**BEFORE THE MISSOURI COURT OF APPEALS**
**EASTERN DISTRICT**



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

**v.**

**JOSEPH SALVICCIO**
**EMPLOYEE/RESPONDENT**

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**Case ED97862**

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**APPEAL FROM THE MISSOURI LABOR AND INDUSTRIAL RELATIONS COMMISSION**

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# BRIEF OF APPELLANT SECOND INJURY FUND

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## JURISDICTIONAL STATEMENT

This appeal is from a final decision issued by the Labor and Industrial Relations Commission of Missouri reversing the decision of an Administrative Law Judge of the Missouri Division of Workers' Compensation and awarding permanent partial disability benefits from the Second Injury Fund. Pursuant to §287.495, RSMo, appeal of the award is to the appellate court. 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, Section 3; §512.020 RSMo.

## STATEMENT OF FACTS

Employee Joseph Salviccio has worked for Western Supplies Company as a machinist for more than twenty-two years, and regularly lifts hundreds of pounds in the performance of his job. (Tr. 30) While he does a lot of lifting, pushing, and pulling of heavy items, his job allows for a thirty minute break between his tasks. (Tr. 31-34)

On November 21, 2008 Salviccio sustained a twisting injury to his left knee while lifting pieces of metal at his work station. The injury required surgery. (Tr. 12-13, 76-77) Salviccio filed a claim for Workers' Compensation against his employer and the Missouri Second Injury Fund regarding his left knee injury. He settled his employer's potential liability for this injury for 20% permanent partial disability of his left knee. (Tr. 83) Salviccio proceeded to hearing against the Second Injury Fund on the theory that disability from his primary left knee injury combined with prior disability to create additional disability for him. (Tr. 82)

Although until November 2008 Salviccio was working fulltime unrestricted duty as a machinist, Salviccio alleges that he had prior disability from his left little finger, his surgical repair of ventral hernias in 1999 and 2005, and from his diabetes (Tr. 30, Tr. 80-82). Salviccio also complained that he had prior problems with his left knee, but Dr. Musich said that Salviccio had "no significant pre-existing disability resulting from any

residual pathology referable to his left knee." (Tr. 79) Salviccio settled his employer's liability for two of the prior physical problems from which he alleges continuing disability: He settled liability for injury to his left little finger below the relevant statutory threshold at 59% of the 22 week level (Tr. 157), and liability for two hernia repairs at 4% and 3½% permanent partial disability of the body as a whole (Tr. 158-159). Dr. Musich rated permanent disability for Salviccio's preexisting left little finger as 25% permanent partial disability at the hand, 15% permanent partial disability for his two hernia repairs, and 20% permanent partial disability for his diabetes. (Tr. 82)

Administrative Law Judge Linda Wenman found that while there was evidence that each of Salviccio's prior physical conditions created some disability, none rose to the level necessary to statutorily trigger Second Injury Fund liability. She therefore found that his Second Injury Fund claim failed. (ALJ award pp 4-5) The Labor and Industrial Relations Commission (Commission) reversed the ALJ's award, and awarded benefits to Salviccio from the Second Injury Fund for 50 weeks for diabetes, 16 weeks for his 1999 hernia, 14 weeks for his 2005 hernia, and 11 weeks for his left little finger. (Commission Award p 4) The Commission determined that the sum of Salviccio's disabilities equals 91 weeks, and that 10% best represents the synergism between Salviccio's prior disabilities and primary left knee injury. (Commission Award p 4) Based on its findings, the Commission found the

Second Injury Fund liable for 12.3 weeks of permanent partial disability. (Commission Award p 4)

## POINT RELIED ON

**The Commission erred in including Employee's pre-existing disability of 4% permanent partial disability of the BAW for his 1999 hernia, 3.5% permanent partial disability of the BAW for his 2005 hernia, and 59% permanent partial disability of his left little finger at the 22 week level, because none of these disabilities are to be considered in determining the liability of the Fund in that under the statute §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 prior disabilities meet 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

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

any and every kind of permanent injury other than those on the enumerated 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 as well as in workers' compensation case law. 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, a pre-existing and a subsequent compensable disability must both 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

**The Commission erred in including Employee's pre-existing disability of 4% permanent partial disability and 3.5% permanent partial disability of the BAW for his 1999 and 2005 hernias, and 59% permanent partial disability of his left little finger at the 22 week level, 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% in order to qualify for Fund consideration, and Employee's prior disabilities meet neither standard.**

In a complete deviation from prior case law, and indeed its own prior holdings, the Commission has held in the present case 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, or 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 it is 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 for benefits from SIF 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.

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 Salviccio (Appendix p. 1), the Commission and the court in *Cardwell* should have included all of Cardwell's pre-existing disabilities existing at the time of the primary injury, even those

that 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 *Caldwell* 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* further 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 assessing 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 claimant 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* directly conflicts with the Commission's holding here. According to the holding here, 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 reached the 50-week threshold (20% to the body as a whole for depression = 80 weeks); and therefore, under its holding as applied by the present case, no pre-existing disability should have been excluded for failing

to meet the threshold requirement. Yet, in *Shipp* 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 of §287.220 the same reading as did the Commission in *Cardwell* and *Shipp.* For example, 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,* Appendix p. 14. The ALJ denied PPD benefits from the Fund, finding that claimant's pre-existing disabilities did not meet the statutory thresholds for Fund liability. Appendix P. 15. The Commission affirmed the denial of Fund benefits by affirming and incorporating the ALJ Award. *Penrod,* Appendix p. 8.

Similarly, in the case of *George Moore,* Injury No. 00-117396 (Aug. 5, 2011), the Commission applied its longstanding reading of the statute. (Appendix p. 16). 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,* Appendix pp. 16, 24.) However, 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*, Appendix p. 17.)

**B. The Commission departed from the established reading of the statute when it found that Employee met the threshold requirement for Fund liability with regard to his left little finger and his two hernia repairs.**

Using the traditional reading of §287.220.1, the Commission would have affirmed the Award of the ALJ regarding the lack of disability attributable to his left little finger and hernia repairs, excluding from the Fund calculation the 3½% BAW disability and 4% BAW disability (hernias) and 59% disability at the 22 week level (left little finger) Instead, the Commission found that these disabilities should be included in the Fund benefit calculation as having met the statutory thresholds by combining all pre-existing body as a whole and major extremity disabilities. Inclusion of these disabilities would seem to negate what the Commission saw as the *service* or purpose of the statutory "thresholds," "to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with *de minimis* disabilities. (Appendix p. 2, 3).

The courts and the Commission have consistently held that when evaluating a disability to see if it meets the thresholds of § 287.220.1, major

extremity and body-as-a-whole disabilities are evaluated singularly, not in combination. Until now, neither the Commission nor the courts have ever combined several disabilities together to reach the 50-week threshold. In fact, just months ago, the Commission that issued the award in Salviccio also issued the awards in *Penrod* and *Moore,* which were consistent with this long-standing precedent.

In addition to the Commission being wrong in stating that the practice of 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. (Appendix p. 3.)

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." Appendix p. 3. 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." (Appendix p. 3.) 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 so.

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

The Commission's decision in *Salviccio* 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.

The Commission also 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 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 that 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), (c), and 333**

I hereby certify that on April 10, 2012, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet.

The undersigned further certifies that the brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 4351 words.

/s/ Kristin Marie Frazier