IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND INJURY FUND,	)	
Appellant,	)	
v.	)	WD74644
JAMES WITTE,	)	Opinion filed: September 4, 2012
Respondent.	)	

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

Before Division Two: Joseph M. Ellis, Presiding Judge,
Alok Ahuja, Judge and Mark D. Pfeiffer, Judge

The Second Injury Fund ("the Fund") appeals from an order issued by the Labor and Industrial Relations Commission ("the Commission") awarding James Witte ("Claimant") $8,478.55 in permanent partial disability benefits. For the following reasons, the Commission's award of compensation is reversed.

The facts are not in dispute. On April 18, 2007, Claimant slipped and fell while cleaning a walk-in freezer at Sho-Me Livestock Cooperative, Inc. where he worked as a laborer. Claimant suffered a broken right leg and hip, which required surgery. Claimant

now has a titanium pin and rod in his right leg and hip that causes him discomfort and interferes with his ability to bend, stoop and lift.

On July 2, 2007, Claimant filed for workers' compensation benefits. On July 18, 2008, Claimant settled his claim against Sho-Me Livestock, stipulating to a permanent partial disability of 20% of the body as a whole and 30% to the right hip. The only issue remaining after the settlement was the Fund's liability for permanent partial disability ("PPD") benefits.

On January 5, 2011, a hearing was held before an administrative law judge ("ALJ") to determine whether Claimant was entitled to PPD benefits from the Fund. Claimant testified at the hearing that he was currently working at a store stocking shelves approximately 12 hours a week. He further testified that he suffers from diabetes, depression, anxiety, a spastic colon, and back problems, all of which were diagnosed prior to the April 18, 2007 accident. Claimant also described a leg injury that resulted from a bicycle accident when he was five and an eye condition that was surgically corrected when he was six.

Claimant also offered into evidence the deposition testimony and medical report of Dr. Robert Poetz. Dr. Poetz opined that Claimant had the following preexisting PPDs: 15% PPD to the body as a whole due to diabetes, 20% PPD to the body as a whole at the left eye, 15% PPD to the right lower extremity, 15% PPD to the body as a whole measured at the gastrointestinal system, 20% PPD to the body as a whole due to depression and anxiety, and 10% PPD to the body as a whole measured at the lumbar spine.

On January 24, 2011, the ALJ issued her Findings of Fact and Rulings of Law in which she concluded that Claimant "failed to sustain his burden of proof that he is entitled to permanent partial disability benefits from the [Fund]." The ALJ found that although Claimant had multiple complaints referable to his diabetes, colon, mental health, left eye, right leg, and back, those complaints did not constitute a hindrance or obstacle to employment or reach the thresholds set out in § 287.220.1. Claimant sought review by the Commission of the ALJ's denial of benefits.

On December 8, 2011, the Commission reversed the ALJ's award and awarded Claimant $8,478.55 in PPD benefits. The Commission found that Claimant suffered from the following PPDs: 10% of the body as a whole referable to diabetes, 10% of the body as a whole referable to Claimant's gastrointestinal condition, 10% of the body as a whole referable to Claimant's psychiatric problems, 10% of the right leg at the 207-week level referable to Claimant's childhood right leg injury, and 5% of the body as a whole referable to the lumbar spine. The Commission believed that the ALJ had denied Claimant PPD benefits on the basis that each of his preexisting PPDs, considered in isolation, must meet the minimum thresholds set out § 287.220.1 – 50 weeks of compensation for an injury to the body as a whole or 15% PPD for an injury to a major extremity only. The Commission concluded there was no support for such a proposition in Missouri's Workers' Compensation Law and, instead, found that the ALJ should have calculated Claimant's "overall preexisting permanent partial disability" by converting all his preexisting PPDs into a common unit of measurement – weeks of compensation –

and then determining whether Claimant's "overall preexisting permanent partial disability" satisfied the 50-week minimum threshold set forth in § 287.220.1.

In justifying its calculation, the Commission explained that the legislature chose two different units of measurement to set forth the thresholds for PPD benefits: (1) fifty weeks of compensation for preexisting disabilities of the body as a whole and (2) fifteen percent permanent partial disability for a preexisting disability to a major extremity only. The Commission found that the two different units of measurement were set forth in order to "foster arithmetic simplicity," but that such arithmetic simplicity cannot be achieved in cases in which a claimant has more than one preexisting PPD. Thus, the Commission concluded that in order to establish Fund liability for PPD benefits, all of Claimant's preexisting PPDs must be converted to a common unit of measurement, which the Commission determined should be weeks of compensation, to "determine if employee's overall preexisting permanent partial disability – stated in weeks – meets or exceeds 50 weeks."

The Commission then calculated Claimant's weeks of compensation as follows:

> 40 weeks for employee's diabetes, 40 weeks for his psychiatric problems, 40 weeks for his spastic colon, 20.7 weeks for his right leg, and 20 weeks for his low back. The sum of the preexisting disabilities is 160.7 weeks. Employee has easily met the 50-week threshold.

The Fund timely sought review by this court.

In its sole point on appeal, the Fund asserts that the Commission erred in including Claimant's preexisting disabilities of 10% of the body as a whole referable to diabetes (40 weeks), 10% of the body as a whole referable to Claimant's

gastrointestinal condition (40 weeks), 10% of the body as a whole referable to his psychiatric problems (40 weeks), 10% of the right leg at the 207-week level (20.7 weeks) and 5% of the body as a whole referable to the lumbar spine (20 weeks) in calculating the Fund's liability in that § 287.220.1 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 Claimant's disabilities meet neither standard.

Our review of the Commission's award is limited to questions of law and should be reversed only if: (1) "the Commission acted without or in excess of its powers"; (2) "the award was procured by fraud"; (3) "the facts found by the Commission do not support the award"; or (4) "there was not sufficient competent evidence in the record to warrant the making of the award." **§ 287.495.1**.[1] "Decisions of the [C]ommission that are clearly interpretations of law are reviewed for correctness without deference to the commission's judgment." ***Pierson v. Treasurer of Mo.***, 126 S.W.3d 386, 387 (Mo. banc 2004). "This court is not bound by and affords no deference to the Commission's interpretation and application of the law." ***Taylor v. Ballard R-II Sch. Dist.***, 274 S.W.3d 629, 632 (Mo. App. W.D. 2009).

The Fund contends that, in reaching its award, the Commission erroneously interpreted § 287.220.1. "Section 287.220.1 sets out the law governing when the second injury fund is liable," ***Claspill v. Fed Ex Freight E., Inc.***, 360 S.W.3d 894, 897 (Mo. App. S.D. 2012) (internal quotation omitted), and provides, in pertinent part:

[1] All statutory citations are to RSMo 2000 unless otherwise noted.

> 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(emphasis added). The Fund asserts that the language in bold quoted above must be interpreted to require each preexisting PPD, considered in isolation, to meet either the 50-week minimum threshold, if an injury to the body as a whole, or the 15% PPD minimum threshold, if an injury to a major extremity, before Fund liability is triggered. Claimant contends, and the Commission found, that each preexisting PPD need not be examined individually; rather, based upon the italicized language quoted

above, a claimant's "overall" preexisting PPD must be used in determining whether a claimant has satisfied the minimum thresholds set forth in § 287.220.1.

"We interpret workers' compensation law with the tools of statutory construction." ***Feld v. Treasurer of Mo.***, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006). "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." ***Tillotson v. St. Joseph Med. Ctr.***, 347 S.W.3d 511, 520 (Mo. App. W.D. 2011) (internal quotation omitted). "Our primary goal is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms used." ***Harris v. Treasurer of Mo.***, 192 S.W.3d 531, 536 (Mo. App. E.D. 2006). "We will not create an ambiguity in a statute, where none exists, in order to depart from the statute's plain and ordinary meaning." ***Id.*** "We presume that the legislature intended that each word, clause, sentence, and provision of a statute have effect and should be given meaning." ***Parsons v. Steelman Transp., Inc.***, 335 S.W.3d 6, 14 (Mo. App. S.D. 2011) (internal quotation omitted).

Furthermore, we must construe provisions of the Workers' Compensation Law strictly. *See* **§ 287.800.1** RSMo Cum. Supp. 2005 (providing that "[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 [the Workers' Compensation Law] strictly"); ***Robinson v. Hooker***, 323 S.W.3d 418, 423 (Mo. App. W.D. 2010). Therefore, we no longer liberally or broadly construe the Workers' Compensation Law "to extend benefits to the

largest possible class," nor are we required to resolve "any doubts as to the right of compensation in favor of the [claimant]." ***Robinson***, 323 S.W.3d at 423. Rather, when strictly construing a provision of the Workers' Compensation Law, we cannot give it a "broader application than is warranted by its plain and unambiguous terms." ***Id.*** (internal quotation omitted). "A strict construction of a statute presumes nothing that is not expressed." ***Id.*** (internal quotation omitted).

In strictly construing § 287.220.1, it is difficult to reconcile the Commission's interpretation of § 287.220.1 with the plain and ordinary language found therein. The Commission determined that the minimum threshold for PPD benefits was satisfied by calculating Claimant's "overall preexisting disability as of the moment of the primary injury" and then comparing that "overall" preexisting disability to the minimum 50-week threshold. Such an interpretation, however, is not supported by the plain language of § 287.220.1 and creates a process for determining PPD benefits not expressed within the statute.

Section 287.220.1 provides that "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." (Emphasis added). Moreover, under the Workers' Compensation Law, "permanent partial disability" is defined as "a disability that is permanent in nature and partial in degree." **§ 287.190.6(1)** (emphasis added). Permanent partial disability, therefore, when used in the context of § 287.220.1, refers to a single disability. Thus, under the

ordinary and plain language of § 287.220.1, the minimum thresholds for triggering Fund liability are expressed in terms of a single, individual preexisting injury or disability. Accordingly, in giving meaning to every word found within the minimum threshold provision, it follows that the legislature intended each singular preexisting PPD to be considered in isolation when determining whether the 50-week or 15% PPD minimum thresholds are satisfied, not a claimant's "overall" preexisting PPD.[2]

Furthermore, the Commission's calculation of Claimant's "overall preexisting permanent partial disability" reads into the statute a method for determining whether the thresholds are satisfied that is not expressed within the statute. The Commission made the following findings with respect to the minimum thresholds:

> 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.
>
> . . . .
>
> 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.

[2] As explained in the text, the language of § 287.220.1 defining the minimum thresholds dictates the result we reach today. Other language in § 287.220.1 may suggest that the legislature used the terms "disability" and "disabilities" imprecisely. Any ambiguity created by that imprecision would not necessarily require a ruling in claimant's favor, however, since "[s]trict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms," and "[t]he operation of the statute must be confined to matters affirmatively pointed out by its terms." ***Robinson***, 323 S.W.3d at 423 (internal quotations omitted).

Thus, the Commission deemed it necessary to convert all preexisting PPDs to one unit of measurement – weeks of compensation – and then determine whether a claimant's "overall" preexisting PPD satisfies the 50-week minimum threshold.

However, "[t]he legislature is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent. ***Hogan v. Bd. of Police Comm'rs of Kansas City***, 337 S.W.3d 124, 130 (Mo. App. W.D. 2011). Thus, we must presume that the legislature, in enacting the 1993 amendments to § 287.220.1, knew and understood workers' compensation law. *See* ***Garibay v. Treasurer of Mo.***, 930 S.W.2d 57, 60 (Mo. App. E.D. 1996). By stating that the "arithmetic simplicity" intended by the legislature cannot be achieved in situations where a claimant has more than one preexisting PPD, the Commission insinuated that the legislature failed to take into account claimants with multiple preexisting PPDs when it enacted the minimum thresholds. Thus, the Commission found that it was necessary that all preexisting PPDs must be converted into one unit of measurement and combined to calculate a claimant's overall preexisting disability in order to determine if the minimum threshold was satisfied. But, as explained in ***Motton v. Outsource International***, 77 S.W.3d 669, 672 (Mo. App. E.D. 2002), "[w]e are not at liberty to write into [a statute] under the guise of construction, provisions which the legislature did not see fit to insert."

In ***Motton***, the Eastern District addressed whether the language in § 287.200.1 regarding an injury to a major extremity was ambiguous. ***Id.*** at 673. The Commission had determined that the language in § 287.220.1 regarding the 15% PPD of a major

extremity threshold was ambiguous because it did not specify a number of weeks of compensation at the different levels used in awarding compensation for injuries to a major extremity. ***Id.*** at 671. The Commission then concluded that "because a 12.5% disability to the arm at the shoulder resulted in 34.8 weeks of disability compensation and 34.8 weeks exceeded the 26.5 weeks representing 15% of weeks of permanent partial disability at the level of the wrist, the [Fund] threshold limits were satisfied." ***Id.*** at 671. In reversing the Commission's award, the court found that "[t]he legislature was familiar with the use of levels of body parts in its schedule of compensation" and that the legislature's "decision not to use those levels in establishing a minimum threshold of disability indicates that it intended not to do so." ***Id.*** at 674. The court went on to say that "[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." ***Id.*** at 674-75. Thus, the court held that the Commission had erred in finding the language in § 287.220.1 regarding the 15% minimum threshold for major extremity injuries to be ambiguous. ***Id.*** at 675.

