

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 07-066411

Employee: Joan Cassell
Employer: Dierbergs Markets (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge.

We note that, by letter dated February 7, 2013, the Second Injury Fund abandoned its argument that an occupational disease cannot constitute a subsequent compensable injury for purposes of § 287.220 RSMo; for that reason, and because we agree with the administrative law judge's analysis and conclusions on the issue, we will not address the question herein.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued October 10, 2012, is attached and incorporated by this reference.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 27th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James G. Avery, Jr., Member

Curtis e. Chick, Jr., Member

Attest:

Secretary

Employee: Joan Cassell

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge awarding permanent partial disability benefits against the Second Injury Fund is in error, and should be reversed.

Employee developed bilateral carpal tunnel syndrome in July 2007 as a result of duties for employer that required repetitive use of both upper extremities. She settled her claim against the employer and brings this claim for benefits from the Second Injury Fund. The parties stipulate that employee suffered a preexisting 25% permanent partial disability of the right wrist owing to a ruptured tendon, and that the primary injury resulted in a 17.5% permanent partial disability of both wrists. The administrative law judge found employee met her burden of proving Second Injury Fund liability and entered an award of 13.125 weeks of permanent partial disability enhancement against the Second Injury Fund. The Second Injury Fund appeals, arguing that employee failed to provide sufficient evidence demonstrating the synergistic combination of her primary injury and preexisting conditions.

I believe this case demonstrates the pitfalls faced by an employee who proceeds to a hearing before the Division of Workers' Compensation without legal representation. A necessary element of a claim versus the Second Injury Fund for permanent partial disability enhancement is a showing that the preexisting and primary disabilities combine in such a way that the resulting disability "is substantially greater than that which would have resulted from the last injury, considered alone and of itself." § 287.220.1 RSMo. In other words, employee needs to show that there is a synergistic combination between the two disabling conditions that creates a combined disability greater than the simple sum of the disabilities. *Hutson v. Treasurer of Mo.*, 365 S.W.3d 269, 271 (Mo. App. 2012). Typically, medical experts will opine about synergy. Here, employee did not obtain any expert medical opinion evidence and is relying only on her hearing testimony and some scant documentation including the paperwork from her settlements with employer and several pages of treatment notes.

At the hearing, the administrative law judge asked employee twice to talk about synergy. The entire exchange is as follows:

- Q. And is there anything you can tell us about the combination of your injuries?
- A. As to, I mean, how my hands are feeling right now. I'm not sure exactly the question. Well, that my hands are not are not normal, are not the best they can be.
- Q. Is there anything else that you'd like to add about either of your injuries or the combination of your injuries?

Employee: Joan Cassell

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- A. I guess that when you get hurt at work it seems like they could send you to better reputable doctors than what they did.

Transcript, page 11-12.

I have carefully reviewed the rest of employee's testimony and her documentary evidence. I can find no other evidence that can fairly be described as supportive of a finding of synergy, other than the raw facts that employee suffered a disabling preexisting condition of her right arm, and then, as a result of the primary injury, suffered another disabling condition to both of her arms. I believe employee's evidence would be sufficient to permit this Commission to determine the nature and extent of disability resulting from each separate condition, but such findings are obviated by the parties having stipulated to the primary and preexisting permanent partial disability ratings. The *only* issue is synergy, and I don't find anything in employee's testimony or the scant medical documentation she provided that shows her conditions, when combined, result in more disability than the simple sum.

One straightforward example of such evidence might be testimony that, when employee only had a problem with her right hand, she was able to compensate with her left, but after the primary injury she is unable to use either hand, which is far worse. But all we have is testimony that employee's hands are not normal and are not the best they can be. While I am sensitive to the fact employee has no legal training and that the issue herein involves a relatively complicated provision of the Missouri Workers' Compensation Law, I don't believe that these considerations permit us to ignore the reality that there is no evidence on this record, lay or expert, that would support a finding of synergy. As a result, I believe that employee simply failed to meet her burden of proof.

For the foregoing reasons, I would reverse the award of the administrative law judge and deny employee's claim against the Second Injury Fund. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee:	Joan Cassell	Injury No.: 07-066411
Dependents:	N/A	Before the
Employer:	Dierbergs Markets (Settled)	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O Corporate Claims Management (Settled)	Jefferson City, Missouri
Hearing Date:	June 18, 2012	Checked by: KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 12, 2007
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant sustained an occupational wrist injury while in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left and right upper extremities at the 175 week level/wrist
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$159.94
16. Value necessary medical aid paid to date by employer/insurer? \$9,135.65

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Not determined.
- 19. Weekly compensation rate: \$352.61
- 20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled.

22. Second Injury Fund liability: Yes

13.125 weeks of permanent partial disability from Second Injury Fund: \$ 4,628.00

TOTAL: \$ 4,628.00

23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Joan Cassell	Injury No.: 07-066411
Dependents:	N/A	Before the
Employer:	Dierbergs Markets (Settled)	Division of Workers' Compensation
Additional Party	Second Injury Fund	Department of Labor and
		Industrial Relations
		Of Missouri
Insurer:	Self C/O	Jefferson City, Missouri
	Corporate Claims Management (Settled)	
Hearing Date:	June 18, 2012	Checked by: KOB:dwp

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on June 18, 2012 for a final hearing to determine the liability of the Second Injury Fund in the matter of Joan Cassell (“Claimant”). Claimant represented herself. Assistant Attorney General Carol Barnard represented the Second Injury Fund. Dierberg’s Markets (“Employer”) and its Insurer, previously settled with Claimant and did not participate in the hearing.

The parties stipulated to the following:

1. On or about July 12, 2007, Claimant sustained an injury by occupational disease arising out of and in the course of employment that resulted in injury to Claimant. The injury occurred in Saint Louis County.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.; Venue is proper in St. Louis; Employer received proper notice of the claim; and Claimant filed the claim within the time allowed by law.
3. The average weekly wage at the date of injury was sufficient for a compensation rates of \$352.61 for permanent partial disability (“PPD”).
4. Employer paid TTD of \$159.94, and medical expenses totaling \$9,135.65.
5. The primary injury by occupational disease resulted in PPD of 17 1/2 % of each hand at the wrist. The pre-existing disability resulted in PPD equal to 25% of the right hand at the wrist.

The issue is the liability of the Second Injury Fund. The specific inquiry involves whether there is Second Injury Fund liability for PPD benefits when the primary claim is for an occupational disease; and whether Claimant has presented sufficient proof to find a synergistic combination.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Exhibits

Claimant offered copies of the Stipulations for Compromise Settlement for each of the injuries, and corresponding medical records. Exhibit A related to the primary claim, and Exhibit B related to the right hand injury in Injury NO. 00-013746. The Second Injury Fund did not offer any additional exhibits.

Live Testimony

1. Claimant testified live. Her testimony was credible. She works in Employer's floral department. Everything she did required significant use of the hands, including wrapping orders, using a stapler, and making bows. She processed up to 300 orders per day.
2. On or about July 12, 2007, Claimant sustained an injury by occupational disease arising out of and in the course of employment that resulted in injury to Claimant's bilateral wrists. She had symptoms typical of carpal tunnel syndrome ("CTS"). At the worst, she was unable to answer the phone. She was numb after sleeping.
3. Claimant received medical care as described in Exhibit A. Dr. Ollinger ordered tests that revealed severe bilateral CTS, right worse than left. She also had a trigger finger that was determined not to be compensable. She had surgery on February 24, 2009, and was released to return to work on April 1, 2009.
4. Claimant and Employer settled the workers' compensation claim arising out of the accident for 17 ½% of each upper extremity at the wrist.
5. Claimant has the following limitations or complaints regarding the work injury: She still has pain and tenderness in the palms of her hands with nodular scar tissue. She testified her hands never really felt fully better. She has knots on both sides. She thought she should have had physical therapy. She has thenar atrophy on the right side and palpable scar tissue.
6. Prior to the date of injury, on February 14, 2000, Claimant sustained an injury to her right hand. She was lifting a heavy plant when she suddenly felt pain and numbness. She had also been working very hard preparing for Valentine's Day. Claimant was diagnosed with a ruptured tendon, and she received authorized medical care as described in Exhibit B. As a

result, her thumb is deformed and almost non-functional, so she has to use her fingers instead. Claimant settled the workers' compensation claim arising out of the injury for 25% of the right hand. The injury was disabling and constituted a hindrance and obstacle to employment.

FINDINGS OF FACT & RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Although it has stipulated to the basic elements of the case, the Second Injury Fund asserts a legal defense that could absolve it of any liability in cases such as this. The Second Injury Fund argues that when the legislature changed the construction of the Missouri Workers' Compensation Law from "liberal" to "strict", it eliminated the Second Injury Fund's liability when the primary claim is an occupational disease. Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App. W.D.2010). A strict construction of a statute presumes nothing that is not expressed. *Id.*

The Second Injury Fund argument is crafted by viewing two portions of the Missouri Workers' Compensation Law through the lenses of strict construction: §287.020.3(5), which provides in relevant part, "the terms "injury" and "personal injuries" shall ... in no case except as specifically provided in this chapter be construed to include occupational disease in any form...."; and the part of §287.220 RSMo that provides for Second Injury Fund liability when a worker with preexisting disability "receives a subsequent *compensable injury*." If a "compensable *injury*" is necessary for Second Injury Fund liability, and "injury" cannot be construed to include

“occupational disease,” the logical conclusion, says the Second Injury Fund, is there is no Second Injury Fund liability when the primary claim is for an occupational disease. For the reasons herein, I find the Second Injury Fund’s argument is without merit.

The flaw in the Second Injury Fund’s position is that it ignores seven key words: “except as specifically provided in this chapter.” Chapter 287 is replete with provisions specifically providing that “injury” includes “occupational disease.”¹ Section 287.067.2 provides that an “**injury by occupational disease** is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability” (emphasis added). Likewise, §287.067.3 provides, “An **injury** due to repetitive motion is recognized as an **occupational disease** for purposes of this chapter” (emphasis added).

Furthermore, by ignoring the important qualifying language, the Second Injury Fund’s position corrupts the rule of statutory construction which mandate, “all provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning.” *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 215 (Mo.App. W.D. 2002).

It is only by ignoring and discounting other words, phrases and clauses throughout the Chapter that the Second Injury Fund can assert their argument.

As recently explained in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 18 (Mo.App. W.D. 2011), the qualifying language of §287.020.3 has further significance. In *KCP & L*, the court held that the definition of “accident” in Chapter 287 did NOT include “occupational disease” for purposes of the application of the exclusivity provision of §287.120.² The court noted at page 23:

The 2005 amendments eliminated the qualifier that the statutory definition of “accident” applied “unless a different meaning is clearly indicated by the context.” In contrast, the 2005 legislature *retained* similar qualifying language in the definitions of an “injury” and an “occupational disease.”³

The removal of the qualification from the definition of “accident” resulted in a single, narrow definition, whereas the retention of the qualifying language for “injury” and “occupational

¹ Other provisions include §287.420 (“No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury.”), §287.063.3 (“The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure”)

² The focus on the definition of “accident” and the application of the exclusivity provision distinguishes the *KCP & L* case from the case at hand, which turns on the definition of “injury” and the Second Injury Fund statute.

³ See § 287.020.3(5) (“The [] terms [‘injury’ or ‘personal injuries’] shall in no case *except as specifically provided in this chapter* be construed to include occupational disease in any form.” (emphasis added)); § 287.067.1 (“the term ‘occupational disease’ is hereby defined to mean, *unless a different meaning is clearly indicated by the context*, an identifiable disease arising with or without human fault out of and in the course of employment” (italics added)).

disease” indicates the legislature intended to maintain the established, broader definition of injury. The retention of the qualifying language and the lack of any substantive change to the Second Injury Fund or “occupational disease” portions of the statute is further evidence the legislature had no intention to change the type of disability that triggers Second Injury Fund liability as the Second Injury Fund suggests.

In interpreting statutes, the purpose is to ascertain the intent of the legislature. *State ex rel. Feltz v. Bob Sight Ford, Inc.* 341 S.W.3d 863, 865 (Mo.App. W.D. 2011). The Second Injury Fund can point to nothing other than its precarious argument to suggest the legislature intended to change Second Injury Fund liability for occupational disease cases. An injury by occupational disease, particularly an injury by repetitive motion, which rises to a compensable level as against the employer, is a “compensable injury” for purposes of the Second Injury Fund. Claimant has met the burden imposed by law.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 17 ½% of each of the upper extremities at the wrist/carpal tunnel (61.25 weeks).
2. As of the time the last injury was sustained, Claimant had preexisting permanent partial disability of 25% of the right upper extremity at the hand/thumb (43.75 weeks). The preexisting disability meets the statutory thresholds and was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
3. Given the fact the primary and preexisting disabilities are to the upper extremities, and to different parts of the same extremity, I find there is sufficient evidence to establish that the combination of the disabilities is greater than the simple sum. Claimant has a hand intensive job which became more difficult, and her ability to compensate for her damaged right thumb was further compromised by the additional disability to both hands.
4. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 12 1/2% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 61.25 weeks for last injury + 43.75 weeks for preexisting injury = 105 weeks x 12 ½ % = 13.125 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$ 4,628.00 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Dated: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation