

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 14-003644

Employee: Douglas Cosby
Employer: Drake Carpentry, Inc. (Settled)
Insurer: Acuity Mutual Insurance (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 reviewed the evidence, read the briefs, and considered the whole record, we find that the award of the administrative law judge denying 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 with this supplemental opinion.

Discussion

Second Injury Fund liability

The administrative law judge denied employee's claim for permanent partial disability benefits from the Second Injury Fund, because § 287.220.3(2), as amended in 2013, provides that "[n]o claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund," and because employee's claim for permanent partial disability benefits against the Second Injury Fund arises from a primary injury that occurred on January 22, 2014. After careful consideration, we agree. However, we provide this supplemental opinion to address the decision in *Gattenby v. Treasurer of Mo. - Custodian of the Second Injury Fund*, 516 S.W.3d 859 (Mo. App. 2017), which was published subsequent to issuance of the administrative law judge's award in this case.

In *Gattenby*, the court held, in a claim for permanent total disability benefits against the Second Injury Fund, that "subsection 287.220.3 applies only where both the preexisting and primary injuries occur after January 1, 2014." 516 S.W.3d at 862. The court so held by engaging in statutory interpretation to determine the meaning of the first sentence of § 287.220.3, which states:

All claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease filed after January 1, 2014, **shall be compensated** as provided in this subsection.

(emphasis added).

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The court reasoned that the foregoing language meant that the new (and more rigorous) standards for proving a compensable claim of permanent total disability against the Second Injury Fund, now set forth under § 287.220.3(2), apply only where the employee's primary and preexisting injuries occur after January 1, 2014.

By contrast, the present claim is one for permanent partial disability benefits from the Second Injury Fund. In this regard, the legislature has provided very clear direction:

No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund.

§ 287.220.3(2) RSMo.

The foregoing language does not address how claims against the Second Injury Fund "shall be compensated," as described in § 287.220.3. Instead, it plainly states that no claim *shall be filed* against the Second Injury Fund for permanent partial disability occurring after January 1, 2014. The present claim is, without question, a claim for permanent partial disability against the Second Injury Fund occurring as of and after January 22, 2014.¹ For this reason, and because we must strictly construe the language of Chapter 287 pursuant to § 287.800.1 RSMo, we find the *Gattenby* decision distinguishable.

As correctly noted by the administrative law judge in his award, the Division of Workers' Compensation and this Commission do not possess statutory authority to resolve employee's argument that the 2013 amendments to § 287.220 RSMo are unconstitutional. However, we do hereby recognize that these arguments have been timely raised and properly preserved for any appellate purposes.

Additionally, we deem it appropriate at this time to express our view that the 2013 amendments are not unconstitutional, in that no rights were extinguished. This is because, "in the absence of an apportionment statute or second injury fund legislation, the employer is liable for the entire disability resulting from a compensable injury[.]" *Fed. Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955, 957 (Mo. 1963). In our view, the 2013 amendments to § 287.220 work the effect that employers and their insurers are now liable for any enhanced permanent partial disability that results from the synergistic combination of preexisting disabilities and primary injuries occurring after January 1, 2014, as the legislature has clearly removed from employers the prior protections of the Second Injury Fund for these kind of synergistic injuries. By the same token, we believe an employer is liable for any claim of permanent total disability resulting from the combination of preexisting disability with a subsequent compensable primary injury, where the facts and circumstances of the claim do not satisfy the new and more rigorous standards set forth under § 287.220.3(2) for proving a compensable claim of

¹ Claims against the Second Injury Fund for permanent partial disability benefits are premised on a synergistic interaction between the primary injury and preexisting disability, which results in greater disability than the simple sum of disabilities referable to the primary injury and preexisting conditions. See § 287.220.2 RSMo. Logically, then, employee did not have a "claim for permanent partial disability" against the Second Injury Fund until the occurrence of his primary injury on January 22, 2014.

Employee: Douglas Cosby

permanent total disability against the Second Injury Fund. Rather than extinguishing any rights or removing any existing remedy, the legislature in 2013 merely shifted back to employers and their insurers any liability that would have otherwise rested with the Second Injury Fund.

Because employee's claim cannot be accepted as filed pursuant to the plain and unambiguous language of § 287.220.3(2), we must deny the claim.

All other issues are moot.

Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge David L. Zerrer, issued July 28, 2016, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 16th day of August 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

VACANT

Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Douglas Cosby

Injury No. 14-003644

Dependents:

Employer: Drake Carpentry, Inc.

Additional Party: Second Injury Fund

Insurer: N/A

Hearing Date: May 11, 2016/June 6, 2016

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: DLZ

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: January 22, 2014
5. State location where accident occurred or occupational disease was contracted: Crawford County, Missouri
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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant fell from ladder
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left knee
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$3,583.89
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$718.51
- 19. Weekly compensation rate: \$479.01/\$446.85
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

All issues of primary claim were previously resolved

- 22. Second Injury Fund liability: Yes No Open

TOTAL: NO BENEFITS ORDERED TO BE PAID

- 23. Future requirements awarded: None

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ronald Edelman

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Douglas Cosby

Injury No: 14-003644

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Drake Carpentry, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: N/A

Checked by: DLZ

On the 11th day of May, 2016, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, Ronald Edelman. The Employer, having previously settled and resolved all issues in the primary claim, did not appear. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General David McCain. The record was ordered left open until 5:00 p.m., June 6, 2016. The award being sought is a final award against the Second Injury Fund.