Just as the court in ***Motton*** found that the legislature was aware of the methods used in awarding workers' compensation benefits, we must presume that the legislature was aware that claimants could have multiple preexisting PPDs encompassing both injuries to the body as a whole and injuries to major extremities when it established the minimum thresholds for PPD benefits. Had the legislature intended a different method to be used in determining if the minimum thresholds were satisfied in situations

involving multiple PPDs, the legislature could have included such a procedure in the statute. However, § 287.220.1 makes no such distinction; rather, the legislature chose to express the minimum thresholds only in terms of a singular, individual injury to either the body as a whole or a major extremity. Thus, the Commission's conversion of all of Claimant's preexisting PPDs into weeks of compensation and subsequent use of that calculation to satisfy the minimum threshold reads into § 287.220.1 a process that the legislature did not see fit to include in the statute. By deeming it necessary to calculate Claimant's "overall" preexisting PPD to determine whether the §287.220.1 minimum thresholds were met, the Commission presumed something that is not expressed within § 287.220.1 and thereby cannot be reconciled with a strict construction of the statutory provision.[3]

[3] We further note that although there is no case law directly on point with this case, there are cases that suggest each of a claimant's preexisting PPDs, considered in isolation, must satisfy the minimum thresholds set out in § 287.220.1 and, thereby, cast doubt on the Commission's determination that the minimum thresholds in § 287.220.1 could be satisfied by combining all of Claimant's preexisting PPDs. *See* ***Hutson v. Treasurer of Mo.,***365 S.W.3d 269, 271, 273 n.1 (Mo. App. E.D. 2012) (noting that the ALJ found that the claimant's preexisting low back disability constituted a "7.5% PPD of the body as a whole, which did not meet the threshold for [Fund] liability" and that the ALJ found the claimant's "preexisting disability from his shoulder injury was at most 10%, and thus did not meet the threshold percentage to trigger [Fund] liability"); ***Cardwell v. Treasurer of Mo.***, 249 S.W.3d 902, 907 (Mo. App. E.D. 2008) (stating that the Commission found that the claimant's 10% of the right knee, 5% PPD of the right shoulder, 7.5% PPD of each wrist, 5% PPD of the body as a whole referable to the low back, and 2.5% PPD of the body as a whole for the claimant's psychiatric condition did not "meet the required statutory threshold for Fund liability"); ***Suarez v. Treasurer of Mo.***, 924 S.W. 2d 602, 602-03 (Mo. App. W.D. 1996) (acknowledging that the claimant's preexisting PPDs of 3.85% to the body as a whole, 10% PPD to his right thumb, and a 5.5% PPD to his right shoulder clearly "[did] not meet the threshold requirements established by the 1993 amendments" to § 287.220.1); ***Cartwright v. Wells Fargo Armored Servs.***, 921 S.W.2d 165, 167 n.3 (Mo. App. W.D. 1996) (stating that "[a]fter the 1993 amendment, the Second Injury Fund is not liable unless *each* of the preexisting injuries meet the equivalent of a 12.5% permanent partial disability to the body as a whole or 15% permanent partial disability if a major extremity and the combination of the disabilities is synergistically substantially greater than the simple sum") (emphasis added)).

Moreover, because new provisions of a statute "must be construed in the light of the problem it seeks to remedy and of the usages, circumstances, and conditions existing at the time the change was made," ***Hogan***, 337 S.W.3d at 130, it is important to note that the minimum thresholds at issue on appeal were enacted as part of the 1993 amendment to § 287.220.1. Prior to the 1993, § 287.220.1 "contained no numerical threshold for the pre-existing disability as a prerequisite to obtaining Second Injury Fund benefits. Rather, it required only that the combination of the pre-existing disability and the current injury taken as a whole be greater than the sum of the two disabilities considered independently."[4] ***Suarez v. Treasurer of Mo.***, 924 S.W.2d 602, 603 (Mo. App. W.D. 1996). Additionally, Missouri courts interpreted § 287.220.1 to require a preexisting PPD to be "industrially disabling" before a claimant was entitled to compensation from the Fund. ***Wilhite v. Hurd***, 411 S.W.2d 72, 77 (Mo. 1967); s*ee also* ***Lawrence v. Joplin R-VIII Sch. Dist.***, 834 S.W.2d 789, 791 n.1 (Mo. App. S.D. 1992). A preexisting disability was deemed industrially disabling when it "adversely affect[ed]

[4] Prior to 1993, § 287.200.1, RSMo Cum. Supp. 1992 provided, in pertinent part, that:

> If any employee who has a permanent partial disability whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is greater than that which would have resulted from the last injury, considered alone and of itself . . . 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.

the employee's ability to work or his earning capacity." ***Rose v. Treasurer of Mo.***, 899 S.W.2d 563, 565 (Mo. App. E.D. 1995). "If these requirements were met, the Fund was then liable to the extent of the difference between the sum of the two disabilities and the disability resulting from their combination." ***Suarez***, 924 S.W.2d at 603.

In 1993, the "industrially disabling" standard was superseded when the legislature significantly revised § 287.220.1. Following the 1993 amendment to § 287.220.1, a preexisting PPD triggers Fund liability if (1) it constitutes a hindrance or obstacle to employment or to obtaining reemployment, (2) it equals a minimum of fifty weeks of compensation if a body as a whole injury or a minimum of 15% PPD if an injury to a major extremity, and (3) the combination of the preexisting disability and the disability resulting from the subsequent compensable injury is synergistically substantially greater than the simple sum. **§ 287.220.1**; *see also* ***Suarez***, 924 S.W.2d at 603; ***Cartwright***, 921 S.W.2d at 167 n.3.

Both Claimant and the Commission concede that the 1993 amendment, which implemented the minimum thresholds, was intended to limit PPD claims against the Fund to cases in which the preexisting PPD is more than de minimis. The 1993 amendment was "an effort to eliminate the inconsistencies flowing from the subjective standards of 'industrially disabling,' and to provide a more objective standard by which liability by the Fund is to be determined." ***Loven v. Greene Cnty.***, 63 S.W.3d 278, 284 (Mo. App. S.D. 2001), *overruled on other grounds by* ***Hampton v. Big Boy Steel Erection,*** 121 S.W.3d 220, 223, 225 (Mo. banc 2003).

"The new standard was meant to clarify which preexisting conditions would be serious enough to trigger the statute." ***Garibay***, 930 S.W.2d at 60. Accordingly, it follows that, as part of the 1993 amendment to § 287.220.1, the legislature implemented the minimum thresholds in order to clarify which preexisting disabilities were of such severity to trigger Fund liability and to help protect the Fund against de minimis PPD claims. Thus, given the purpose behind the 1993 amendments and the plain and ordinary language of § 287.220.1, the statute can only be construed to require each preexisting PPD to satisfy the minimum thresholds in order to establish that the disability is serious enough to trigger Fund liability.

Claimant avers, and the Commission found, that the following language in § 287.220.1 requires the degree or percentage of all of a claimant's preexisting disabilities to be used as the measure for determining whether the minimum fifty-week or 15% PPD threshold has been satisfied:

> 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.

(Emphasis added). However, as Claimant seemingly concedes in his brief, when read in context, such language "provides the mechanics" by which compensation is to be determined *after* the minimum thresholds have been satisfied.

It is well established that "[i]n order for a claimant to be entitled to recover permanent partial disability benefits from the Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, caused greater overall disability than the independent sum of the disabilities." ***Claspill***, 360 S.W.3d at 897 (internal quotation omitted). When computing permanent partial disability benefits, "the ALJ or the Commission first determined the degree of disability as a result of the last injury." ***Michael v. Treasurer***, 334 S.W.3d 654, 663 (Mo. App. S.D. 2011) (internal quotation omitted). Then "the Commission determines the degree or percentage of [a claimant's] disability that is attributable to all injuries or conditions existing at the time the last injury was sustained." ***Id.*** (internal quotation omitted). "The final step in the analysis is a determination of whether, and if so, to what extent, the combined disability as of the date of the last injury exceeds the simple sum of the disability from the last injury and the pre-existing disability." ***Id.*** at 664 (internal quotation omitted). Therefore, such language simply sets forth the process by which the Commission is to calculate how much compensation a claimant should receive from the Fund, not how the Commission is to determine whether the minimum thresholds have been satisfied.[5]

[5] It is also noteworthy that "[t]he 1993 amendments to section 287.220 have been described as an attempt to codify the theory behind the Second Injury Fund's guidelines used for settlements before the 1993 amendments." ***Motton***, 77 S.W.3d at 675 n.3. These guidelines "were based on certain thresholds or minimums for the work-related injury and the pre-existing disability." 1 Mo. Workers' Compensation Law, § 3.5 (MoBar 2d ed. 1994). Historically, the Fund took the position that "there [was] no greater combined disability if either the work-related injury or the pre-existing disability [was] less than five percent of the body as a whole . . . or less than ten percent of a major extremity." ***Id.*** "*Once the thresholds or minimums were met*, the number of weeks of disability from the work-related injury were added to the number of weeks of disability from the pre-existing disability, and the sum was then multiplied by a 'loading factor' . . . to determine the combination effect of the disabilities." ***Id.*** (emphasis added). Thus, the Fund's settlement guidelines, upon which the amendment to § 287.220.1 was based, first determined whether the injury met the minimum thresholds.

Claimant also relies upon ***Shipp v. Treasurer of Mo.***, 99 S.W.3d 44 (Mo. App. E.D. 2003), to assert that the Fund's "stacking" argument has already been rejected by Missouri courts. The court in ***Shipp***, however, addresses only injuries to a major extremity and is factually distinguishable from the present case.

In ***Shipp***, the Commission adopted the ALJ's finding that the claimant had a "pre-existing PPD of the right wrist and right elbow which were found to constitute fifteen percent PPD of the right upper extremity at the level of the shoulder." ***Id.*** at 49. The Fund cross-appealed the Commission's findings, asserting that "the commission could not combine or 'stack' claimant's preexisting injuries to her right elbow and right wrist in order to meet the required fifteen percent PPD of a major extremity, which triggers potential [Fund] liability." ***Id.*** at 51-52. The court affirmed the Commission's award, concluding that "[i]f 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.*** at 53.

The court in ***Shipp*** addresses only the stacking of separate disabilities at different levels to the same major extremity. It does not stand for the proposition that all of a claimant's preexisting PPDs, regardless of whether they are injuries to the body as a whole or injuries to a major extremity, can be "stacked" or "combined" to determine whether the minimum thresholds were satisfied. And the ***Shipp*** court narrowly tailored its holding to indicate that such "stacking" of injuries to a major extremity is appropriate in limited situations depending upon the facts and circumstances surrounding the injuries. ***Id.*** Thus, the Commission's calculation of Claimant's "overall" preexisting

PPD, regardless of the facts and circumstances surrounding those PPDs, differs significantly from the court in ***Shipp*** affirming the Commission's rating of the claimant's injuries to her wrist and elbow as a 15% PPD to the claimant's upper right extremity.[6] ***Shipp***, therefore, cannot justify the Commission's calculation of Claimant's "overall" preexisting PPD in order to satisfy the minimum thresholds set forth in § 287.220.1.

Accordingly, the Commission erred as a matter of law when it concluded that each of Claimant's injuries, considered in isolation, need not satisfy the minimum thresholds in § 287.220.1. The Commission, thus, erred in awarding Claimant $8,478.55 in PPD benefits. The Commission's final award granting compensation is reversed.

The dissent sets forth an alternative interpretation of § 287.220.1 that would permit affirmance of the Commission's ultimate decision, a result that is entirely consistent with the purpose of the Second Injury Fund. For all the reasons discussed above, however, not the least of which being our view that a strict construction of § 287.220.1 compels interpretation of the statute as set out above, we conclude otherwise and reverse the Commission's award. But we would be remiss if we failed to observe that our interpretation is counterintuitive to and inconsistent with the whole purpose and intent of the Second Injury Fund to provide additional compensation to an injured worker

[6] We note that in this case the Commission determined Claimant's "overall" pre-existing PPD based on injuries or conditions of different parts of the body or organ systems. A different case might be presented, and the analogy to *Shipp* might be stronger, if a claimant had incurred multiple injuries, or suffered from multiple conditions, which all affected the functioning of the same body part.

whose injury, when combined with a pre-existing disability or disabilities, results in an even greater hindrance or obstacle to the worker's employment or reemployment.

At oral argument, the Attorney General's Office, on behalf of the Second Injury Fund, informed the Court that there are nine other pending appeals in all three districts of the Court of Appeals involving the proper interpretation of § 287.220.1. Because of the general interest and importance of the issues involved in this case, pursuant to Rule 83.02, the Court orders the case transferred to the Missouri Supreme Court.

Joseph M. Ellis, Judge

Ahuja, J. concurs.
Pfeiffer, J., concurs in part and dissents in part in separate opinion filed.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND INJURY FUND,	)	
Appellant,	)	WD74644
v.	)	Opinion filed: September 4, 2012
JAMES WITTE,	)	
Respondent.	)	

SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART

Respectfully, I concur in part and dissent in part. I concur with the majority opinion's conclusion that the Commission erred in its § 287.220.1 minimum threshold calculation (to trigger second injury fund liability) when the Commission included "major extremity" weeks of preexisting disability in its "body as a whole" calculation of Claimant's preexisting permanent partial disability. However, I respectfully dissent with the majority opinion's ruling that this legal conclusion ends the Fund liability threshold discussion. Given this court's responsibility to "affirm the Commission's decision if we find, upon a review of the whole record that 'there is sufficient competent and substantial evidence to support the [Commission's decision],'" *Higgins v. Missouri Div. of Emp't Sec.*, 167 S.W.3d 275, 279 (Mo. App. W.D. 2005) (quoting *Hampton v. Big Boy*

Steel Erection, 121 S.W.3d 220, 223 (Mo. banc 2003)), I would affirm the Commission's ultimate decision that the § 287.220.1 minimum threshold triggering second injury fund ("Fund") liability has been met.

I agree with the majority opinion's description of the § 287.220.1 three-step minimum threshold process to trigger Fund liability:

> (1) The preexisting permanent partial disability must constitute a hindrance or obstacle to employment or to obtaining reemployment; AND
>
> (2) The preexisting permanent partial disability must equal a minimum of fifty weeks of compensation if a body as a whole injury **OR** a minimum of 15% permanent partial disability if an injury to a major extremity; AND
>
> (3) The combination of the preexisting disability and the disability resulting from the subsequent compensable injury is synergistically substantially greater than the simple sum.

In this case, the dispute centers on step two. Thus, in order to trigger Fund liability, the question in this case is whether the preexisting disability *either*:

> (A) Equals a minimum of fifty weeks of compensation if a body as a whole injury; **OR**
>
> (B) Equals a minimum of 15% permanent partial disability if an injury to a major extremity.

Simply put, the minimum threshold calculation requires that the Commission determine Fund liability through an analysis of a preexisting disability that is *either* a "body as a whole" injury *or* a "major extremity" injury. The statute does not authorize the Commission to *combine* a "body as a whole" injury with a "major extremity" injury to satisfy the minimum threshold. Because the Commission did just that in this case, I

agree with the analysis of the majority opinion concluding that the Commission "acted in excess of its powers."

That, in my opinion, does not end the discussion.

Ultimately, the decision the Fund appeals from is that Fund liability was—as the Commission found—triggered by the § 287.220.1 minimum threshold on a "body as a whole" basis. If there is sufficient competent and substantial evidence that Claimant suffered from a preexisting permanent partial disability that equated to a minimum of fifty weeks of compensation for a "body as a whole" injury, then the Commission did not ultimately err when it concluded that the minimum threshold had been met.

Stated another way, whether the evidence in the record supports a preexisting permanent partial disability to the "body as a whole" equating to 50 or 51 or 52 or 55 or 120 or 140 or 160.7 weeks of compensation, the step-two threshold has been met. In my opinion, there was such evidence in the record.

Section 287.190.1 defines "scheduled" or "extremity" injuries including, but not limited to, injuries to a person's hand, foot, knee, elbow, shoulder, and hip. "Non-scheduled" or "body as a whole" injuries are defined by § 287.190.3, which states, in pertinent part:

> For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified [in subsection 1], but no period shall exceed four hundred weeks, at the rates fixed in subsection 1. The other injuries shall include permanent injuries causing a loss of earning power.

In this case, the Commission concluded that Claimant suffered from preexisting "body as a whole" injuries attributable to: (1) a lumbar spine injury; (2) a psychiatric condition; (3) a gastrointestinal condition; and (4) diabetes. The Fund does not contest that any of these preexisting physical and mental problems is not properly categorized as a "body as a whole" injury.

As a result of Claimant's lumbar spine injury, his diabetic condition, his gastrointestinal condition, and his psychiatric condition, the Commission concluded that Claimant's weeks of compensation related to his preexisting "body as a whole" injuries was 140 weeks.

The Commission then concluded that Claimant also suffered from a preexisting "major extremity" injury to his leg that amounted to 20.7 weeks of compensation and erroneously added that to its "body as a whole" weeks of compensation calculation to arrive at a total "body as a whole" compensation calculation of 160.7 weeks of compensation. For reasons addressed in the majority opinion, that was error. But it does not erase the Commission's finding of 140 weeks of "body as a whole" compensation attributed to his preexisting permanent partial disability.

The Fund responds by arguing that the 140 weeks of preexisting "body as a whole" compensation was erroneously calculated by the Commission adding together weeks of "body as a whole" compensation for diabetes (40 weeks), a gastrointestinal condition (40 weeks), a psychiatric problem (40 weeks), and a lumbar spine injury (20 weeks). The Fund thus argues that because none of the individual "body as a whole"

injuries or conditions separately equates to a minimum of 50 weeks of compensation, step two of the § 287.220.1 minimum threshold has not been met.

In so doing, I respectfully submit that the Fund ignores our legislature's use of the word "disability" in § 287.220.1. For example, within the first sentence of § 287.220.1, the statute describes a person with a "preexisting permanent partial disability" who sustains a "subsequent compensable injury resulting in additional permanent partial disability *so that the degree or percentage of* ***disability*** *. . .* ***caused by the combined disabilities*** *is substantially greater than that which would have resulted from the last injury, considered alone and of itself . . ."* (emphasis added).

Thereafter, in the second sentence of § 287.220.1, the General Assembly refers to "disability" as follows, "*[t]he degree or percentage of employee's* ***disability*** *that is* ***attributable to all injuries or conditions existing at the time the last injury was sustained*** . . ." (emphasis added).

Since it is our obligation to "presume[ ] that the legislature intended that every word, clause, sentence, and provision of a statute have effect," *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 252 (Mo. banc 2003) (overruled on other grounds by *Hampton*, 121 S.W.3d at 224,[7] and may not depart from the statute's "plain and ordinary meaning" to ascertain the intent of the legislature, *Greenlee v. Dukes Plastering Serv.*,

[7] Where the law requires us to give meaning to every different word in a statute, the majority categorizes these different words in § 287.220.1 as "imprecision." *See* fn. 2. The majority offers no precedent for this categorization and corresponding decision to depart from our obligation to analyze these plain, ordinary, and descriptive words *precisely* as they are used in the same subsection of § 287.220. There is nothing ambiguous about the words and the context of those words used in subsection 1 of § 287.220. The legislature has used plain and simple words and we must give *all* of those words meaning.

75 S.W.3d 273, 276 (Mo. banc 2002), it follows that § 287.220.1 plainly and unambiguously contemplates that a "disability" may be sustained due to "combined disabilities" or multiple "injuries and conditions."

It is no coincidence then, that our courts have already interpreted § 287.220.1 to permit a preexisting permanent partial *disability* of the right wrist and a preexisting permanent partial *disability* of the right elbow to be combined together to constitute a preexisting permanent partial *disability* of a "major extremity" for purposes of threshold calculations to trigger Fund liability. *Shipp v. Treasurer of State*, 99 S.W.3d 44, 52 (Mo. App. E.D. 2003). "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.* (emphasis added).

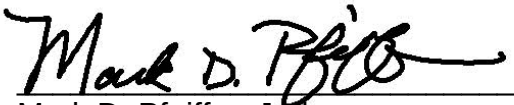
Thus, while I agree with the majority opinion that a claimant cannot mix and match preexisting "body as a whole" injuries with preexisting "major extremity" injuries to achieve a threshold Fund-triggering level of preexisting permanent partial disability, § 287.220.1 plainly permits combining multiple preexisting "injuries and conditions" within the threshold discussion of *either* a "body as a whole" preexisting disability *or* a "major extremity" preexisting disability, if the facts and circumstances justify it.

Here, it was not error for the Commission to conclude that a workers' compensation claimant with a preexisting spastic colon, bad back, diabetes, and serious psychiatric problems suffered from a combined "body as a whole" preexisting disability representing 140 weeks of compensation—far greater than the minimum threshold of 50

weeks of compensation for a "body as a whole" preexisting disability necessary to trigger Fund liability.

Accordingly, I would affirm the Commission's award.

Because the Fund has identified nine other cases pending in all three districts of the Missouri Court of Appeals relating to the interpretation of § 287.220.1 as it relates to the minimum thresholds requirements, I concur with the majority opinion in transferring this case to the Missouri Supreme Court because of its general interest and importance to our state. Rule 83.02.



Mark D. Pfeiffer, Judge