BEFORE THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

WILLIAM DYSON
EMPLOYEE/RESPONDENT

v.

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

Case ED 97865

92850

APPEAL FROM THE MISSOURI LABOR AND INDUSTRIAL RELATIONS COMMISSION

BRIEF OF APPELLANT SECOND INJURY FUND

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JURISDICTIONAL STATEMENT

This appeal arises from a final award issued by the Labor and Industrial Relations Commission in a workers' compensation case. As the issues herein do not fall within the exclusive appellate jurisdiction of the Supreme Court, as designated in Article V, Section III, Constitution of Missouri, 1945 (as amended 1982), this case is within the general appellate jurisdiction of the Court of Appeals.

The subject of this appeal emanates from an injury on June 23, 2008, in the City of St. Louis, State of Missouri; therefore, this case lies within the jurisdiction of the Court of Appeals, Eastern District. §477.050, RSMo (2008).

TABLE OF AUTHORITIES

Cases:

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STATEMENT OF FACTS

Employee, William Dyson (Dyson) worked as a warehouseman and driver for Employer, D & D Distributors (Employer) and his duties included loading and unloading half barrels and cases of beer. (Tr. 7). While working for Employer pulling half barrels on June 23, 2008, Dyson injured his right shoulder. (Tr. 11). After failing conservative treatment for his right shoulder, Dyson had an arthroscopy and debridement on August 21, 2008, for rotator cuff tendonitis and impingement. (Tr. 11, 41). Dyson was released to full duty with no restrictions on October 10, 2008. (Tr. 55).

Employer settled the primary claim for the June 2008 work injury with Dyson for 25% permanent partial disability of the right shoulder. (L.F. 8 and Tr. 1).

Before the primary work injury, Dyson had injuries to his neck and right ankle. (Tr. 8). Dyson injured his neck at work moving a beer barrel January 8, 2008. (Tr. 7). Dyson entered into a stipulation of compromise settlement with Employer with regard to that 2008 injury based on 15% permanent partial disability. (Tr. 8, 56). Dyson injured his right ankle in 2001 and treated conservatively. (Tr. 9). At the time of this work injury, Dyson was not treating for the right ankle and had no permanent restrictions related to the right ankle. (Tr. 14, 19).

Dyson was evaluated by Dr. David Volarich on April 8, 2009. (Tr. 137). Dr. Volarich assessed 65% permanent partial disability for the primary right shoulder injury; 15% permanent partial disability to the body as a whole for the January 2008 neck injury; and 20% permanent partial disability for the right ankle injury. (Tr. 123 and 125). Dr. Volarich acknowledged he did not review any medical records referable to the right ankle injury. (Tr. 127).

On March 28, 2011, Administrative Law Judge Kathleen Hart (ALJ) held a hearing to determine whether Dyson was entitled to workers' compensation benefits from Second Injury Fund (the Fund). (L.F. 9-13).

The Administrative Law Judge found the primary right shoulder amounted to 25% permanent partial disability and the preexisting neck injury amounted to 15% body as a whole permanent partial disability, both meeting the minimum threshold as set forth in Section 287.220(1) and then combining with a 10% load factor to yield a total of 11.8 weeks of permanent partial disability, which at Dyson's compensation rate entitled him to $4590.67 in benefits. (L.F. 13). The ALJ further found that Dyson's pre-existing right ankle injury was not was sufficient to meet the minimum statutory threshold to trigger Fund liability. (L.F. 13).

Dyson filed an application for review with the Labor and Industrial Relations Commission (Commission). (L.F. 14). The Commission issued a final

award allowing compensation, modifying the award and decision of the ALJ. (L.F. 16-24).

The Commission affirmed the ALJ's finding that Dyson suffered a preexisting permanent partial disability of 15% of the body as a whole referable to the cervical spine as a result of the his neck injury and the Commission made an additional finding of fact that Dyson suffered a 7.5% permanent partial disability of the right ankle. (L.F. 18). The Commission included the 7.5% permanent partial disability to the right ankle in its Fund calculations. (L.F.18). The Commission concluded Dyson had met the 50 week threshold by converting all of Dyson's preexisting disabilities into weeks of compensation and totaling, it found pre-existing disabilities 60 weeks for the neck and 11.63 for the right ankle for the sum of 71.63 weeks. (L.F. 18).

The Fund appeals the final award of the Commission based on the Commission's having departed from the established reading of §287.220.1, RSMo, finding Dyson met the threshold required for Fund liability.

POINTS RELIED ON

POINT I

The Commission erred in including Employee's pre-existing disability of 7.5% of his right ankle (11.63 weeks) in calculating the liability of the Fund because to be considered in determining the liability of the Fund §287.220.1 requires a disability to a major extremity to be at least 15% to qualify for Fund consideration.

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

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

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

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

POINT II

The Commission erred in awarding benefits to Employee including the 7.5% permanent partial disability to Employee's right ankle because there is no evidence that this was a hindrance or obstacle to Employee's employment or re-employment in that it made no finding whatsoever regarding the affect upon Employee's employability the disabilities had as required by §287.220.1 and there is no evidence that the 7.5% permanent partial disability of the right ankle was a hindrance or obstacle to Employee's employment or re-employment.

Muller v. Treasurer of Missouri, 87 S.W.3d 36 (Mo.App. 2002)

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. W.D. 2001); *Walsh v. Treasurer of the State of Missouri,* 953 S.W.2d 636 (Mo.App. S.D. 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

[1] All statutory references are to RSMo, (2008), unless otherwise indicated.

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 list. *Betz v. Columbia Telephone, Co.* 24 S.W.2d 224, 227 (Mo. 1930). These are the injuries that in the Workers' Compensation practice are commonly known and referred to as the "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 statue, 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 also e.g., Haggard v. Synder Construction 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 Division of General 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 RSMo.

POINT I

The Commission erred in including Employee's pre-existing disability of 7.5% of his right ankle (11.63 weeks) in calculating the liability of the Fund because to be considered in determining the liability of the Fund §287.220.1 requires a disability to a major extremity to be at least 15% to qualify for Fund consideration.

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 thresholds of 50 weeks if to the body as a whole or 15% if to a major extremity, 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 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 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 at* 907. The Court affirmed the holding of the Commission excluding from the Fund 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 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 *Dyson*, Appendix 1-6, 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 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 it determined that they were not a hindrance or obstacle to employment, and 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 the purposes of 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 here, that if there are disabilities to more than one body part, *all* disabilities, no matter what their individual percentage 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 Number 06-109748* (August 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 P. 9, Appendix P. 13. The ALJ denied permanent partial disability benefits to the claimant from the Fund, finding his pre-existing disabilities did not meet the statutory thresholds for Fund liability. *Penrod,* ALJ Award P. 9, Appendix P. 13, 14. The Commission

affirmed the denial of Fund benefits to the claimant by affirming and incorporating the ALJ Award. *Penrod,* Commission Award P. 1, Appendix P. 7.

Similarly, in the case of *George Moore, Injury Number 00-117396* (August 5, 2011), the Commission applied the longstanding reading of the statute. Appendix P. 15. Both the ALJ and the Commission awarded Mr. Moore 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,* ALJ Award P. 8, Appendix P. 25. 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 P. 1, Appendix P. 15, 16.

The Commission's current interpretation of §287.220.1 is a stark change from how not only the courts, but this very Commission interpreted the statute previously. However, by the Commission's recent decision of *Walter Glanz, Injury Number 06-001605* (March 15, 2012), the Commission again applied this new interpretation and finding the bilateral hip was more appropriate as body whole threshold instead of a major extremity. Commission Award P. 2, Appendix P. 28. With this recent award it is evident

the Commission will continue to depart from the established reading of §287.220.1. 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 Int'l., Inc. v. Director of Revenue,* 156 S.W.3d 333, 333 (Mo. 2005).

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, excluding from the Fund calculation the 7.5% disability to right ankle which the Commission itself made a specific finding of fact calculating disability to the right ankle at 7.5%. The Commission found that Employee had, prior to his compensable work related injury, a disability of 15% of the body as a whole referable to the cervical spine as result of his neck injury and a 7.5% permanent partial disability of the

right ankle. Instead, it found in this case that the right ankle should be included in the Fund benefit calculation, having met the statutory thresholds by combining the pre-existing "body as a whole" neck injury and "major extremity" disability to the right ankle.