The parties have entered into a stipulation pertaining to certain facts which are not at issue in this claim as follows, to wit: On or about the 22nd day of January, 2014, Drake Carpentry, Inc., was an employer operating subject to the Missouri Workers' Compensation Law; on the alleged injury date of January 22, 2014, Douglas Cosby was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about January 22, 2014, Claimant sustained an accident, which arose out of the course of and scope of employment; the employment occurred in Crawford County, Missouri, and the parties agree that Phelps County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was

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filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$718.51, sufficient to allow the following compensation rates: \$479.01 for temporary total disability, temporary partial disability, and permanent total disability and \$446.85 for permanent partial disability; temporary disability benefits have been paid in the amount of \$3,583.89; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award; the parties further agreed that all pleadings were filed on a timely basis.

ISSUES

The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability?

Whether amendments to Section 287.220 RSMo. set out in Senate Bill 1, passed by the legislature effective January 1, 2014, are constitutional?

DISCUSSION

A legal file was established for this hearing which consisted of the following documents, to wit: Report of Injury; Claim for Compensation, filed with the Division February 24, 2014; Answer of the Second Injury Fund to Claim for Compensation, filed with the Division February 28, 2014; Stipulation for Lump Sum Compromise of the primary claim, approved by the Division August 20, 2015; Amended Answer to Claim for Compensation, filed with the Division April 15, 2016; Request for Final Hearing, filed with the Division February 29, 2016.

Claimant testified that he began working in construction with his father doing heavy concrete foundation construction. His job duties included working as a laborer, working with concrete forms, digging and excavating, and handling individual weights up to 250 pounds.

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After about eight years of concrete construction, Claimant became a carpenter doing mostly framing of buildings. After doing carpentry for about 20 years, Claimant joined a carpenter union in 2000 and worked out of the union until 2014, when Claimant's injury occurred.

On January 22, 2014, Claimant was injured while working for Drake Carpentry as a carpenter at his assigned work-site in Cuba, Missouri. Claimant was climbing down a ladder from the rafters when the ladder slid out from under him and he fell. He landed on his left knee and leg. He was treated by the Sullivan Clinic that day. An X-ray was obtained. He was provided a knee immobilizer, diclofenac, and was sent for an MRI. He was evaluated by Dr. Kostman who diagnosed a well-round osseous or cartilaginous loose body evident in the patellofemoral joint of the left knee which appeared to measure ½ cm in size.

Dr. Kostman performed surgery on February 10, 2014. Claimant underwent a left knee arthroscopy, excision of loose body, partial lateral meniscectomy, and excision of plica of patellofemoral joint. He was postoperatively diagnosed with left knee loose body, lateral meniscus tear, and plica. He attended physical therapy at ProRehab and followed up with Dr. Kostman on March 5, 2014. He continued therapy with work restrictions. On March 20, 2014, Dr. Kostman released him at maximum medical improvement. Dr. Kostman assessed a 1% disability for the left knee.

On October 23, 2014, Claimant was evaluated by Dr. Robert Poetz. Dr. Poetz noted multiple complaints with the left knee regarding weakness, shifting, difficulty walking, and compensating with the right leg. Claimant was unable to squat. Testing showed both knees range of motion below normal limits. Dr. Poetz diagnosed left knee lateral meniscus tear and plica with loose body and exacerbation of degenerative joint disease to the January 22, 2014, work injury. Dr. Poetz placed multiple restrictions on the left knee and noted crepitus at the knees bilaterally.

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Claimant testified that he still has pain and swelling. That it feels like it wants to pop out of place. That the pain never goes away entirely and he has to take Tylenol, Advil, and use ice. He takes 8-12 pills a day for the pain. He still wears a knee brace since the work accident.

Claimant testified that he continues to work as a carpenter, but more from non-union work than through the union hall. Claimant states that he works about 20-25 hours per week as a non-union carpenter.

Claimant testified that he has problems getting up and down when climbing ladders, lifting, standing, and problems with heights because of all of his injuries. He cannot rely on his arms, his legs, or abdominal strength to get up a ladder. He has kept his union card but can no longer work a union job because of all his injuries. He has not worked a full-time job since released from treatment from the injury of January 22, 2014.

Evidence was introduced as to Claimant's four pre-existing injuries: a 1974 left knee surgery; 2002 bilateral inguinal hernias; a 2004 left shoulder rotator cuff tear; and a 2008 right shoulder rotator cuff tear.

Claimant testified that while in high school, he injured his left knee playing football in or around 1974. Claimant underwent a left knee arthrotomy, lateral meniscectomy and repair of ligaments. After being released from surgery, he continued to have problems with stability of his knee and the instability which made it harder to work on uneven ground. Claimant stated that he tried to stay away from using ladders and had to ask for help from co-employees from time to time.

