SUPREME COURT OF MISSOURI
en banc

TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN OF THE SECOND INJURY FUND, Appellant, v. JONATHAN PARKER, Respondent.	)	***Opinion issued April 20, 2021*** No. SC98704

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

The Second Injury Fund (the "Fund") appeals the decision of the Labor and Industrial Relations Commission (the "Commission") awarding permanent total disability ("PTD") benefits to Jonathan Parker under section 287.220.2.[1] Because Mr. Parker's injuries occurred after January 1, 2014, all parties agree the Commission erred in applying subsection 2 of section 287.220 rather than subsection 3 of that statute. The Fund argues this Court should deny Mr. Parker benefits under subsection 3, and Mr. Parker argues this Court should award him benefits under subsection 3. This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution. Because

[1] All statutory references are to RSMo 2016, unless otherwise indicated.

article V, section 18 of the Missouri Constitution permits this Court to review only the decisions and findings of the Commission, not to make such decisions in the first instance, this Court vacates the Commission's award of PTD benefits to Mr. Parker and remands the case to the Commission to determine whether Mr. Parker is entitled to benefits under subsection 3.

Background[2]

From 2004 to 2015, Mr. Parker worked as a tree-trimmer for Asplundh. Mr. Parker suffered a work-related injury to his right elbow and shoulder in March 2014. In June 2014, Mr. Parker suffered another work-related injury to his neck. Dr. Stechschulte performed surgery on Mr. Parker's right arm in August 2014. Following this surgery, Mr. Parker continued to work for Asplundh, but he did not return to his position as a tree-trimmer, instead performing only light-duty work. In September 2015, Dr. Adrian Jackson performed a cervical discectomy and fusion surgery on Mr. Parker. He did not return to work for Asplundh following this surgery. Mr. Parker asked to return to work at Asplundh in a capacity that did not involve tree climbing, but he never heard back from Asplundh. In June 2016, Mr. Parker attempted to work at Dollar Tree stocking shelves, but quit after a few weeks due to pain from his injuries.

Mr. Parker filed claims against the Fund for his March 2014 injury and his June 2014 injury. After he dismissed his claim for the March 2014 injury, Mr. Parker

[2] Because this Court is remanding for the Commission to perform its fact-finding and law-applying role, this statement of facts is provided merely for context. It comes from the parties' briefs and is limited to the portions in which they agree. This Court is not finding facts nor confirming (let alone rejecting) facts found by the Commission.

proceeded to a hearing on his June 2014 injury. At the hearing, Mr. Parker offered a medical report authored by Dr. James Stuckmeyer. Attached to Dr. Stuckmeyer's report were medical records that Dr. Stuckmeyer reviewed but did not prepare. The Fund did not object to the admission of Dr. Stuckmeyer's complete medical report, but the Fund objected to the admission of the records attached to the report. The administrative law judge ("ALJ") overruled the Fund's objection. Ultimately, the ALJ found the Fund liable for PTD benefits under section 287.220.2. The Commission adopted the award of the ALJ (as supplemented and corrected) in its "Final Award Allowing Compensation."

Analysis

This Court reviews the Commission's findings to determine if they are "supported by competent and substantial evidence upon the whole record," but questions of statutory interpretation are questions of law reviewed *de novo*. *Cosby v. Treasurer of State*, 579 S.W.3d 202, 205-06 (Mo. banc 2019) (quotation marks omitted). "When interpreting statutes, this Court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible." *Id.* at 206 (alteration and quotation marks omitted). Further, this Court refrains from adding words to the statute. *Macon Cnty. Emergency Servs. Bd. v. Macon Cnty. Comm'n*, 485 S.W.3d 353, 355 (Mo. banc 2016).

I. Statutory Construction[3]

In 2013, the legislature amended section 287.220 to limit the number of workers eligible for fund benefits because the Fund was insolvent. *Cosby*, 579 S.W.3d at 205. The legislature created subsection 2 of section 287.220 for compensable work injuries occurring before January 1, 2014, and subsection 3 for compensable work injuries occurring after January 1, 2014. *Id.* at 207-08. Although the legislature retained the pre-amendment framework for fund benefits in subsection 2, it eliminated claims for permanent partial disability ("PPD") under subsection 3. Further, the legislature limited the Fund's liability for PTD claims under subsection 3.

Under subsection 3, employees now must meet two conditions to make a compensable PTD claim. First, the employee must have *at least* one qualifying preexisting disability. § 287.220.3(2)(a). To qualify under the first condition, the preexisting disability must be medically documented, equal at least 50 weeks of permanent partial disability, and meet one of the following criteria:

> (i) A direct result of active military duty in any branch of the United States Armed Forces; or
> (ii) A direct result of a compensable injury as defined in section 287.020; or
> (iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or
> (iv) A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable

[3] Even though this case must be remanded for the Commission to find the facts and apply section 287.220.3 in the first instance, several questions of statutory construction are certain to arise before the Commission. Because these issues have been fully briefed and argued in this Court, and in the interest of avoiding unnecessary litigation and delay, the Court will address them here.

> work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear[.]

§ 287.220.3(2)(a)(i)-(iv). Second, the employee must show he "thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability … results in a permanent total disability …." § 287.220.3(2)(b). The "subsequent compensable work-related injury" is often referred to as the "primary injury."

The Fund argues the first condition can be met only when the preexisting disability is determined to have reached maximum medical improvement ("MMI") before the employee suffered his primary injury. The Fund reasons that section 287.220.3(2)(a) requires the employee's preexisting disability equal a minimum of 50 weeks of PPD. The Fund further contends PPD cannot be calculated before the injury reaches MMI. The Fund concludes an employee whose preexisting disability has not been determined to reach MMI before he suffered his primary injury did not have a preexisting disability equaling 50 weeks of PPD.

Section 287.220.3(2)(a), however, requires only that "[a]n employee ***has*** a medically documented preexisting disability equaling a minimum of fifty weeks of [PPD]" before suffering the primary injury. [Emphasis added.] That the employee's disability was determined to reach MMI after he suffered his primary injury does not mean the employee suffered his preexisting disability after he suffered his primary injury. The statute does not require the employee *know* his injury equals a minimum of 50 weeks of PPD before suffering the injury or that PPD already be established in proceedings

before the Commission. Accepting the Fund's reading of section 287.220.3(2)(a) would require this Court to add words to the statute. Therefore, an employee who suffers a preexisting disability before his primary injury can meet the first condition regardless of whether he knew (or it had been determined) before suffering his primary injury that his preexisting disability equaled 50 weeks PPD.

To meet the second condition, the Fund argues only one preexisting disability can combine with the primary injury to result in PTD. Again, this Court disagrees. Although section 287.220.3(2)(b) refers to the preexisting disability in the singular form – "when combined with ***the preexisting disability***" – section 1.030 instructs that the singular form should be interpreted to include the plural form.[4] (Emphasis added.) Therefore, section 287.220.3(2)(b) should be read to include "when combined with ***the preexisting disabilities***."

Mr. Parker argues the second condition can be met by showing the primary injury resulted in PTD when combined with all of the employee's disabilities (regardless of whether those disabilities meet the first condition). This argument also fails. Section 287.220.3(2)(b) specifies that the subsequent work-related injury must combine "with the preexisting disability, ***as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph***." (Emphasis added.) By specifying that the preexisting disability must qualify under one of the four eligibility criteria in the first condition, the legislature

[4] Although this Court held in *Treasurer v. Witte*, 414 S.W.3d 455, 463-64 (Mo. banc 2013), that claimants could not stack multiple disabilities to meet the threshold for Fund liability, *Witte* predates the 2013 amendments and, therefore, no longer applies.

excluded disabilities that are not the primary injury and that do not qualify under the first condition from being considered when determining if the claimant meets the second condition. Therefore, an employee satisfies the second condition by showing the primary injury results in PTD when combined with ***all*** preexisting disabilities ***that qualify*** under one of the four eligibility criteria listed in the first condition.

Mr. Parker argues that only considering qualifying preexisting disabilities when determining if a claimant meets the second condition would render some claimants "too qualified," but that is not the case. The existence of non-qualifying disabilities does not count against (or for) the claimant in evaluating whether he meets the second threshold condition. In other words, two claimants with identical qualifying preexisting disabilities and primary injuries should be evaluated the same way when determining if they meet the second condition regardless of whether one has additional non-qualifying disabilities.

II. Award in the Present Case

In this case, the Commission concluded Mr. Parker was PTD and the Fund was liable. The Fund asks this Court to reject those findings and conclusions as unsupported by competent and substantial evidence on the record as a whole. This Court cannot do that because – as both parties concede to this Court – the Commission mistakenly applied subsection 2 rather than subsection 3, which controls here given that the primary injury occurred after January 1, 2014. In essence, the Fund wants this Court to reject (and Mr. Parker wants this Court to affirm) the findings and conclusions they believe the Commission would have made had it applied the proper subsection. This, the Court cannot do.

Under article V, section 18 of the Missouri Constitution, this Court is only to review the findings and decisions made by the Commission. This role is an important one (as evidenced by its express inclusion in the constitution), but it is a limited one. This Court cannot make these findings or conclusions in the first instance nor ascribe to the Commission findings and conclusions all parties concede it did not make. It is for the Commission – and only the Commission – to apply the statutory scheme as construed above to the facts it finds in the present case and, then, to make or deny an award based on those findings and conclusions, including (if the Commission concludes it is proper) a determination that the Fund is liable and, if so, in what amount. When this process is completed, either party may seek judicial review as in any other case.

III. Evidentiary Issue

Because the Commission, on remand, must find the facts relevant to an analysis under section 287.220.3 on the record already made before the ALJ, this Court addresses the parties' dispute concerning the admissibility of the materials on which Dr. James Stuckmeyer relied in preparing his report and that were attached to the notice of his report. Section 287.210.7 provides, "The testimony of a treating or examining physician may be submitted in evidence on the issues in controversy by a complete medical report and shall be admissible without other foundational evidence …." To be a complete medical report, the physician's report must contain "the physician's qualifications and the patient's history, complaints, details of the findings of any and all laboratory, X-ray and all other technical examinations, diagnosis, prognosis, nature of disability, if any, and an estimate of the percentage of permanent partial disability, if any." § 287.210.5. Further,

"[a]n element or elements of a complete medical report may be met by the physician's records." *Id.*

The party submitting a complete medical report must also give notice of its intent to submit a complete medical report at least 60 days before the hearing. § 287.210.7. The notice must include "a copy of the report and all the clinical and treatment records of the physician including copies of all records and reports received by the physician from other health care providers." § 287.210.7.

Prior to the hearing, Mr. Parker timely gave notice of his intent to submit Dr. Stuckmeyer's report as a complete medical report. The notice contained medical records upon which Dr. Stuckmeyer relied in creating his medical report, including a report by Dr. Harold Hess. At the hearing, Mr. Parker submitted into evidence Dr. Stuckmeyer's complete medical report *and* the notice he gave to the Fund with the records relied upon by Dr. Stuckmeyer attached. The Fund did not object to the admission of Dr. Stuckmeyer's report because it was properly introduced as a complete medical report. The Fund, however, objected to the admission of the records attached to the notice Mr. Parker had given the Fund. The Fund specifically argues the Commission erred in admitting Dr. Hess' report, which was attached to the notice.

Materials are not admissible simply because they are attached to the notice. Section 287.210.7 provides that the complete medical report is admissible without further evidence or foundation, but it does not make a similar provision for the notice. The purpose of the notice is to help the other party evaluate the complete medical report.

Accordingly, the notice was not admissible under section 287.210.7, and Dr. Hess' report was not admissible under that provision simply because it was attached to the notice.

Nevertheless, it appears Dr. Hess' report was a part of Dr. Stuckmeyer's complete medical report. Section 287.210.5 provides that a complete medical report must include a patient's history and that "elements of a complete medical report may be met by the physician's records." Because the entirety of the complete medical report is admissible, Dr. Hess' report was admissible as a part of it.

Even if this were not so, any error in admitting Dr. Hess' report could not have been prejudicial for the reason that Dr. Stuckmeyer's report – to which the Fund made no objection – included the findings from Dr. Hess' report. For example, Dr. Hess found Mr. Parker had cervical spinal cord compression and recommended an "anterior cervical discectomy and fusion at C3-C4." Dr. Stuckmeyer's report related Dr. Hess' diagnosis and explained that Dr. Jackson performed the anterior cervical discectomy and fusion surgery on Mr. Parker after Dr. Hess' recommendation. Dr. Hess opined that Mr. Parker's work as a foreman exacerbated his chronic neck pain. Dr. Stuckmeyer's report stated "in agreement with Dr. Hess, that as a direct, proximate, and prevailing factor of" the nature of Mr. Parker's employment with Asplundh, he developed chronic neck pain. Dr. Hess also limited Mr. Parker to lifting 10 pounds before Mr. Parker underwent his surgery. Mr. Dreilling, who testified as a vocational expert, mentioned this pre-surgery limitation in his report, which was admitted as Exhibit C. It appears, therefore the material portions of Dr. Hess' report were included within evidence to which the Fund did not object. Accordingly, there is no reason why the Commission

cannot consider this evidence on remand and, if believed, give it such weight as it deems appropriate.

Conclusion

For the reasons set forth above, the Commission's decision is vacated, and the case is remanded to the Commission to evaluate Mr. Parker's claim for PTD benefits under section 287.220.3.

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Paul C. Wilson, Judge

Draper, C.J., Russell, Powell,
Breckenridge and Fischer, JJ., concur.