.

Appellant argues that the Commission "complete[ly] deviat[ed] from prior case law, and indeed its own prior holdings" in awarding 91 weeks of preexisting disability to the Respondent herein. Appellant's argument is inaccurate, contrary to the case law, and seeks to change the plain meaning of Section 287.220.1.

Appellant cites Cardwell v. Treasurer of Missouri and Shipp v. Treasurer of Mo., 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. 2003), to support its position that the Commission erred in its decision in awarding PPD benefits to the Respondent which included the preexisting disability referable the two hernias and the left finger. Neither of these cases supports the Appellant's position.

In Shipp, the administrative law judge found that the claimant sustained fifteen percent PPD to the left shoulder and five percent PPD to the right wrist referable to the primary injury. Her preexisting conditions included a right wrist injury and a right elbow injury. The ALJ found that these two separate preexisting injuries "[were] found to constitute fifteen percent PPD of the right upper extremity at the level of the shoulder." Shipp, at 49. The Commission noted that "[t]echnically this may have been better phrased as [fifteen percent] of the arm or upper extremity [instead of fifteen percent PPD of the right upper extremity at the level of the shoulder], *but we believe that just as where there are injuries to multiple parts of the body it may be appropriate to 'rate' on the body as a whole*

[citation omitted] where there are injuries to different parts of an arm, it may often be appropriate to consider the disability of the entire arm." (emphasis added) Id.

In Shipp, the Second Injury Fund cited Motton v. Outsource Int'l., "in support of its argument that Section 287.220.1 does not permit stacking preexisting disabilities in order to reach the minimum fifteen percent PPD threshold for triggering potential liability of the SIF." Shipp, at 52. This court rejected the SIF's argument in that case.

"Motten does not stand for the argument that section 287.220 does not permit 'stacking' of preexisting claims." Shipp, at 52. "The SIF fails to cite any case law which specifically prohibits 'stacking' of preexisting injuries at various levels." Id., at 53. "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.

The Commission's findings herein are distinguishable from the findings made in Cardwell. In that case, the claimant had preexisting disabilities that amounted to 25 percent of the neck, ten percent of the right knee, five percent of the right shoulder, seven and a half percent of each wrist, five percent of the low back and two and a half percent of the body as a whole for a psychiatric condition. In Cardwell, only the claimant's preexisting neck injury was determined by the Commission to be a hindrance or obstacle to employment, which also happened to be the only preexisting condition to meet statutory threshold of and by itself.

There is nothing in the Cardwell decision, or Section 287.220.1, that states each and every preexisting condition independently must reach 50 weeks if a body as a whole injury. In Shipp, the Commission allowed for stacking of preexisting disabilities in order to reach the fifteen percent threshold in the case of a major extremity. Appellant's antithetical position, that each and every preexisting condition independently must reach either a minimum of 50 weeks if a body as a whole injury, or a minimum of fifteen percent PPD if a major extremity, is simply not supported by the case law or Section 287.220. Further, Appellant fails to acknowledge in her argument that the Respondent met the statutory threshold requirement of 50 weeks referable to his preexisting diabetes before the Commission determined overall preexisting disability.

CONCLUSION

The Commission's award of permanent partial disability benefits from the Second Injury Fund is supported by sufficient competent and substantial evidence and is not contrary to the overwhelming weight of the evidence. The Commission acted within its statutory power and applied the plain meaning of the statute. The Appellant does not allege and the evidence does not support a finding that the award was procured by fraud. As such, the Commission's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06(b), (c), and 333

I hereby certify that on May 7, 2012, a true and correct copy of the foregoing was filed electronically via Missouri Case.Net.

This Appellate Brief complies with the page, word and line limits of Rule 84.06(b) and Special Rule 360, and that the brief contains 3799 words.

/s/ Elizabeth J. Ituarte

APPENDIX TO RESPONDENT'S BRIEF
SIF v. JOSEPH SALVICCIO
APPEAL NO. ED97862

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Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 08-105816

Employee: Joseph Salviccio

Employer: Western Supplies Company (Settled)

Insurer: Guarantee Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated March 8, 2011.

Introduction
The sole issue stipulated in dispute at the hearing before the administrative law judge was the liability of the Second Injury Fund for permanent partial disability benefits. The administrative law judge found that employee failed to sustain his burden of proof on the issue of Second Injury Fund liability.

Employee filed an Application for Review alleging the administrative law judge's award is erroneous in that: (1) the administrative law judge ignored the uncontradicted opinions of the only medical expert who testified; and (2) the administrative law judge ignored employee's testimony about the hindrances and obstacles created by his preexisting conditions.

We reverse the award of the administrative law judge for the reasons set forth herein.

Findings of Fact
Primary injury
On November 21, 2008, employee fell at work and hurt his knee. Employee suffered a torn medial meniscus and disruption of the anterior cruciate ligament and had to have surgery. Employee experiences weakness and pain in his left knee for which he takes Tylenol. Employee also has difficulty going up or down stairs.

Employee settled his claim with employer for the primary injury for 20% permanent partial disability of the left knee. Dr. Musich, the only physician to testify in this matter, rated employee's permanent partial disability resulting from the primary injury at 45% of the left lower extremity at the knee.

After considering the evidence, we find Dr. Musich's rating excessive. We find that, as a result of the primary injury, employee sustained a 20% permanent partial disability of the left lower extremity at the knee.

Preexisting conditions
Employee suffered from multiple preexisting conditions of ill at the time of the November 2008 primary injury. We discuss each condition below.

Employee's left little finger is permanently bent at 90 degrees at the proximal joint as a result of a workplace injury in 1995 which severed the tendons in his finger. Employee had surgery and settled a workers' compensation claim for 59% of the left little finger at the 22-week level. The finger gets in the way at work and employee has to work around it. Employee is right-handed.

Employee suffered a hernia in 1999 and another in 2005. Employee had separate surgeries to repair each. The second surgery involved reconstruction of the abdominal wall. Both were workplace injuries and employee settled his workers' compensation claims for permanent partial disability of 4% referable to the body as a whole for the 1999 hernia and 3.5% referable to the body as a whole for the 2005 hernia. Employee has to be very careful when he's lifting.

Employee suffers from diabetes, diagnosed approximately 15 years before the hearing in this matter. Employee takes two different types of insulin and Metformin daily. Throughout the day, employee experiences sensations of tingling, hot and cold, and pain in his hands, arms, feet, and toes.

Dr. Musich rated employee's preexisting permanent partial disabilities as follows: 15% of the body as a whole referable to the two hernias, 20% of the body as a whole referable to diabetes, and 15% of the left hand referable to the little finger condition.

After carefully considering all of the evidence, we find employee suffered the following preexisting permanent partial disabilities: 50% of the left little finger at the proximal joint, 12.5% of the body as a whole referable to diabetes, 4% of the body as a whole referable to the 1999 hernia, and 3.5% of the body as a whole referable to the 2005 hernia. In light of the distinct possibility for each of these conditions to combine with a work injury to result in worse disability than in the absence of such condition, we conclude that each of these conditions was serious enough to constitute a hindrance or obstacle to employment at the time of the November 2008 primary injury.

Dr. Musich also opined that the disability from the primary injury combines with the disability from the preexisting injuries to result in greater disability than the simple sum of the disabilities. We find Dr. Musich credible on this point and find that employee's overall disability from the combination of his preexisting conditions and the primary injury is greater than the simple sum of those disabilities. We find that this synergism is best represented by a load factor of 10%.

Conclusions of Law

On page 5 of her award, the administrative law judge explained why she denied employee's claim against the Second Injury Fund: "I do find each of Claimant's preexisting conditions/injuries have a level of permanent partial disability, but none of the preexisting conditions reach the necessary level to trigger SIF liability." These comments suggest the administrative law judge was of the opinion that if none of a worker's preexisting 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. We reject the administrative law judge's reasoning regarding the triggering of Second Injury Fund liability. Our analysis of the operation of the Second Injury Fund thresholds follows.

Purpose of the Second Injury Fund

The purpose of the Second Injury 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." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by

ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit permanent partial disability awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what disabilities will trigger Second Injury Fund liability now states:

> 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.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

> 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...(emphasis added).

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability.

Application of the thresholds

The second threshold applies when a claimant has preexisting permanent partial disability of a single major extremity ("if a major extremity injury only"). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: "fifty weeks of compensation" for preexisting disabilities of the body as a whole; and "fifteen percent permanent partial disability" for a preexisting disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting disability to a major extremity, the legislature made "a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels." *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant's overall preexisting disability as of the moment of the primary injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition so the first threshold applies. We must determine if employee's overall preexisting permanent partial disability – stated in weeks – meets or exceeds 50 weeks.

Converting employee's preexisting disabilities into weeks of compensation yields the following results: 50 weeks for employee's diabetes,16 weeks for the 1999 hernia, 14 weeks for the 2005 hernia, and 11 weeks for the left little finger. The sum of the preexisting disabilities is 91 weeks. Employee has met the 50-week threshold.

We have found that employee suffers from a total of 91 weeks of preexisting permanent partial disability referable to his preexisting disabling conditions, and that these conditions constituted hindrances and obstacles to employment at the time he sustained the November 2008 primary injury. As a result of the work injury, employee suffers from a permanent partial disability of the left knee equivalent to 32 weeks. Under § 287.220.1, employee is entitled to compensation from the Second Injury Fund if he proved the disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. See *Gassen v. Lienbengood*, 134 S.W.3d 75 (Mo. App. 2004).

We have credited Dr. Musich's opinion that employee's preexisting conditions of ill combine with the effects of the November 2008 work injury to result in greater disability than the simple sum. We have also found that this synergism is best represented by a load factor of 10% applied to the sum of permanent disability attributable to employee's preexisting conditions and primary injury.

Employee's preexisting conditions amount to 91 weeks of permanent partial disability. His primary injury resulted in 32 weeks of permanent partial disability. The sum of these two amounts is 123 weeks. When we multiply the sum by the 10% load factor, the result is 12.3 weeks.

Employee has met his burden. We conclude that the Second Injury Fund is liable for 12.3 weeks of permanent partial disability enhancement.

Decision

We reverse the award of the administrative law judge. We conclude employee met his burden of proof on the issue of Second Injury Fund liability for enhanced permanent partial disability.

The stipulated rate of compensation is $404.66 per week. The Second Injury Fund is liable to employee for $4,977.32 in permanent partial disability benefits.

This award is subject to a lien in favor of Elizabeth Ituarte, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Linda J. Wenman, issued March 8, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 8th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Joseph Salviccio

Injury No.: 08-105816

Dependents: N/A

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Employer: Western Supplies Company (settled)

Additional Party: Second Injury Fund

Insurer: Guarantee Insurance Company (settled)

Hearing Date: December 7, 2010

Checked by: LJW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: November 21, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis City, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While standing on a work platform, Employee twisted and his foot went through a hole in the platform injuring his left knee.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left knee
14. Nature and extent of any permanent disability: 20% PPD referable to the left knee, previously paid by Employer.
15. Compensation paid to-date for temporary disability: $1,340.82
16. Value necessary medical aid paid to date by employer/insurer? $13,734.04

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Joseph Salviccio	Injury No.: 08-105816
Dependents:	N/A	Before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Western Supplies Company (settled)	
Additional Party:	Second Injury Fund	
Insurer:	Guarantee Insurance Company (settled)	Checked by: LJW

PRELIMINARIES

A hearing for a Second Injury Fund final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on December 7, 2010. Post-trial briefs were submitted by January 7, 2011. Attorney Elizabeth Ituarte represented Eleazar Arellano (Claimant). Assistant Attorney General Kristin Frazier represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the issue for disposition in this case as the liability of SIF for permanent partial disability (PPD) benefits. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation. Claimant offered Exhibits A-H, and SIF offered Exhibits I-III. All exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled. All markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is 56 years old and has worked as a machinist for Employer for the past 25 years. On November 21, 2008, Claimant was working on a platform, twisted his body, causing his left foot and leg to twist and fall into a hole on the platform. On February 12, 2009, Claimant underwent surgery on his left knee that included a left knee arthroscopy, left knee chondroplasty due to chondromalacia, and left knee partial lateral meniscectomy. During surgery the surgeon noted Claimant had chronic left ACL insufficiency, and chronic torn left lateral meniscus. On March 16, 2010, Claimant settled his case with Employer for 20% PPD referable to his left knee. As of hearing, Claimant testified his left knee is very weak and he must think in advance every step he plans to take. He frequently ices his knee and takes Tylenol for pain.

2. Claimant has rated preexisting conditions to his left hand, ventral hernia, and insulin dependent diabetes mellitus. During April 1995, Claimant underwent surgery to repair his left 5th

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finger ulnar digital nerve and flexor tendon. The injury left Claimant's left 5th finger bent at 90 degrees at the IP joint, and 45 degrees at the DIP joint. Claimant testified he learned how to keep this finger out of the way when working. During 1999 and again in 2005, Claimant suffered ventral hernias. Both hernias were surgically repaired, and the 2005 repair included an abdominal wall reconstruction. Currently, Claimant feels abdominal pressure when lifting. He is no longer able to lift items greater than 300 pounds. Claimant was diagnosed as a diabetic 15 years ago, and began using insulin 2 years ago. As of hearing, Claimant has not been diagnosed with neuropathy, but does experience paresthesia of all extremities.

3. Dr. Musich examined Claimant at his request on November 2, 2009. Upon examination, Claimant's left knee demonstrated pain to deep palpation over the medial joint line, a positive McMurray test, 1+ knee laxity, and end range pain with maximum flexion. Dr. Musich rated Claimant's left knee at 45% PPD. Dr. Musich noted Claimant "did suffer prior left knee strain and documented left knee pathology prior to November 2008; however, based on this patient's history and medical record review I found no significant pre-existing disability resulting from any residual pathology referable to the left knee before November 21, 2008." Dr. Musich rated Claimant's other preexisting conditions at 25% PPD referable to his left hand; 15% BAW PPD referable to Claimant's ventral hernias; and 20% BAW PPD referable to Claimant's diabetes. Dr. Musich noted the combination of Claimant's primary left knee injury and his preexisting left hand, ventral hernias, and diabetic conditions combined to produce disability that was significantly greater than the simple sum, and was a hindrance in his routine activities of daily living.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues related to SIF liability for PPD benefits

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the simple sum of the conditions.

Claimant's primary injury settled with Employer for 20% PPD referable his left knee, and the evidence supports this level of disability. I adopt this percentage when considering the SIF claim. Claimant's documented preexisting disabilities are to his left knee, left 5th finger, abdominal wall due to hernias, and his diabetes. As previously discussed, Dr. Musich did not find any preexisting disability to Claimant's left knee prior to the injury of November 21, 2008. I cannot substitute my judgment over that of a medical expert regarding the apportionment of disability between two separate injuries. Dr. Musich fails to find any preexisting disability to Claimant's left knee, and I must adopt this finding.

The remaining preexisting injuries involve the appropriate percentage of disability to be determined. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App.1983) (overruled on other grounds). It is acknowledged Claimant's left 5th finger injury does impact the use of his hand, but, the degree of hand disability must rise to a minimum of 15% or 26.25 weeks to be considered for a SIF claim. Claimant testified following the injury he taught himself how to lift without using his 5th finger, he is right hand dominant, and when Dr. Musich measured his grip strength it was 110 pounds on the left and 130 pounds on the right dominant hand. I do not find Claimant's disability to his left 5th finger affecting his left hand to rise to 15% PPD. A body as a whole injury must produce disability of 12.5% PPD or 50 weeks to be considered for a SIF claim. Claimant's last ventral hernia repair included an abdominal wall reconstruction. Dr. Musich described an abdominal wall reconstruction as placing "Marlex mesh over the defect in order to strengthen the wall, and he ran sutures in two separate layers strengthening the abdominal wall hopefully reducing the possibility of a recurrent hernia." I do not find Claimant's disability due to his hernia repairs to rise to the necessary 12.5% BAW PPD required for SIF liability. The medical evidence does demonstrate Claimant was an insulin dependent diabetic prior to the November 21, 2008 injury. However, the medical records placed in evidence do not state what type of insulin Claimant was taking, what his level of blood glucose control was prior to the last injury, and other than Claimant's testimony, whether he was experiencing any complications of being a diabetic for multiple years. Claimant testified he has tingling and burning in his extremities. Dr. Musich calls this "stocking and glove paresthesia," but acknowledged he had never reviewed Claimant's diabetic records, nor were the records placed in evidence. I do not find Claimant's disability due to his diabetes to rise to the necessary 12.5% BAW PPD required for SIF liability. I do find each of Claimant's preexisting conditions/injuries have a level of permanent partial disability, but none of the preexisting conditions reach the necessary level to trigger SIF liability. As Claimant's preexisting conditions do not rise to the levels necessary to trigger SIF liability, Claimant's SIF claim fails.

CONCLUSION

Claimant's work at Employer was the prevailing factor in causing injury to his left knee. Claimant's SIF claim fails. SIF has no liability in this case.

Date: March 8, 2011 Made by: Linda J. Wenman

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson

Naomi Pearson
Division of Workers' Compensation

Section 18 Judicial review of action of administrative agencies--scope of review. Section 18. All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record. Unless otherwise provided by law, administrative decisions, findings, rules and orders subject to review under this section or which are otherwise subject to direct judicial review, shall be reviewed in such manner and by such court as the supreme court by rule shall direct and the court so designated shall, in addition to its other jurisdiction, have jurisdiction to hear and determine any such review proceeding.

(Amended August 3, 1976)

(This was Sec. 22 of Art. V prior to 1976)

(1955) Since public assistance granted by the state is a gratuity and is not granted in contractual requital or for a consideration, it does not constitute a "private right" so that judicial review provision of constitution has no application thereto. Scope of review is therefore controlled by Sec. 208.100, RSMo. Ellis v. State Dept. of Public Health & Wel., 365 Mo. 614, 285 S.W.2d 634.

(1956) The scope of review prescribed by the constitutional provision is a "minimum standard" and such provision does not prohibit legislation authorizing a broader scope of review. State ex rel. St. L. Publ. Serv. Co. v. Pub. Serv. Comm., 365 Mo. 1032, 291 S.W.2d 95.

(1958) Section 22, Art. V of the Constitution does not affect Sec. 64.120 and, therefore, the reviewing court on certiorari may hear and consider evidence in addition to that before the board. State ex rel. Beacon Court v. Wind (A.), 309 S.W.2d 663.

(1958) In reviewing a workmen's compensation case, the constitution does not mean that the court may substitute its own judge for that of the commission; but does authorize the court to decide whether such tribunal could have reasonably made its findings. Evidence is viewed in light most favorable to the findings of the commission. Hague v. Wurdack (Mo.), 316 S.W.2d 523.

(1958) Method of review prescribed in Sec. 89.110 was not abrogated by Art. V Sec. 22 of the constitution and requirement that petition for review be presented to court within thirty days after decision filed by board is mandatory and jurisdictional and extrajudicial statement of counsel of board, if made, that he would notify protestants of final decision could neither modify statute nor invalidate lawfully made order of the board. Cohen v. Ennis (Mo.), 318 S.W.2d 310.

(1960) Order of Division of Workmen's Compensation denying application for exhuming of body of deceased employee and for postmortem examination held not final and not subject to appeal either under statutory or constitutional provisions. State ex rel. Faris v. Eversole (Mo.), 332 S.W.2d 879.

(1960) Suspension of city liquor license after hearing sustained as against contention that provision in statute requiring licensee to request recording of proceedings at his own expense is violative of Sec. 22 of Article V of the Constitution since that requirement is valid. State ex rel. Bauman v. Quinn (Mo.), 337 S.W.2d 84.

(1961) Where issue of whether appellants, by reason of their petition for review of administrative board's decision in proceeding where they appeared as witnesses, were entitled to judicial review under administrative procedure act was to be determined before necessity of ruling on constitutional question arose, the supreme court would transfer case to court of appeals. Clay & Bailey Mfg. Co. v. Anderson (Mo.), 344 S.W.2d 46.

(1961) County held entitled to institute proceedings for judicial review of State Tax Commission's determination as to the value of property as against contention that the public policy as established by Sec. 22 of Article V of the Constitution is that only private persons have the right to judicial review. In re St. Joseph Lead Company (Mo.), 352 S.W.2d 656.

(1962) A review of a workmen's compensation case is of whole record, including legitimate inferences to be drawn therefrom, in light most favorable to commission's award, and may set aside the findings only if they are not supported by competent, substantial evidence or if findings are contrary to overwhelming weight of evidence. Cross v. Crabtree (A.), 364 S.W.2d 61.

(1965) In workmen's compensation case, reviewing court cannot substitute its own judgment on evidence for that of Industrial Commission, but is empowered to determine whether award of commission is supported by competent and substantial evidence on the whole record. Jacobs v. Eldridge Construction Co. (A.), 393 S.W.2d 33.

(1966) Industrial Commission is sole judge of weight of evidence and credibility of witnesses in workmen's compensation proceedings. Harryman v. L-N Buick-Pontiac, Inc. (A.), 402 S.W.2d 828.

(1966) This case gives a summary of the general rules governing the scope of judicial review of administrative hearings. Edwards v. Firemen's Retirement System of St. Louis (A.), 410 S.W.2d 560.

(1967) Where there is no material conflict in, or dispute concerning, the facts bearing upon a claimant's status as an employee vel non, the resolution of that issue becomes a question of law and the industrial commission's determination is not binding on the reviewing court. Lawson

v. Lawson (A.), 415 S.W.2d 313.

(1973) Held, welfare benefits are in the nature of property rights or fundamental civil rights protected by the Fed. Const., and as such are "private rights" within the meaning of Art. V Sec. 22, Mo. Const. Hill v. State Dept. of Public Health & Welfare (Mo. Banc), 503 S.W.2d 6.

(1975) School district has no right to appeal decision of county board of equalization. State ex rel. St. Francois County School Dist. R-III v. Lalumondier (Mo.), 518 S.W.2d 638.

Section 287.220 Compensation and payment of compensation for disability--second injury

1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. 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. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond

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given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

2. In all cases in which a recovery against the second injury fund is sought for permanent partial disability, permanent total disability, or death, the state treasurer as custodian thereof shall be named as a party, and shall be entitled to defend against the claim. The state treasurer, with the advice and consent of the attorney general of Missouri, may enter into compromise settlements as contemplated by section 287.390, or agreed statements of fact that would affect the second injury fund. All awards for permanent partial disability, permanent total disability, or death affecting the second injury fund shall be subject to the provisions of this chapter governing review and appeal. For all claims filed against the second injury fund on or after July 1, 1994, the attorney general shall use assistant attorneys general except in circumstances where an actual or potential conflict of interest exists, to provide legal services as may be required in all claims made for recovery against the fund. Any legal expenses incurred by the attorney general's office in the handling of such claims, including, but not limited to, medical examination fees, expert witness fees, court reporter expenses, travel costs, and related legal expenses shall be paid by the fund. Effective July 1, 1993, the payment of such legal expenses shall be contingent upon annual appropriations made by the general assembly, from the fund, to the attorney general's office for this specific purpose.

3. If more than one injury in the same employment causes concurrent temporary disabilities, compensation shall be payable only for the longest and largest paying disability.

4. If more than one injury in the same employment causes concurrent and consecutive permanent partial disability, compensation payments for each subsequent disability shall not begin until the end of the compensation period of the prior disability.

5. If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer. Any funds received by the employee or the employee's dependents, through civil or other action, must go towards reimbursement of the second injury fund, for all payments made to the employee, the employee's dependents, or paid on the employee's behalf, from the second injury fund pursuant to this subsection. The office of the attorney general of the state of Missouri shall bring suit in the circuit court of the county in which the accident occurred against any employer not covered by this chapter as required in section 287.280.

6. Every three years the second injury fund shall have an actuarial study made to determine the solvency of the fund, appropriate funding level of the fund, and forecasted expenditures from the fund. The first actuarial study shall be completed prior to July 1, 1988. The expenses of such actuarial studies shall be paid out of the fund for the support of the division of workers' compensation.

7. The director of the division of workers' compensation shall maintain the financial data and records concerning the fund for the support of the division of workers' compensation and the second injury fund. The division shall also compile and report data on claims made pursuant to subsection 9 of this section. The attorney general shall provide all necessary information to the division for this purpose.

8. All claims for fees and expenses filed against the second injury fund and all records pertaining thereto shall be open to the public.

9. Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

(RSMo 1939 3707, A.L. 1943 p. 1068, A.L. 1945 p. 1996, A.L. 1951 p. 617, A.L. 1953 p. 524, A.L. 1955 p. 590, A.L. 1980 H.B. 1396, A.L. 1981 H.B. 324, A.L. 1982 H.B. 1605, A.L. 1987 H.B. 564, A.L. 1992 H.B. 975, A.L. 1993 S.B. 251, A.L. 1998 H.B. 1237, et al.)

Prior revision: 1929 3317

(2004) Defense by uninsured employer of having fewer than five employees is also available to the Second Injury Fund. Higgins v. Treasurer of the State of Missouri, 140 S.W.3d 94 (Mo.App.W.D.).

(2006) Subsection 4 of section does not apply to compensation payments by the Second Injury Fund. Honer v. Treasurer of State of Missouri, 192 S.W.3d 526 (Mo.App.E.D.).

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Section 287.495 Final award conclusive unless an appeal is taken--grounds for setting

1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, 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.

2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

(L. 1980 H.B. 1396, A.L. 1998 H.B. 1237, et al.)

(2003) A reviewing court is not required to view evidence and all reasonable inferences therefrom in light most favorable to Labor and Industrial Relations Commission award. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo.banc).

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