In 2002 Claimant suffered two separate hernia injuries. The dates of injury were June 27, 2002 and August 20, 2002. He suffered the first injury when lifting a 200-pound concrete form and the second injury when lifting a 300-pound floor finishing machine at work.

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Claimant underwent mesh repairs of the right inguinal hernia and the left inguinal hernia in separate surgeries. Claimant testified that after the surgeries he had trouble lifting, squatting, he had to seek assistance at work from time to time for lifting, and he had to lift with his legs rather than his body. Approved settlements are set out in Exhibit 1 which indicate settlements of 2.5% of the body as a whole permanent partial disability for the June 27, 2002, injury and 12.5% body as a whole permanent partial disability for the August 20, 2002, injury. The Claimant also settled with the Second Injury Fund on the August 20, 2002, claim which indicated a 20% permanent disability to the left knee and 12.5% permanent disability to the body as a whole for the August 20, 2002 injury.

In 2004, Claimant injured his left shoulder when he fell out of a tree stand while deer hunting. He suffered a full thickness tear and underwent a left shoulder arthroscopy with left rotator cuff repair on December 1, 2004. Claimant continues to experience occasional pain and occasional cracking and popping sensation. He testified that this affected his ability to work because he stopped pulling up weights at shoulder height and had trouble lifting a box of nails and plywood.

In 2008, Claimant injured his right shoulder when he was moving his approximately 780-pound motorcycle and felt something tear. Claimant was diagnosed with a right rotator cuff tear. On December 8, 2008, he underwent right shoulder arthroscopy, subacromial decompression, debridement of rotator cuff, and mini open rotator cuff repair. He continues to experience pain and twitching in the right shoulder. He has the same problems with his left arm. It affected his ability to work making it hard to pick up things and hold weight. He testified he has to hold his arm straight down to hold weight. He stopped working on heights and on roofs. Claimant is right hand dominant.

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Dr. Poetz opined the following permanent disability percentages: 30% permanent partial disability at the left knee for the January 22, 2014, injury, 15% permanent partial disability at the left knee for 1974 injury; 25% permanent partial disability of the body as a whole for the inguinal hernias in 2002; 25% permanent partial disability at the left shoulder for the 2004 injury; and 25% permanent partial disability at the right shoulder for the 2008 injury.

Claimant testified that he understood that Dr. Poetz's work restrictions attached to his report are for the combination of all the Claimant's injuries. Dr. Poetz indicated the synergism between the body parts injured in combination with the primary injury caused a synergistic affect and reliance of core strength, upper body strength, and lower body strength to accomplish tasks related to these injuries. Dr. Poetz states the combination of the present and prior disabilities results in a total which exceeds the simple sum by 15%.

FINDINGS OF FACT AND RULINGS OF LAW

The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability?

Claimant testified that he continues to work as a carpenter in non-union jobs and has been doing so since released from treatment for the primary injury herein.

Based on the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant is not permanently totally disabled from the primary injury which was settled and resolved prior to this hearing nor is the Claimant permanently totally disabled as a combination of the primary injury in combination with Claimant's pre-existing conditions and/or injuries.

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With regard to whether the Claimant has suffered an enhanced level of permanent partial disability, I find that the Claimant was injured in the primary claim on January 22, 2014.

I further find that Claimant filed a claim for the January 22, 2014, injury on February 14, 2014.

In 2013 the legislature amended Section 287.220 in certain respects. The amended Section 287.220.3 reads as follows:

3. (1) All claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection.

(2) No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund. Claims for permanent total disability under section [287.200](#) against the second injury fund shall be compensable only when the following conditions are met:

(a) An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is:

(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 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; and

b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph, results in a permanent total disability as defined under this chapter; or

(b) An employee is employed in a sheltered workshop as established in sections [205.968](#) to [205.972](#) or sections [178.900](#) to [178.960](#) and such employee thereafter sustains a compensable work-related injury that, when combined with the preexisting disability, results in a permanent total disability as defined under this chapter.

Section 287.220.3 (1) prohibits any claim against the Second Injury Fund for injuries occurring after January 1, 2014. Claimant's injury occurred January 22, 2014.

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After a review of all the evidence adduced at the hearing, both oral and written, I find there is substantial and competent evidence that Claimant's injury did in fact occur after January 1, 2014, thereby prohibiting Claimant from receiving benefits from the Second Injury Fund in connection with or growing out of the injury of January 22, 2014.

It is hereby ordered that Claimant shall receive no benefits from the Second Injury Fund on this Claim for enhance permanent partial disability.

I find this issue in favor of the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund.

Whether amendments to Section 287.220 set out in Senate Bill 1 passed by the legislature effective January 1, 2014, are constitutional?

The Labor and Industrial Relations Commission and the Division of Workers' Compensation are administrative agencies limited in authority to that which is set out in the statutes.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that an administrative law judge, as a Trier of fact, lacks specific authority to determine the constitutionality of the provisions of Chapter 287 RSMo. Therefore, no further findings of fact are made with regard to this issue and no order is entered in this award as to the constitutionality of any provision of Chapter 287 RSMo and in particular to Section 287.220.

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Made by: _____
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation