BEFORE THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ERIC BUHLINGER
EMPLOYEE/RESPONDENT

92867

v.

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

Case ED97864

APPEAL FROM THE MISSOURI LABOR AND INDUSTRIAL RELATIONS COMMISSION

REPLY BRIEF OF APPELLANT SECOND INJURY FUND

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ATTORNEY FOR THE SECOND INJURY FUND

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Employee argues that the Commission's decision is correct because to determine otherwise would give no meaning to the fourth sentence of §287.220. (Employee's Brief p. 13-15). However, following the Employee's rationale gives no meaning to the third sentence of §287.220.1.

The third sentence of §287.220.1 sets forth specific thresholds that a disability must meet to be considered in the Second Injury Fund calculation. It reads:

> 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.

§287.220.1 RSMo.

Employee acknowledges that this sentence was added by the legislature in 1993 "because the Missouri legislature determined 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." (Employee's Brief p. 10, 11). However, by the Commission's holding and the Employee's argument, the acknowledged purpose of this sentence is violated. The Commission included in the Fund calculations Employee's *de minimus* disabilities of 5% to the body as a whole for a concussion and 5% to his right elbow. Such is not allowed. Employee argues that in essence the fourth sentence of §287.220.1 overrides the third sentence setting forth the thresholds and requires that "all injuries or conditions existing at the time the last injury was sustained" are taken into

consideration for Fund purposes. (Employee's Brief p. 13, 14). If Employee and the Commission are correct, there is no purpose to the thresholds at all. As the Missouri Supreme Court noted in 2009, "the legislature intended that every word, clause, sentence, and provision of a statute have effect," and that "'the legislature did not insert verbiage or superfluous language in a statute." *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009).

Furthermore, Employee makes no argument refuting the line of cases, both Courts of Appeal and cases from the very same Commission deciding this one, which contrast the Commission's holding in this case.

Rather, Employee correctly points out that there is a basis for "stacking" of separate disabilities at different levels to the same major extremity. (Employee's Brief p. 11-12), *Shipp v. Treasurer of the State of Missouri, as custodian of the Second Injury Fund,* 99 S.W.3d 44 (Mo.App. 2003). However, Employee seeks to expand the ruling of *Shipp* to include stacking of below-threshold disabilities that are not to a major extremity. Such an expansion is not supported by statute or case law. This Court clearly pointed out the limited nature of "stacking" that "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." *Shipp* at 53. Employee seeks the same expansion of the holding in *Motton v. Outsource Int'l,* 77 S.W.3d 669 (Mo.App.

2002), another case which deals only with major extremity injuries.

Employee has not set forth any facts and circumstances to warrant such stacking and fails to provide any support for the stacking of a major extremity with body as a whole disability. The Commission has no authority for "stacking" disabilities that are not to the same major extremity by including Employee's 5% body as a whole for his concussion and 5% elbow.

Respectfully submitted:

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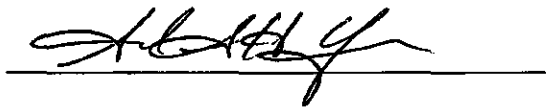

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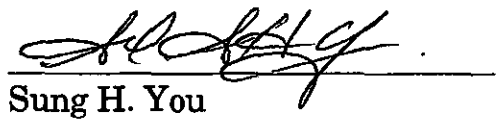
Certificate of Service and Compliance with Rule 84.06(b) and (c)

The undersigned certifies that on this Friday, April 27, 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 822 words.



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