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 P. 2, Appendix P. 2. 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. Commission Award P. 2, Appendix P. 2.

After noting that the ALJ found Dyson's prior ankle injury did not meet the minimum statutory threshold to trigger SIF liability, the Commission wrote:

> This comment and the resulting award suggest the administrative law judge was of the opinion, that if one of a worker's preexisting disabling conditions, considered in isolation, fails to meet one of the thresholds in §287.220.1, then that condition is ignored for all purposes when considering the liability of the Second Injury Fund. Such an approach

has no support in the Missouri Workers' Compensation Law or in Missouri case law.

Commission Award p. 1, Appendix P. 1, 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; they are not combined. 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 p. 2, Appendix P. 2.

The Commission cites *Motton v. Outsource Int'l.*, 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 P. 2, Appendix P. 2. The Commission in *Motton* held that the term "major extremity" is ambiguous and held that a 12.5% permanent partial disability to the shoulder at the 232 week level meet 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 P. 2, Appendix P. 2. 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 here 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 allow 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 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 7.5% permanent partial disability of the right ankle. An injury to the ankle is to a major extremity; in this case, the right ankle 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 her award considering only disabilities both pre-existing and compensable which 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" which meets certain requirements including

the thresholds and "a subsequent compensable injury resulting in additional permanent partial disability" which 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. Furthermore, the Commission excluded entirely from its analysis for Fund liability if the pre-existing right ankle meet the other requirements of §287.220.1. The holding of the Commission on this point should be reversed.

POINT II

The Commission erred in awarding benefits to Employee including the 7.5% permanent partial disability to Employee's right ankle because there is no evidence that this was a hindrance or obstacle to Employee's employment or re-employment in that it made no finding whatsoever regarding the affect upon Employee's employability the disabilities had as required by §287.220.1 and there is no evidence that the 7.5% permanent partial disability of the right ankle was a hindrance or obstacle to Employee's employment or re-employment.

In order to be entitled to benefits from the Fund, an employee has to

prove that his pre-existing disabilities where a hindrance or obstacle to his employment or re-employment. §287.220.1. The Court in *Muller v. Treasurer of Missouri,* addressed this requirement. 87 S.W.3d 36 (Mo.App. 2002). "As a prerequisite to imposing liability on the Second Injury Fund, a claimant must first establish that a pre-existing permanent partial disability existed at the time the work-related injury was sustained and was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment." *Muller,* 87 S.W.3d at 40.

Section 287.220.1 requires more than just a finding that the disabilities meet a certain threshold. It also requires that a disability be "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the Employee becomes unemployed." 287.220.1. The Commission made no finding that Dyson's disabilities which were excluded by the ALJ, but included by it in the calculations of Fund liability were a hindrance or obstacle to Employee's employment or reemployment.

While the Commission mentions the phrase "hindrance or obstacle" in the final award, reading the award in the entirety, it becomes evident that the Commission never addressed or sufficiently set forth a factual basis how the pre-existing right ankle was a hindrance or obstacle to employment or reemployment. Commission Award, P. 2, 3.

While the Commission incorporated the ALJ's award where not inconsistent, the ALJ's award makes no finding that Dyson's prior ankle injury was a hindrance to his employment or reemployment. The ALJ made specific factual findings that Employee injured his right ankle in 2001, treated with injections and physical therapy and still had ongoing complaints leading up to the primary injuries. (Appendix p. 4 and 5). The medical records showed minimal treatment and a diagnosis of right ankle strain. (Tr. 115-116). Dr. Volarich, Employee's own expert, acknowledged he did not review any medical records referable to the pre-existing ankle injury. (Tr. 127). The ALJ had the benefit of the treatment records from Midwest Podiatry and Associates and Employee's testimony's as to his subjective complaints and level of functioning referable to his right ankle which the ALJ found to be credible. (Appendix p. 5-6). The Commission failed to show evidence that Dyson's pre-existing right ankle injury was a hindrance or obstacle to his employment or reemployment, thus it should not have been included in the calculation of the liability of the Fund. The holding of the Commission on this point should be reversed.

CONCLUSION

For the reasons stated above, 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 Friday, March 30, 2012 two true and correct copies of the foregoing brief and one disk 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 5419 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus free.