

Issued by THE LABOR AND INDUSTRIAL RELATIONS  
COMMISSION

FINAL AWARD DENYING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-085340

Employee: William Clark  
Employer: Durable Metals (Settled)  
Insurer: Travelers Indemnity Company of Missouri (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: January 31, 2003

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 12, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda J. Wenman, issued October 12, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of February 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

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John J. Hickey, Member

Attest:

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Secretary

## DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed and that the Second Injury Fund (Fund) should be liable to employee for benefits based on the synergistic combination of his preexisting disability and primary work injury.

The relevant facts are not disputed. Claimant sustained a compensable occupational disease on January 31, 2003, resulting in occupational hearing loss of 26.2% of his left ear. Employee previously had sustained a 20% permanent partial disability of his right wrist. These two injuries, when combined, created a greater disability than their simple sums by 10%. Based on that load factor, the parties stipulated that if the Fund was found liable for benefits, it would be liable to employee for \$1,627.07 in benefits.

The administrative law judge erroneously applied the fifty-week threshold of section 287.220.1 RSMo (2000) in finding that the Fund was not liable to employee for permanent partial disability benefits. She reasoned that in accordance with the decision of the Missouri Supreme Court in *Pierson v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund*, 126 S.W.3d 386 (Mo. 2004), employee's left ear disability should be treated as an injury to the body as a whole in determining Fund liability. As set forth below, this finding conflicts with the Supreme Court's holding in *Pierson*.

In *Pierson*, the employee had been completely blind in his left eye since childhood. *Id.* at 387. He then suffered a back injury, resulting in 35% permanent partial disability to the body as a whole. *Id.* The employee made a claim against the Fund for benefits based on the synergistic combination of those disabilities. The Fund argued that it could not be held liable even if those two disabilities combined synergistically, because the preexisting injury was not to a major extremity or the body as a whole. *Id.*

As the Supreme Court correctly pointed out, "[t]o accept the fund's interpretation of sections 287.190 and 287.220, . . . this Court would be required to hold that the legislature has chosen to make all injuries except those to the eyes and ears compensable by the fund when they combine synergistically with a later injury." *Id.* at 389. The Court rejected the Fund's position because there was "no logical reason why the legislature would chose not to allow fund compensation for these two types of injuries, but would for all others." *Id.* The Court found that an "injury to the eye is also a partial injury to the body as a whole purposes of fund liability." *Id.* at 390.

The *Pierson* case did not hold that an ear injury should be treated as an injury to the body as a whole as the administrative law judge incorrectly determined. While ear injuries were mentioned in the case, the holding only dealt with an eye injury. That holding cannot apply to single ear injuries as it would render it impossible to find Fund liability for even a 100% disabled ear. Complete disability of single ear results in 49 weeks of permanent partial disability benefits, just below the 50-week threshold required to find Fund liability for a body as a whole injury. Clearly, this cannot be the result based on the Supreme Court's holding in *Pierson*.

Therefore, the statute must be read to merely limit the application of the thresholds for body as a whole injuries and major extremity injuries, and not to limit fund liability solely to those situations. As such, the Fund should be liable for benefits anytime that a preexisting permanent partial disability which causes a hindrance or obstacle to employment, synergistically combines with a subsequent permanent partial disability to result in a greater disability than their simple sum.

Therefore, I would find that employee is entitled to benefits from the Fund totaling \$1,627.07. Accordingly, I would reverse the decision of the administrative law judge and award employee Fund benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny

compensation.

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John J. Hickey, Member