IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED97864

TREASURER OF THE STATE OF MISSOURI,
as custodian of the Second Injury Fund,
Appellant,

v.

ERIC BUHLINGER
Respondent.

Appeal from the Labor and Industrial
Relations Commission
#08-072563

BRIEF OF RESPONDENT ERIC BUHLINGER

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POINT RELIED ON

I.

The Labor and Industrial Relations Commission did not err in its inclusion of Respondent's primary disabilities of 5% of the right elbow and 5% of the body as a whole in the calculation of Appellant's liability, because the Commission correctly interpreted the provisions of §287.220.1 to require a two step process in which it is first determined whether a claimant qualifies to make a claim against the Second Injury Fund through means of the "thresholds", and in which it is then determined whether all disabilities were shown to be a hindrance or obstacle to employment, in that such a statutory interpretation necessarily follows from a strict construction of the plain and simple language of the law.

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

Richards v. Treasurer of the State of Missouri, as custodian of the Second Injury Fund, Missouri Labor and Industrial Relations Commission, December 8, 2011.

ARGUMENT

I.

The Labor and Industrial Relations Commission did not err in its inclusion of Respondent's primary disabilities of 5% of the right elbow and 5% of the body as a whole in the calculation of Appellant's liability, because the Commission correctly interpreted the provisions of §287.220.1 to require a two step process in which it is first determined whether a claimant qualifies to make a claim against the Second Injury Fund through means of the "thresholds", and in which it is then determined whether all disabilities were shown to be a hindrance or obstacle to employment, in that such a statutory interpretation necessarily follows from a strict construction of the plain and simple language of the law.

I. Standard of Review

This Court's standard of review is governed by Section 287.495.1 of the Missouri Workers' Compensation Act, which states that the Court shall review only questions of law and may modify, reverse, remand or set aside for only these reasons: 1) a finding that the Commission acted without or in excess of its powers; 2) a finding that the award was procured by fraud; 3) a finding that the facts found by the Commission do not support the award; or 4) a finding that there was not sufficient competent evidence in the record to warrant the making of the award. Mo.Rev.Stat. §287.495.1 (1993).

II. Basic Statutory Construction Guidelines

The primary rule of statutory construction is to ascertain the intent of the General Assembly from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *Sheldon v. Board of Trustees*, 779 S.W.2d 553, 554 (Mo. 1989); *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988). The courts are to look to the object to be accomplished and the problems to be remedied by the statute, *State ex rel. Kemp v. Hodge*, 629 S.W.2d 353, 358 (Mo.banc 1982), and utilize rules of statutory construction "that subserve rather than subvert legislative intent." *Oberreiter v. Fullbright Trucking Co.*, 117 S.W.3d 710 (Mo.App. 2003). In *Crest Communications v. Kuehle,* 754 S.W.2d 563, 566 (Mo. 1988), the Missouri Supreme Court stated that:

> [p]rovisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized.

See also *Kincade v. Treasurer of the State of Missouri*, 92 S.W.3d 310, 311 (Mo.App. 2002).

III. The Commission's Analysis

The explanation from the Commission, as to how it reached its conclusion, is somewhat sparse. However, the Commission's analysis can be better understood through a reading of a companion case which is currently also pending before this Court. In *Treasurer of the State of Missouri v. Thomas Richards*, Case No. ED97863, the

Commission more fully explained its rationale for its findings, in a matter with a similar factual scenario. *Richards v. Treasurer of the State of Missouri, as custodian of the Second Injury* Fund, Missouri Labor and Industrial Relations Commission, December 8, 2011. Respondent's argument in this matter will largely address the Commission's rationale as laid out in *Richards*.

IV. Section 287.220.1

The Commission bases its analysis of matters such as this on two sentences contained within the Workers' Compensation Law which serve to establish the Second Injury Fund. Those sentences read as follows:

> 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.

§287.220.1.

V. The Commission's Analysis

A. Recognition of a Difference in §287.220.1 Language

The Commission decisions recognize that these two sentences, the third and fourth sentences of §287.220.1, are written differently. It acknowledges that the Missouri legislature wrote the third sentence with terminology which limits its application to situations where disabilities meet certain "threshold" amounts, whereas the fourth sentence was given terminology which makes it effective for "all injuries or conditions". *Richards v. Treasurer of the State of Missouri, as custodian of the Second Injury* Fund, Missouri Labor and Industrial Relations Commission, December 8, 2011. The Commission has stated that these sentences were written differently because they have different purposes.

B. The Third Sentence of §287.220.1

The third sentence of §287.220.1 contains terminology which has come to be known as "thresholds". There are two thresholds:

1) if the disability is a "body as a whole" injury, then the threshold is fifty (50) weeks of compensation;

2) if the disability involves only a major extremity, then the threshold is 15% .

§287.220.1. The Commission stated these thresholds were added to the law in 1993 because the Missouri legislature determined that it did not want the Fund to be subject to claims based upon disabilities which are *de minimus*, such that only those claims which

meet or exceed the thresholds will invoke Fund liability.[1] *Richards v. Treasurer of the State of Missouri, as custodian of the Second Injury* Fund, Missouri Labor and Industrial Relations Commission, December 8, 2011. Section 287.220.1 does not state why it contains two separate thresholds, one for body as a whole injuries and one for major extremity injuries, but the Missouri Court of Appeals has previously indicated that the legislature created different thresholds to simplify mathematical computations. *Motton v. Outsource Int'l*, 77 S.W.3d 669 (Mo.App. 2002). In *Motton* the claimant made a claim against the Fund based upon a pre-existing disability to her left arm, thereby invoking the 15% threshold, rather than the 50 week threshold. *Id.* The Court said that the legislature created a separate threshold for major extremity injuries because it was simpler. *Id.*, at 675. They said "the legislature intended to make 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". (emphasis added). *Id.*

C. Stacking

There can be a problem with the desire for simplicity in that not all situations can be made simplistic. This can be seen in matters where the claimant has multiple

[1] The Courts have also said that the purpose of the thresholds is to establish a "more objective standard" by which Fund liability is determined. *Culp v. Lohr Distributing Co.*, 898 S.W. 2d 613, 614 (Mo.App. 1998).

pre-existing disabilities, rather than the singular disability noted in *Motton*. For instance, suppose that a claimant has pre-existing disabilities of 10% of the left wrist,[2] 10% of the left elbow, and 7.5% of the left shoulder. None of these disabilities, considered alone, reaches the threshold level of 15% of a major extremity required by §287.220.1. This does not mean that this claimant has no legitimate claim against the Fund, because it has previously been found that the law allows disabilities to be "stacked" to achieve the requisite threshold. *Shipp v. Treasurer of the State of Missouri, as custodian of the Second Injury Fund*, 99 S.W.3d 44 (Mo.App. 2003). In *Shipp* the claimant was allowed to "stack" pre-existing disabilities of the elbow and hand, such that the two disabilities combined to create an overall pre-existing disability of 15% of the entire arm at the level of the shoulder, and Second Injury Fund liability was invoked. Id., at 49.

From a purely mathematical standpoint, it is simpler to "stack" multiple disabilities when dealing with injuries to a major extremity, because the major extremities have different set values. For instance, a "hand" has a set value of 175 "weeks" of disability, whereas an "elbow" has a set value of 210 "weeks", and a "shoulder" has a set value of 232 "weeks". So 10% disability of the hand produces a number that is smaller than 10% disability of the elbow, and both of them produce numbers which are smaller than 10% of the shoulder. The legislature recognized this. So instead of creating mathematical

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[2] Disabilities to the hand and elbow qualify as disabilities to a "major extremity" for purposes of claims made under §287.220.1. *Motton*, 77 S.W.3d at 674.

difficulties by requiring that "weeks" of disability on a hand be converted to "weeks" of disability on the shoulder, or on the body, the legislature stated that disability on major extremity injuries was to be determined on a simple percentage basis of 15%.

This brings us to the case at hand. In the present matter the Commission stacked the disabilities from the primary injury after converting them into "weeks" of disability, thereby using the simplest mathematical calculation. In doing so, 27.5% of the neck (body) became 110 weeks; 5% from the concussion (body) became 20 weeks; 5% of the right elbow became 10.5 weeks; and 17.5% of the left ankle became 27.12 weeks. The sum total, when stacked, therefore became 167.62 weeks.

This finding by the Commission implemented all of the necessary tenets in determining such cases. It applied the plain language of the law, it allowed stacking of disabilities, and it used the simplest mathematical calculation. Thus, the Commission correctly concluded that all of Respondent's disabilities could be stacked to invoke Second Injury Fund liability per §287.220.1.

D. The Fourth Sentence of §287.220.1

Also key to understanding the Commission's decision is recognition of the fact that while the third sentence of §287.220.1 limits its application to disabilities which meet certain thresholds, the fourth sentence of §287.220.1 does not. The Commission noted that the plain language of the fourth sentence says that after the disability from the work-related injury is determined, then "*all* injuries or conditions existing at the time the

last injury was sustained" are taken into consideration. (emphasis added). While the third sentence of §287.220.1 was amended in 1993 to include the thresholds, the fourth sentence was not. The fourth sentence contains the original language, without reference to thresholds. If the legislature wanted the thresholds to apply to the calculation of Fund liability, it easily could have added terminology to the sentence which indicated that the thresholds were applicable, such as the underlined terminology listed here:

> 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 <u>which meet the heretofore stated threshold limits</u> 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.

But the legislature did not do so. In dealing with a related matter in which interpretation of legislation was required, the Court in *Motton* said:

> [h]ad 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 of the body as a whole. [citation 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.

77 S.W.3d at 674-675. The same rationale applies in this matter. If the legislature had intended for the thresholds to apply to the calculation of Fund liability, it could have said so. And since it did not do so, it must be presumed that the legislature had a reason for not doing so. What remains is the plain and simple language of §287.220.1, which states that **all** injuries are to be included in assessing Fund liability.

E. Strict Construction

And there is another reason why the interpretation of the Commission is supported by the law, and that is the 2005 amendments to the Workers' Compensation Law. While the fourth sentence of §287.220.1 was left untouched by the 1993 amendments, the legislature passed an amendment in 2005 which changed how the entirety of the Act is to be construed. The changes to §287.800 were such that the section now states, in part:

> [a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the

provisions of this chapter strictly.

Mo.Rev.Stat. §287.800 (2005). One reviewing court, in applying this amendment, stated:

> [s]trict construction means that a "statute can be given no broader application than is warranted by its plain and unambiguous terms." *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo.App. 2009). The operation of the statute must be confined to "matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter." *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 828 (Mo.App. 2009) *(citing 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008))*. "A strict construction of a statute presumes nothing that is not expressed." *Id.*

Robinson v. Hooker, 323 S.W.3d 418, 423 (Mo.App. 2010). So it was with these tenets that the Commission analyzed the fourth sentence of §287.220.1 and correctly concluded that a strict construction of the plain and simple language indicates that all prior disabilities are to be included in the calculation of Fund liability.

The Commission properly analyzed this matter by recognizing that §287.220.1 requires that all injuries be included in the computation of Fund liability, once Fund liability has been invoked through the provisions of the third sentence. As such, the decision of the Commission should be affirmed.

CONCLUSION

The Labor and Industrial Relations Commission correctly concluded that the plain and ordinary language of §287.220.1 requires the inclusion of all disabilities in the Second Injury Fund calculations, once Fund liability has been invoked. Previous decisions have also allowed the stacking of disabilities when calculating Fund liability. Since the Commission based its decision on a strict construction of the statute, its decision should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby states that on this 16th day of April 2012, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet.

The undersigned further certifies that this brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 3138 words. Further, this brief complies with Rules 84.06(c) and 333.

/s/ Dean L. Christianson

Dean L. Christianson