

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

Injury No.: 06-057579

Employee: Kenneth Dixon
Employer: Jefferson Asphalt Co. (Settled)
Insurer: General Casualty Company of Wisconsin (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated April 5, 2012, as supplemented herein.

I. Preliminaries

On June 20, 2006, employee injured his left forearm at work when a backhoe hit him. Employee settled his permanent partial disability claim against employer/insurer. Employee proceeded to final hearing of his claim against the Second Injury Fund.

The ALJ found that as a result of employee's primary injury he sustained 15% permanent partial disability of the left forearm at the 200 week level. The ALJ further found that "[t]he disability imposed on [employee] by his preexisting cardiac and cervical spine injuries is similarly found to be 20 percent of the body...." The ALJ then concluded that [t]he synergistic effect or disability above and beyond the simple sum of the disabilities to the left forearm from the June 20, 2006, accident and injury and the preexisting cardiac and cervical spine injuries is two and three quarters percent of the body..." and found the Second Injury Fund liable for the same.

The Second Injury Fund appealed to the Commission alleging that the ALJ erred in awarding employee compensation from the Second Injury Fund because one or both of employee's preexisting disabilities did not meet the statutory threshold of permanent partial disability required under § 287.220.1 RSMo.

II. Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission, herein.

¹ Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

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III. Discussion

The Second Injury Fund largely relies on a recent Missouri Court of Appeals for the Western District decision, *Treasurer v. Witte*, 2012 Mo. App. LEXIS 1093 (Mo. App. Sep. 4, 2012), for its argument that the ALJ erred in combining employee's preexisting cardiac and cervical spine conditions to meet the preexisting "body as a whole" statutory threshold under § 287.220.1 RSMo. The Second Injury Fund argues that according to *Witte*, the ALJ was required to consider the cervical spine and cardiac conditions separately. The Second Injury Fund argues that, as the ALJ's award stands, it violates § 287.220.1 RSMo in that one, or both, of the preexisting disabilities does not meet the threshold required for Second Injury Fund liability.²

In *Witte*, the Commission reversed an ALJ's award denying a claim for benefits against the Second Injury Fund. The Commission found that the claimant in *Witte* suffered from the following permanent partial disabilities: 10% of the body as a whole referable to diabetes, 10% of the body as a whole referable to the claimant's gastrointestinal condition, 10% of the body as a whole referable to the claimant's psychiatric problems, 10% of the right leg at the 207-week level referable to the claimant's childhood right leg injury, and 5% of the body as a whole referable to the lumbar spine. *Witte*, 2012 Mo. App. LEXIS 1093 at *3-4. The Commission believed that the ALJ had denied the claimant enhanced permanent partial disability benefits against the Second Injury Fund on the basis that each of the claimant's preexisting disabilities, considered in isolation, must meet the minimum thresholds set out in § 287.220.1 RSMo. The Commission concluded that there was no support for such a proposition in Missouri's Workers' Compensation Law and, instead, found that the ALJ should have calculated the claimant's "overall preexisting permanent partial disability" by converting all of his preexisting permanent partial disabilities into a common unit of measurement – weeks of compensation – and then determining whether the claimant's "overall preexisting permanent partial disability" satisfied the 50-week minimum threshold set forth in § 287.220.1 RSMo. *Id.*

Based upon the aforementioned, the Commission then calculated the 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 Commission concluded that the sum of the preexisting disabilities is 160.7 weeks and easily meets the 50-week threshold. *Id.* at *5.

The Second Injury Fund sought review of the Commission's decision in *Witte*. The Second Injury Fund argued on appeal that the Commission erroneously interpreted § 287.220.1 RSMo. The Second Injury Fund asserted that the plain language of § 287.220.1 RSMo "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

² For permanent partial disability enhancement awards, § 287.220.1 RSMo requires preexisting permanent partial disabilities of the body as a whole to equal a minimum of 50 weeks (or 12.5%) of compensation before Second Injury Fund liability is triggered. The Second Injury Fund argues that because the ALJ found that employee's cardiac and cervical conditions combine to equal only 20% permanent partial disability, the two disabilities cannot both individually meet the 12.5% threshold.

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whole, or the 15% PPD minimum threshold, if an injury to a major extremity, before Fund liability is triggered.”

In response to the Second Injury Fund’s “stacking” argument, the claimant in *Witte* relied on *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo. App. 2003). In *Shipp*, the Commission adopted an ALJ’s finding that a claimant had a “preexisting 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. In *Shipp*, the Second Injury Fund cross-appealed the Commission’s findings, asserting that “the [C]ommission 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 Missouri Court of Appeals for the Eastern District affirmed the Commission’s decision in *Shipp*, 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 *Witte* distinguished its facts from those in *Shipp* by stating the following:

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. Thus, the Commission’s calculation of [c]laimant’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. *Shipp*, therefore, cannot justify the Commission’s calculation of [c]laimant’s ‘overall’ preexisting PPD in order to satisfy the minimum thresholds set forth in § 287.220.1.

Witte, 2012 Mo. App. LEXIS 1093 at *28.

The court in *Witte* concluded that the Commission erred as a matter of law in finding that each of the claimant’s injuries, considered in isolation, need not satisfy the minimum thresholds in § 287.220.1 RSMo. The court reversed the Commission’s decision. However, due to there being nine other pending appeals in all three districts of the Court of Appeals involving the proper interpretation of § 287.220.1, and because of the general interest and importance of the issues involved in the case, the court ordered the case transferred to the Missouri Supreme Court. At the time of this award, *Witte* is still pending with the Missouri Supreme Court.

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We find that in addition to the decision in *Witte* not being final, this case is distinguishable from *Witte* in that in this case the only two preexisting disabilities added together to meet the 50-week threshold are “body as a whole” disabilities, whereas, in *Witte*, the Commission combined “body as a whole” disabilities with “major extremity” disabilities to meet the 50-week threshold. In other words, this case does not involve mix-matching preexisting “body as a whole” disabilities with “major extremity” disabilities to meet the § 287.220.1 threshold.

Section 287.190.1 RSMo defines “scheduled” or “extremity” injuries including, but not limited to, injuries to a person’s hand, elbow, shoulder, foot, knee, and hip. “Non-scheduled” or “body as a whole” injuries are defined by § 287.190.3 RSMo, 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 ALJ classified that employee suffered from preexisting “body as a whole” injuries attributable to employee’s cervical spine and cardiac conditions. The Second Injury Fund does not contest that either of these preexisting conditions is not properly categorized as a “body as a whole” injury.

As a result of employee’s cervical spine and cardiac conditions, the ALJ concluded that employee’s weeks of compensation related to his preexisting “body as a whole” injuries was 80 weeks.³

The Second Injury Fund argues that one or both of employee’s preexisting disabilities does not equate to a minimum of 50 weeks of compensation and, therefore, employee’s claim against the Second Injury Fund should be denied.

We find that the Second Injury Fund ignores our legislature’s use of the word “disability” in § 287.220.1 RSMo. 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).

³ 80 weeks = (.20 * 400 weeks).

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We find that the legislature's aforementioned use of "disability" plainly and unambiguously contemplates that a "disability" may be sustained due to "combined disabilities" or multiple "injuries and conditions." In fact, the Missouri Court of Appeals has a long history of allowing awards in which a "body as a whole" rating was derived from combining multiple injuries. In *Dauster v. Star Mfg. Co.*, 145 S.W.2d 499 (Mo. App. 1940), the court allowed a solitary "body as a whole" rating and award where an accident resulted in the partial loss of the use of both of the claimant's legs. *Id.* at 502. In contemplating the two separate extremity injuries, the court interpreted the then applicable statutory section dealing with "non-scheduled," or "body as a whole," disabilities to provide for a single period of compensation in such cases, which shall not exceed 400 weeks. *Id.* at 503. In applying *Dauster*, the court in *Chapman v. Raftery*, 174 S.W.2d 352 (Mo. App. 1943) explained further that where there are multiple injuries:

the compensable period is not necessarily to be fixed with regard for the relation which each and every one of such multiple injuries may bear to some one of the specific injuries mentioned in the statutory schedule, but that instead, the commission, in such a case, may properly fix the period in its relation to the maximum period of 400 weeks, considered from the standpoint of the percentage of disability in the normal functions of the injured man himself.

Id. at 354.

Also, in *Russell v. Kansas City Public Service Company*, 276 S.W.2d 644 (Mo.App. 1955), the court affirmed a Commission's award based on a percentage of the body as a whole even though the claimant's injuries were to both hands. *Id.* at 649. The court in *Russell* acknowledged that "the Commission in its discretion, fixes the disability." *Id.* at 648. The court has consistently held that the Commission not only maintains this discretion, but that it has "broad" discretion as to how the award is calculated. *Sapienza v. Deaconess Hospital*, 738 S.W.2d 149, 152 (Mo. App. 1987).

Based upon the aforementioned, we find that § 287.220.1 RSMo plainly permits combining multiple preexisting "injuries and conditions" to arrive at a global "body as a whole" rating. Therefore, we find that the ALJ acted well within her broad discretion in finding that employee's preexisting cervical spine and cardiac conditions combined to create 20% permanent partial disability of the body as a whole. Because we find that the ALJ acted within her discretion in making this finding, we do not even need to address the issue concerning whether the two preexisting conditions each, individually, meet the § 287.220.1 RSMo thresholds. The ALJ found that employee had a 20% preexisting permanent partial disability of the body as a whole. This 20% rating meets the 50-week threshold required and, therefore, no further analysis is needed.

In addition to finding that the ALJ acted within her discretion, we further find, based upon the medical evidence, employee's testimony, and the record as a whole, that the ALJ's conclusions are fully supported by the competent and substantial evidence.

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IV. Decision

We affirm the ALJ's award with supplementation as provided herein.

We find that employee's primary injury (15% PPD of the left forearm at the 200-week level, or 30 weeks) combines with his preexisting disabilities (20% PPD of the body as a whole referable to his cervical spine and cardiac conditions, or 80 weeks) to result in a permanent partial disability enhancement of 2.75% of the body as a whole, or 11 weeks of benefits (= .0275 * 400 weeks).

The Second Injury Fund is liable for employee's 11 weeks of enhanced permanent partial disability benefits, or \$4,015.88 (= 11 weeks * \$365.08).

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued April 5, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 29th day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kenneth Dixon

Injury No.: 06-057579

Dependents: N/A

Employer: Jefferson Asphalt Co.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

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

Insurer: Previously Settled

Hearing Date: March 28, 2012

Checked by: HDF/scb

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: June 20, 2006.
5. State location where accident occurred or occupational disease was contracted: Maries 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? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award.
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 forearm.
14. Nature and extent of any permanent disability: 15% left forearm.
15. Compensation paid to-date for temporary disability: ----
16. Value necessary medical aid paid to date by employer/insurer? ----
17. Value necessary medical aid not furnished by employer/insurer? ----

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18. Employee's average weekly wages: \$519.54.
19. Weekly compensation rate: \$365.08 per week for permanent partial disability.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:
22. Second Injury Fund liability: 2.75% body = \$4,015.88
23. Future Requirements Awarded: - 0 -

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

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: Kerry O'Sullivan.

Employee: Kenneth Dixon

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kenneth Dixon

Injury No: 06-057579

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Jefferson Asphalt Co.

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

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Insurer: Previously Settled

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on March 28, 2012.

The parties stipulated that on or about June 20, 2006, the claimant, Kenneth Dixon, sustained an injury by accident while employed by Jefferson Asphalt Company; the accident arose out of and in the course of employment.

The parties stipulated that all facts relevant to the claimant's relationship with the employer/insurer are resolved in the claimant's favor in his claim against the Second Injury Fund. The parties stipulated that the claim against the employer/insurer settled based on a permanent disability of 15 percent of the left forearm at the 200 week level; the parties did not, however, agree that this represents the extent of permanent partial disability resulting from the injury of June 20, 2006, in the pending claim against the Second Injury Fund.

The parties stipulated that the compensation rate is \$365.08 per week for all benefits.

The issue to be resolved by hearing is 1) the liability of the Second Injury Fund for permanent disability benefits (permanent partial disability is alleged).

FACTS

The claimant, Kenneth Dixon, testified that he is 62 years old. On June 20, 2006, Mr. Dixon was working light duty after a July 2005 quadruple heart bypass surgery, directing road traffic as a flagman, when a backhoe swung out and struck him in the left forearm and chest. Mr. Dixon had no surgery on his left forearm as the result of the injury, although he does bear a scar where the wound healed. As a result, Mr. Dixon continues to have problems with his left arm, including numbness and lack of grip strength.

As the result of the 2005 heart surgery, Mr. Dixon complains of being short winded and having to limit his lifting to 50 pounds, although Mr. Dixon also noted that his lifting limitations result from his 2006 left forearm injury as well.

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Mr. Dixon also suffered from restricted motion in his neck as the result of a 2001 accident. Mr. Dixon has had limited motion in his neck since the 2001 accident and now turns his body rather than his neck when he looks back.

Mr. Dixon described being on light duty with Jefferson Asphalt since the 2001 accident, which he said was basically working with concrete rather than asphalt.

Dr. Berkin, DO, testified by deposition that he evaluated Mr. Dixon on February 25, 2008. Dr. Berkin opined to a permanent disability of 20 percent of the body relative to Mr. Dixon's cervical injury preexisting 2006 and 25 percent of the body relative to Mr. Dixon's cardiac condition preexisting 2006. Dr. Berkin felt that the preexisting disabilities represented a hindrance or obstacle to employment or reemployment at the time of the June 2006 injury and that the preexisting disabilities in combination with the disabilities resulting from the June 2006 accident and injury represented a significantly greater disability than the sum of the individual disabilities.

APPLICABLE LAW

RSMo Section 287.220.1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. 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. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major

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extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

AWARD

The claimant, Kenneth Dixon, has sustained his burden of proof that the Second Injury Fund is liable for his increased permanent partial disability as the result of the combination of the left forearm injury of June 20, 2006, combined with his preexisting cardiac and cervical spine injuries. Mr. Dixon has proven that his left forearm injury and his preexisting cardiac and neck injuries are each serious enough to cause a hindrance or obstacle to employment. The disability imposed on Mr. Dixon by his left forearm injury is 15 percent of the left forearm based on both Mr. Dixon's testimony regarding the limitations imposed on him by his left forearm injury as well as the opinion of Dr. Berkin. The disability imposed on Mr. Dixon by his preexisting cardiac and cervical spine injuries is similarly found to be 20 percent of the body based on Mr. Dixon's testimony regarding the limitations imposed on him by his cardiac and cervical spine injuries as well as the opinion of Dr. Berkin. The synergistic effect or disability above and beyond the simple sum of the disabilities to the left forearm from the June 20, 2006 accident and injury and the preexisting cardiac and cervical spine injuries is two and three quarters percent of the body.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation