

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award of Administrative Law Judge
by Separate Opinion)

Injury No.: 14-019986

Employee: Richard Gattenby
Employer: Stanger Industries (Settled)
Insurer: Midwest Builders' Casualty Mutual Co. (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 of the administrative law judge by separate opinion.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether employee's preexisting disability was a hindrance and obstacle to his employment; and (2) whether the Second Injury Fund has any liability to the employee for any disability compensation.

The administrative law judge concluded that the Second Injury Fund is liable to employee for permanent total disability benefits.

The Second Injury Fund filed a timely application for review with the Commission alleging the administrative law judge erred in concluding the Second Injury Fund is liable to employee for permanent total disability benefits.

On December 16, 2015, the Commission received from the Second Injury Fund a Motion to Strike arguing that certain attachments to employee's reply brief were not a part of the record on appeal from the Division. On December 21, 2015, employee filed a Motion to Supplement the Record on Appeal or in the Alternative to Submit Additional Evidence, and Suggestions in Opposition to Appellant's Motion to Strike.

By order dated January 14, 2016, the Commission overruled the Second Injury Fund's Motion to Strike, and granted employee's Motion to Supplement the Record.

On January 22, 2016, the Commission received the Second Injury Fund's Motion to Reconsider and Set Aside the Order of January 14, 2016. By order issued February 11, 2016, we denied the Second Injury Fund's Motion to Reconsider.

Findings of Fact

Employee's date of birth is November 26, 1958. After finishing high school, he completed two years of community college, but did not receive a degree. Instead, employee enrolled in a four-year plumbing apprenticeship with his local union, and thereafter went to work as a plumber on residential, commercial, and industrial jobs. Employee continued in the plumbing trade until 2014. Employee has no other job skills, training, or work history.

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Preexisting conditions of ill-being

In 1977, employee was operating a motorcycle in the course of his employment delivering parts for a plumbing company, when another driver ran a stop sign and crashed into him. As a result, employee suffered multiple compound fractures of the left lower extremity which required approximately 13 surgeries to correct. Ultimately, treating surgeons fused employee's entire left ankle at 10° plantar flexion, and also fused each of the toes of his left foot.

After more than a year on crutches, employee was eventually able to return to normal work duties, but his coworkers dubbed him the "hobbling plumber" owing to the effects of the 1977 injury. As a result of employee's 1977 injury and subsequent surgeries, employee suffers a total loss of plantarflexion and dorsiflexion in his left ankle and is unable to move the toes to stabilize his left foot. At the time of the primary injury, this condition caused employee to walk with a markedly antalgic gait, and he was unable to endure prolonged standing or walking on his left leg without suffering severe left ankle and foot pain. He also experienced difficulty carrying, owing to the inability to flex the ankle or toes to stabilize weight, and was unable to walk backwards at all, or to climb stairs normally. In addition, employee suffered marked atrophy of the musculature of his left leg.

Employee entered a workers' compensation settlement in his claim arising out of the 1977 motor vehicle accident for approximately 60% permanent partial disability of the left leg rated between the ankle and the knee. On August 19, 2009, employee's evaluating expert, Dr. James Stuckmeyer, assigned a 40% permanent partial disability of the left ankle. In a subsequent report of August 2, 2014, Dr. Stuckmeyer again assigned a 40% rating to employee's 1977 left ankle injury.

After careful consideration, given the profoundly limiting effects of the 1977 injury, including the near total loss of motion in employee's left ankle, his ongoing pain, and his considerable difficulty with numerous activities such as carrying, climbing stairs, and prolonged weight bearing, we find that employee suffered a 60% preexisting permanent partial disability of the left ankle at the 155-week level as a result of the 1977 injury and fusion surgeries; this correlates to 93 weeks of permanent partial disability.

On August 23, 2007, employee suffered a work injury affecting his left shoulder. The initial treating physician, Dr. Joseph Noland, determined following an MRI that employee suffered tears of the supraspinatus, infraspinatus, and superior labrum. On February 7, 2008, Dr. Vincent Key performed a left shoulder medial arthroscopy with biceps tendon and rotator cuff debridement. Dr. Key's post-surgical diagnoses were (1) left shoulder pain, (2) left shoulder biceps tendon tear, and (3) left shoulder rotator cuff tear; he did not find evidence that employee had suffered a tear of the superior labrum. After a course of physical therapy, Dr. Key returned employee to work on May 9, 2008.

After he returned to full duty work in 2008, employee continued to suffer considerable pain and loss of strength in the left shoulder; difficulty pushing, pulling, lifting, and reaching; and difficulty performing overhead work. In particular, employee was no longer able to raise a screw gun with his left hand, which was an essential activity he performed as a plumber, and employee's pace of work suffered as a result. Owing to his seniority within the union, employee was able to continue working in a supervisory role as a foreman, although he was still expected to perform physical work in this capacity.

Employee entered a workers' compensation settlement in his claim arising out of the 2007 left shoulder injury for approximately 17.5% permanent partial disability of the left shoulder at the 232-week level. In his August 2009 report, Dr. Stuckmeyer assigned a 25% permanent partial

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disability of the left shoulder. In the subsequent August 2014 report, Dr. Stuckmeyer again assigned a 25% rating to employee's left shoulder. We find the 17.5% settlement amount most persuasive; this correlates to 40.6 weeks of permanent partial disability.

On January 13, 2009, employee suffered a right shoulder work injury while attempting to throw an extension cord up to a roof. Following an MRI, the initial treating physician, Dr. Kenneth Reynolds, diagnosed a complete rupture of the long head of the biceps tendon. On February 4, 2009, Dr. Key performed a right shoulder tenodesis. At some point following the surgery, employee suffered a re-rupture of the tendon. Employee underwent a course of physical therapy, and Dr. Key returned him to full duty on April 13, 2009. Following Dr. Key's release, employee continued to suffer lost strength in the right arm, which limited his ability to carry heavy items, such as buckets of gravel. Employee relied on coworkers to perform such tasks.

Employee entered a workers' compensation settlement in his claim arising out of the 2009 right shoulder injury for approximately 17.5% permanent partial disability of the right shoulder at the 232-week level. In his August 2009 report, Dr. Stuckmeyer assigned a 25% permanent partial disability of the right shoulder. In the subsequent August 2014 report, Dr. Stuckmeyer again assigned a 25% rating to employee's 2009 right shoulder injury. We note that employee's only ongoing complaint referable to the right upper extremity appears to be some loss of strength; accordingly, we find employee suffered 17.5% permanent partial disability of the right shoulder at the 232-week level as a result of the 2009 right shoulder injury; this correlates to 40.6 weeks of permanent partial disability.

On August 13, 2010, employee suffered multiple injuries after a hard landing while skydiving. Employee suffered a comminuted fracture of the left tibia; tears of the supraspinatus and infraspinatus tendons in the left shoulder; and a medial meniscus tear of the right knee. Treatment for these injuries involved multiple surgeries, and employee was off work for over a year.

Employee's initial treatment for the left leg fracture included surgery in the form of an open reduction/internal fixation of the tibial fracture followed by extensive physical rehabilitation. Employee later developed extra-articular scars and heterotopic ossification affecting the left femur, for which he underwent manipulation under anesthesia on December 14, 2011, with surgical excision of the heterotopic ossification. In his evaluating report of March 20, 2014, Dr. Chris Fevurly noted that employee's left knee problems referable to the skydiving accident caused him to struggle with his work duties as a plumber, such as kneeling, squatting, and climbing ladders, and that employee continued to suffer from left knee pain and reduced range of motion. In the physical examination described in his August 2014 report, Dr. Stuckmeyer noted that employee had only 0 to 90° range of motion in the left knee, diffuse joint line tenderness over the medial lateral compartment, patellofemoral pain, crepitus, and a positive grind test. Although Dr. Stuckmeyer did not provide a rating for the left knee injury,¹ we deem the evidence sufficient to support a finding that the skydiving accident caused employee to suffer a 25% permanent partial disability of the left lower extremity at the 160-week level; this correlates to 40 weeks of permanent partial disability.

For the left shoulder injury resulting from the skydiving accident, Dr. Key performed an arthroscopic decompression, acromioplasty, open rotator cuff repair, and open distal clavicle excision on March 24, 2011. Dr. Stuckmeyer did not increase his permanent partial disability rating of the left shoulder in his August 2014 report; instead, as we have noted, he retained his

¹ Dr. Stuckmeyer did not discuss the skydiving accident in his August 2014 report, and instead focused solely on employee's disability referable to his 1977, 2007, 2009, and 2014 work-related injuries.

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25% rating. Nor did Dr. Fevurly provide a disability rating referable to the skydiving accident in his March 2014 report; instead, Dr. Fevurly related complaints from employee that are generally indistinguishable from those that we have found employee suffered following the prior 2007 left shoulder injury: pain and weakness in the left shoulder; difficulty pushing, pulling, lifting, and reaching; and an inability to hold power tools overhead with the left arm. In fact, apart from generally describing employee's ongoing struggles with the left shoulder after returning to work, the only new physical complaint described by Dr. Fevurly is popping in the left scapula and shoulder following the 2011 surgery.

Meanwhile, at the hearing before the administrative law judge, employee failed to specifically describe any new complaints affecting his left shoulder which he did not already experience as a result of his prior 2007 left shoulder work injury. Instead, in response to a generalized leading question posed by his attorney, he merely agreed that his left shoulder problems continued to affect his work in a similar fashion after the skydiving accident. Given the dearth of evidence on this point, we find that employee suffered only an additional 5% permanent partial disability referable to the left shoulder as a result of the skydiving accident; this correlates to 11.6 weeks of permanent partial disability.

For the right knee injury resulting from the skydiving accident, Dr. Key performed a partial medial meniscectomy and plica excision on June 9, 2011. Employee told Dr. Fevurly that this surgery was effective in resolving his right knee pain complaints. Once again, Dr. Stuckmeyer did not discuss or rate this condition in his August 2014 report. Nor did employee, in his testimony before the administrative law judge, identify or complain of any right knee problems referable to the skydiving accident. Accordingly, we decline to make a finding that employee suffered any preexisting permanent partial disability of the right knee.

Employee claimed and received Social Security disability benefits during the period he was off work following the 2010 skydiving accident. At some point in 2012, employee returned to his regular work, but experienced difficulty performing his normal duties owing to his left shoulder disability, and because he was no longer able to squat with his left leg given the extensive limitations affecting the left knee and left ankle referable to the 1977 and 2010 injuries.

Primary injury

On March 5, 2014, while working for employer, employee turned and pivoted with his right knee while carrying a 12-inch pipe. Employee suffered immediate right knee pain. Initial treating physicians assessed internal derangement of the right knee, and provided employee with a knee immobilizer and prescriptions for Naprosyn and cyclobenzaprine. On March 13, 2014, an MRI revealed an oblique tear of the posterior horn of the medial meniscus. On March 25, 2014, Dr. Thompson performed a right knee arthroscopy with partial medial meniscectomy, and chondroplasty of the medial femoral condyle and trochlea with removal of a loose body.

Employee experienced some improvement following surgery, but continued to suffer right knee pain, reduced range of motion, as well as increased difficulty with prolonged standing, walking, and traversing stairs. Employee tried returning to restricted duty for the employer after Dr. Thompson released him from care on April 9, 2014. Employee performed some work sorting parts, but experienced considerable difficulty owing to the multiple injuries affecting his bilateral upper and lower extremities, and employee frequently had to stop and rest. In particular, employee was no longer able to squat or kneel at all, because after suffering the primary injury, he could no longer compensate for his left lower extremity disability by relying upon his right. At the end of April 2014, employee chose to retire rather than continue attempting to perform this work.

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Employee entered a workers' compensation settlement in his claim arising out of the primary injury for approximately 15% permanent partial disability of the right knee. In his August 2014 report, Dr. Stuckmeyer assigned a 30% rating to the right knee injury. After careful consideration, we find employee suffered a 15% permanent partial disability of the right knee as a result of the primary injury.²

Permanent total disability

As noted, employee advances the expert medical opinion of Dr. Stuckmeyer in support of his claim for permanent total disability benefits from the Second Injury Fund. In his August 2014 report, Dr. Stuckmeyer restricted his analysis to employee's 1977, 2007, 2009, and 2014 work-related injuries, and indicated that if a vocational expert determined employee was incapable of work in the open labor market, that it would be Dr. Stuckmeyer's opinion that such permanent total disability results from a combination of the preexisting disability and that resulting from the primary injury.

Employee additionally advances the testimony of the vocational expert Terry Cordray, who determined that employee is limited to sedentary work as a result of the physical limitations identified by Dr. Stuckmeyer, and that employee's lack of training in any area other than the plumbing field further restricts employee to unskilled sedentary work, which represents an approximate loss of access to 96% of jobs available in the open labor market. Mr. Cordray believes employee is not placeable in the open labor market, owing to the following factors: employee is approaching advanced age; has only a high school education; has no computer or other sedentary office clerical skills; has a history of multiple work-related injuries requiring surgical repair; and is now unable to return to the only profession in which he has worked for 37 years. We find Mr. Cordray's analysis to be thorough and persuasive.

The Second Injury Fund did not advance any expert medical or vocational testimony. Instead, the Second Injury Fund advances a legal argument (discussed more fully below) that we are precluded from considering in our permanent total disability analysis certain of employee's preexisting conditions of ill-being. As a result, the opinions from Dr. Stuckmeyer and Mr. Cordray are effectively uncontested on this record. We discern no compelling reason to disregard the uncontested expert opinions from Dr. Stuckmeyer and Mr. Cordray. We find that employee is permanently and totally disabled owing to the effects of the primary injury in combination with his preexisting conditions of ill-being.

Conclusions of Law

Second Injury Fund liability

Section 287.220 RSMo, as amended by the Missouri legislature in 2013, provides, in relevant part, as follows:

2. All cases of permanent disability where there has been previous disability due to injuries occurring prior to January 1, 2014, shall be compensated as provided in this subsection. 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

² Although it could be argued that employee suffered some additional permanent partial disability owing to the synergistic interaction of the effects of the primary injury with the preexisting left knee injury, and that such should be deemed an additional component of the employer's liability for the primary injury under the new Second Injury Fund statute (discussed in more detail below) which abrogates Fund liability for such enhanced disability, the parties have not argued this point or asked us to so find. Accordingly, we decline to address that question herein.

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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 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 the second injury fund.

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) 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

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(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.

(3) When an employee is entitled to compensation as provided in this subsection, the employer at the time of the last work-related injury shall only be liable for the disability resulting from the subsequent work-related injury considered alone and of itself.

We note that § 287.220.2 above essentially restates the requirements for Second Injury Fund liability as they existed prior to the 2013 legislative amendments; on the other hand, § 287.220.3 sets forth a new, more restrictive set of requirements for Second Injury Fund liability. Employee argues that § 287.220.2 remains applicable in this case, because his claim involves preexisting disability due to injuries occurring prior to January 1, 2014. The Second Injury Fund, on the other hand, argues that § 287.220.3 applies, because employee's primary or last injury occurred after January 1, 2014.³

We conclude that § 287.220.3 applies to this claim. We are mindful that the Second Injury Fund does not compensate injured workers for preexisting disabilities, but, rather, only for enhanced disability sustained **after** (and, in part, as a result of) a subsequent compensable work injury. We note that § 287.220.3(1) speaks in terms of "**claims** against the Second Injury Fund for injuries occurring after January 1, 2014" (emphasis added). Employee's *claim* against the Second Injury Fund seeks compensation for a condition of permanent and total disability that necessarily arose, by the very facts upon which employee relies, after the last injury of March 5, 2014. Stated another way, employee would not have a claim against the Second Injury Fund for permanent total disability benefits *unless* he had suffered the injury of March 5, 2014.⁴ For this reason, we conclude that employee's claim against the Second Injury Fund is "for" an injury that occurred after

³ The Second Injury Fund additionally suggests that employee is prohibited from arguing before the Commission that § 287.220.2 applies, because employee did not file an application for review from the administrative law judge's award, which determined that § 287.220.3 applies. We disagree. In any workers' compensation case, we must determine at the outset the provisions of law that apply to the employee's claim. In our view, the parties are no more capable of "waiving" such questions than we are of avoiding our duty to resolve them.

⁴ We also note that the law, as amended, clearly contemplates claims for Fund liability based on preexisting disability *not* due to "injuries," see § 287.220.3(2)(a).iii); it follows that the triggering "injury" to which the legislature refers in § 287.220.3(1) must be the last, or primary injury.

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January 1, 2014. Accordingly, we will apply § 287.220.3 to claims against the Second Injury Fund where the last or primary injury occurs after January 1, 2014.

Turning to § 287.220.3, we recognize that this is the first case in which the Commission has been called upon to apply the new requirements. Some initial observations are thus in order. First, we note that, although the parties asked the administrative law judge to determine whether employee's preexisting disability was a "hindrance or obstacle to employment," *Transcript*, page 4, no such requirement now appears in the law. We conclude, therefore, that employee was not required to prove that his preexisting disability constituted a hindrance or obstacle to employment.

Second, we note that parties may no longer file claims for permanent partial disability occurring after January 1, 2014, against the Second Injury Fund. Consequently, we are unable to entertain under § 287.220.3 any alternative argument that employee may be entitled to permanent partial disability benefits if the evidence is deemed insufficient to establish Second Injury Fund liability for permanent total disability benefits. In this case, employee is either entitled to permanent total disability benefits, or no compensation whatsoever from the Second Injury Fund.

Third, we note that our legislature has, for the first time, required a threshold level of preexisting permanent partial disability in order to trigger a claim for permanent total disability benefits against the Second Injury Fund.⁵ Namely, the employee must show that he suffered "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" otherwise a result of a qualifying injury or condition under § 287.220.3(2)(a)a.(i)-(iv). Here, we have found that employee suffered considerable preexisting disability of the left lower extremity resulting from the workers' compensation injury of 1977. We conclude that employee's preexisting left lower extremity disability is "medically documented," in that Drs. Stuckmeyer and Fevurly have examined employee and described such disability. We are also able to conclude that such disability greatly exceeds the 50-week threshold; we have found the 1977 injury resulted in 93 weeks of permanent partial disability referable to the left ankle.

Turning to the criteria under § 287.220.3(2)(a)a(i)-(iv), we conclude that both sub-paragraphs (ii) and (iv) are satisfied with respect to the preexisting 1977 left ankle disability, because that disability is both "a direct result of a compensable work injury" and "a preexisting permanent partial disability of an extremity ... when there is a subsequent compensable work-related injury ... of the opposite extremity[.]" Consequently, it appears to us that § 287.220.3(2)(a)a(i)-(iv) is satisfied, and we proceed finally to the question whether the Second Injury Fund is liable for employee's permanent total disability pursuant to § 287.220.3(2)(a)b.

In answering that question, we note that the Second Injury Fund argues that it has no liability under § 287.220.3 whenever the employee has any preexisting disability that is shown to be a contributing factor in causing permanent total disability but that does not meet the criteria of § 287.220.3(2)(a)a.⁶ In effect, the Second Injury Fund would have us interpret § 287.220.3(2)(a)b as if it read:

⁵ Compare *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 156-60 (Mo. App. 2014), making clear that no such requirement applied under the old law.

⁶ Although there was some apparent confusion on this point at oral argument, we do not read the Second Injury Fund's brief to argue that it is liable only when the employee is able to show that a *single* preexisting disabling condition combines with the primary injury to result in permanent total disability, as this would be both illogical and inconsistent with § 1.030 RSMo.

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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, **without consideration of any preexisting disabling conditions that do not meet the criteria set forth in § 287.220.3(2)(a)a.**

(additions in bold).

Such construction, in our view, is inconsistent with the strict construction mandate under § 287.800.1 RSMo:

Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

The courts have provided the following guidance with regard to the strict construction mandate:

[A] strict construction of a statute presumes nothing that is not expressed. The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions.

Allcorn v. Tap Enters., 277 S.W.3d 823, 828 (Mo. App. 2009)(citations omitted).

By its clear, plain, and obvious terms, § 287.220.3(2) defines the “conditions” which must be met to establish Second Injury Fund liability. We conclude that those conditions have been met in this case. Employee sustained compensable injury to his left lower extremity in 1977 which greatly exceeded the statutory 50-week threshold, and his primary injury affects the opposite extremity. Consistent with the expert medical and vocational opinion evidence that we have credited, this preexisting disability is shown to be an essential factor, in combination with employee’s compensable primary injury, resulting in permanent total disability.

We note that the Second Injury Fund’s argument effectively asks us to presume that our legislature intended that employers remain liable whenever (as will almost always be the case) an employee has any preexisting condition that contributes to the condition of total disability but that does not satisfy the requirements under § 287.220.3(2)(a)a. This is because § 287.220.3(3) only protects employers when the Second Injury Fund is shown to be liable under § 287.220.3:

When an employee is entitled to compensation as provided in this subsection, the employer at the time of the last work-related injury shall only be liable for the disability resulting from the subsequent work-related injury considered alone and of itself.

We do not believe the legislature intended (nor that a strict construction of § 287.220.3 supports a conclusion) that employers maintain liability for permanent total disability benefits whenever it is shown that any factor which contributes to causing such disability does not meet the criteria

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set forth in § 287.220.3(2)(a)a. This, in part, is because we must presume that the legislature was aware of the state of the Missouri case law on the topic of Second Injury Fund liability at the time it enacted the 2013 amendments. *Thompson v. State Veterans' Home & State Office of Administration/Caro*, 58 S.W.3d 657, 661 (Mo. App. 2001). Accordingly, we presume the legislature was cognizant of the long line of decisions from our courts declaring the purpose underlying the Second Injury Fund:

The purpose of the Fund is to encourage employers to hire partially disabled applicants. The hiring of such individuals raises the possibility that the partial disability will combine with a later, on-the-job injury to produce a greater (if not total) permanent disability. The legislature wanted to assure employers that, in such cases, they would not be exposed to a greater amount of liability than that which results from the work-related injury. Thus, it limited the employer's liability to that part of the disability that can be attributed to the last injury alone.

Gassen v. Lienbengood, 134 S.W.3d 75, 79 (Mo. App. 2004)(citations omitted).⁷

The facts of this case amply demonstrate that the Second Injury Fund's reading of the statute is unworkable from the standpoint of protecting employers and encouraging the employment of the partially disabled. If we accept the Second Injury Fund's reading of the statute, this employer should be held liable for employee's condition of permanent and total disability resulting after the March 2014 primary injury, solely because employee suffered from some preexisting disabilities that do not, when they are considered individually, satisfy the requirements under § 287.220.3(2)(a)a. In other words, this employer's commendable willingness to provide work to employee—despite his suffering from some preexisting disabilities—would expose employer to liability for weekly disability payments for the rest of employee's lifetime if he was later deemed permanently and totally disabled following a compensable work injury. This result is so antithetical to the well-established purposes underlying the Second Injury Fund, and constitutes such a drastic departure from the state of the law at the time the legislature enacted the 2013 amendments, that we will not presume the legislature intended such a result absent express language so declaring.⁸

For all of the foregoing reasons, we conclude that Second Injury Fund liability is potentially triggered under § 287.220.3 whenever one of the employee's preexisting disabling conditions satisfies the requirements under § 287.220.3(2)(a)a(i)-(iv), and such condition is shown to be an essential factor, when combined with the primary injury, in causing permanent total disability.

We have credited the uncontested expert medical and vocational opinions from Dr. Stuckmeyer and Mr. Cordray that employee is unable to compete for work in the open labor market following the March 2014 work injury. As detailed by Dr. Stuckmeyer and Mr. Cordray, employee's disability referable to the 1977 left ankle injury is a critical component of employee's permanent total disability. We conclude that employee would not have been rendered permanently and totally disabled but for the combination of disabilities attributable to his 1977 left ankle injury and

⁷ See also *Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955, 957 (Mo. 1963); *Meilves v. Morris*, 422 S.W.2d 335, 338 (Mo. 1968); *Bone v. Daniel Hamm Drayage Co.*, 449 S.W.2d 169, 171 (Mo. 1970); *Roby v. Tarlton Corp.*, 728 S.W.2d 586, 589 (Mo. App. 1987); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. 1992); *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 617 (Mo. App. 1995); *Boring v. Treasurer of Missouri*, 947 S.W.2d 483, 488 (Mo. App. 1997); *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 389 (Mo. 2004); *Walls v. Treasurer of Mo.*, 207 S.W.3d 136, 138 (Mo. App. 2006); *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 630 (Mo. 2012); and *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455, 460 (Mo. 2013).

⁸ For example, if such a result were intended, one would expect our legislature to expressly abrogate the long line of Missouri cases declaring the purpose of the Second Injury Fund.

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his primary work-related injury.⁹ Under these circumstances, the existence of other preexisting disabilities which contribute to cause permanent total disability but which do not meet the criteria of § 287.220.3(2)(a)a(i)-(iv) does not relieve the Second Injury Fund of liability for permanent total disability.

We conclude, therefore, that the Second Injury Fund is liable for permanent total disability benefits.

Award

The Second Injury Fund is liable for weekly permanent total disability benefits beginning on the date of maximum medical improvement, April 9, 2014, at the differential rate of \$406.23 for 24 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$853.08. The weekly payments shall continue for employee's lifetime, or until modified by law.

This award is subject to a lien in favor of Patrick B. Starke, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Lawrence G. Rebman, issued August 18, 2015, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 5th day of August 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

CONCURRING OPINION
Curtis E. Chick, Jr., Member

Attest:

Secretary

⁹ We found no evidence that employee's disability is a result of any injury or condition that arose subsequent and unrelated to his primary injury, and indeed, the Second Injury Fund does not so argue before this Commission.

Employee: Richard Gattenby

CONCURRING OPINION

I concur in the majority's decision to award permanent total disability benefits from the Second Injury Fund, but for different reasons. The Commission majority has determined that § 287.220.3 RSMo (the "new law") applies to this claim. I disagree. As explained below, I believe that § 287.220.2 RSMo (the "old law") is applicable to this claim under the plain language of the 2013 amendments.

The Commission majority astutely notes that the post-2005 strict construction mandate under § 287.800.1 RSMo prevents us from reading any additional language into the statute; instead, we must apply the precise language we have been provided by our legislature and give effect to that language. In its brief, the Second Injury Fund asserts that the post-2013 language of § 287.220 is "poorly worded," but suggests that the intent of our legislature is clear. But under strict construction, we are not permitted to ignore the words chosen by our legislature, even if we think their choice "poor," nor are we entitled to rely upon our own speculation as to the legislature's unstated intentions.

Section 287.220.2 *plainly and unmistakably* declares, in its very first sentence, that "[a]ll cases of permanent disability where there has been previous disability due to injuries occurring prior to January 1, 2014, shall be compensated as provided in this subsection." Employee's claim is one of "permanent disability," and as agreed by the parties, it is one in which "there has been previous disability due to injuries occurring prior to January 1, 2014," namely, the injuries employee suffered in 1977, 2007, 2009, and 2010. Consequently, we must apply § 287.220.2 to employee's claim if we are to give effect to the plain meaning of the actual words chosen by our legislature.

Section 287.220.3, on the other hand, states in its first sentence as follows:

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.

The majority reasons that the "injury" for which employee claims compensation from the Second Injury Fund is his condition of "total disability," which arose after the March 2014 injury. The majority thus reads the foregoing language as follows: "[a]ll claims against the second injury fund for **permanent total disability** occurring after January 1, 2014 ... shall be compensated as provided in this subsection." But how can we justify such a reading under strict construction?

The majority additionally ignores that the terms "injury" and "total disability" enjoy their own particular definitions for all purposes under Chapter 287, and thus we simply cannot conflate them in this way, or presume our legislature chose the word "injury" when they really meant "total disability":

In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment.

§ 287.020.3(1) RSMo.

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom.

Employee: Richard Gattenby

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These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

§ 287.020.3(5) RSMo.

The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

§ 287.020.6 RSMo.

As § 287.020.3(5) above makes clear, the term "injury" does not include the term "occupational disease" in Chapter 287, except where specifically provided. For purposes of § 287.220.3, we can be confident that the term "injuries" is not intended to include "occupational diseases," because the legislature has chosen different criteria for when the new law applies with respect to each category of claim. Specifically, the legislature has instructed that the new requirements under § 287.220.3 apply to:

(1) [a]ll claims against the second injury fund for *injuries occurring after January 1, 2014*; and

(2) [a]ll claims against the second injury fund involving a subsequent compensable injury which is an occupational disease *filed after January 1, 2014*.

(emphasis added).

With respect to claims for occupational diseases, the legislature made clear that the triggering date that controls whether the new law applies is that upon which the actual claim is filed. On the other hand, with respect to claims for all other types of injury, the legislature has instructed that the triggering date is that upon which the "injuries occur." How can we best give meaning to these words?

In answering that question, I will join the Commission majority in presuming that the legislature was aware of the state of the law at the time it enacted the 2013 amendments. Thus, the legislature was necessarily aware that all claims against the Second Injury Fund, by their very nature, involve two distinct classes or categories of "injuries" with respect to *when* the injuries occur: (1) those injuries that are preexisting, and (2) those injuries that constitute "subsequent compensable injuries." The courts and workers' compensation practitioners have historically referred to the latter category as the "last" or "primary" injuries. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455, 462 n.4 (Mo. 2013).

Notably, with respect to claims involving occupational diseases, the legislature specifically employed the phrase "subsequent compensable injury" to describe when the new law controls. But with respect to claims for all other injuries, the legislature did **not** distinguish between "preexisting" and "subsequent compensable injuries," and instead simply restricted application of the new law to "all claims ... for injuries occurring after January 1, 2014." "We presume the legislature intended every word, clause, sentence, and provision of a statute to have effect and did not insert superfluous language into the statute." *McGuire v. Christian County*, 442 S.W.3d 117, 123 (Mo. App. 2014)(citation omitted). The legislature's choice to expressly refer to the

Employee: Richard Gattenby

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“subsequent compensable injury” in the context of occupational disease claims, but to refrain from such limitation in the context of claims for all other injuries, must be presumed intentional, and we must give it effect.

By the same token, I note that § 287.220.2 plainly refers to “previous disability,” whereas § 287.220.3 does not. Our legislature clearly knew how to contrast “previous disability” with that resulting from “subsequent compensable injuries,” but they made no such distinction in § 287.220.3. This confirms to me that the “injuries” to which the legislature refers in § 287.220.3 are *all* of the employee’s injuries for which the claim is made against the Second Injury Fund, i.e., the employee’s preexisting *and* primary injuries.

Thus, I conclude that § 287.220.3 only applies where *all* of the employee’s injuries (both preexisting and primary) occur after January 1, 2014. Especially when read in conjunction with the plain language of § 287.220.2 with an eye toward harmonizing both provisions, this result gives meaningful effect to all of the language chosen by our legislature, and is consistent with the strict construction mandate. As I have demonstrated, the only way to hold otherwise is to ignore strict construction and impermissibly insert language into the statute on the misguided premise that we know better than the legislature what they meant when they enacted the 2013 amendments.

I would apply § 287.220.2 to this claim, because it *unquestionably* involves previous disability due to injuries occurring prior to January 1, 2014. Because I agree with the majority’s choice to credit the uncontested expert opinion evidence from Dr. James Stuckmeyer and Terry Cordray, I believe employee’s claim succeeds under the prior, less restrictive requirements for proving Second Injury Fund liability for permanent total disability benefits. For this reason, I concur in the majority’s decision to award permanent total disability benefits to employee.

Curtis E. Chick, Jr., Member

**FINAL AWARD
SECOND INJURY FUND ONLY**

Employee: Richard Gattenby

Injury No: 14-019986

Employer: Stanger Industries (Settled)

Insurer: Midwest Builders' Casualty Mutual Co.

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

Hearing Date: April 16, 2015

Briefs Filed: June 11, 2015

Checked by: LGR/drl

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: March 5, 2014
5. State location where accident occurred or occupational disease was contracted: Overland, Park, Kansas
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: Mr. Gattenby twisted his right knee while retrieving a pipe at work.
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: Right Knee
14. Nature and extent of any permanent disability: Permanent Total Disability as to the Second Injury Fund
15. Compensation paid to date for temporary disability: \$1,091.82
16. Value necessary medical aid paid to date by employer/insurer? \$10,735.69
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1,550.00
19. Weekly compensation rate: \$853.08/446.85
20. Method wages computation: Stipulation of the parties

COMPENSATION PAYABLE

22. Second Injury Fund liability:

Permanent total disability benefits from Second Injury Fund of \$853.08 weekly for Claimant's lifetime minus a credit for the disability paid by the Employer.

23. Future requirements awarded: Employee shall receive Permanent Total Disability Compensation for the duration of her life. Said payments are to begin as of April 9, 2014 subject to employers credit and to be payable and be subject to modification and review as provided by law.
24. The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Patrick Starke, Attorney, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard Gattenby

Injury No: 14-019986

Employer: Stanger Industries (Settled)

Insurer: Midwest Builders' Casualty Mutual Co.

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

Hearing Date: April 16, 2015

Briefs Filed: June 11, 2015

Checked by: LGR/drl

On April 16, 2015, the Employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Richard Gattenby, appeared in person and with counsel, Patrick Starke. The Second Injury Fund appeared through its counsel, Benita Seliga, Assistant Attorney General.

STIPULATIONS

The parties stipulated that:

1. On or about March 5, 2014, ("the injury date"), Stanger Industries ("Employer") was an employer with its liability fully insured by Midwest Builders' Casualty Mutual Co.
2. Richard Gattenby was its employee working in Overland Park, Kansas.
3. Employee notified Employer of his injuries and filed his claim within the time allowed by law; and
4. Employer provided Employee with medical care costing \$10,735.69.
5. Employee met with injury by accident or occupational disease arising out of and in the course of his employment.
6. Employer provided Employee temporary-total disability in the amount of \$1,091.82.
7. Employee's Average Weekly Wage is \$1,550.00

8. The weekly compensation rate is \$853.08 / \$ 446.85.
9. Employee and Employer settled the primary claim based upon a 15% permanent partial disability to the right knee at the 160 week level.

ISSUES

The parties requested the Division to determine:

1. What is the liability of the Second Injury Fund for Permanent Partial or Permanent Total Disability, if any?

EXHIBITS

Employee appeared in person, testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Settlement Stipulation for Injury No. 14-019986
- Exhibit B – Settlement Stipulation for Injury No. 14-019986
- Exhibit C – Settlement Stipulation for Injury No. 14-019986
- Exhibit D – Report of James A. Stuckmeyer, MD
- Exhibit E – Deposition of Terry Cordray, with Exhibits 1 & 2
- Exhibit F – Dr. Fevurly 3/20/2014 Letter
- Exhibit G – Medical Records
- Exhibit I – Wage Statement
- Exhibit J – 4/10/14 Letter Provider

The Second Injury Fund did not call any witnesses and offered the exhibits.

- Exhibit 1 – Information and Instructions about you IME
- Exhibit 2 – Employee Benefits Letter
- Exhibit 3 – Dr. Stuckmeyer 8/19/2009 Letter

The Court took judicial notice of its files in injury AS-55921 for Mr. Gattenby from 1977.

FINDINGS OF FACT

Mr. Gattenby was 56 at the time of the hearing. He is a high school graduate. He attended Longview Community College from 1977 until 1979, but did not complete a degree and doesn't recall how many credit hours he completed. He has spent his entire professional career in the plumbing field.

Mr. Gattenby was an apprentice with Plumber's Local #8 from 1980 until 1984. The apprenticeship was for four years, with classroom training two nights per week, as well as ongoing on-the-job training. He became a journeyman plumber in 1984 and worked a total of 31 years in residential, commercial and industrial plumbing through the Plumber's Union until he retired in 2014. His last employer was Stanger Industries. He was a working foreman and supervised other plumbers.

Mr. Gattenby suffered a severe left ankle injury from a motor vehicle accident in 1977. He was delivering parts for Burgess Mechanical Unlimited on his motorcycle when a car hit him, resulting in a compound fracture of his left lower extremity. As a result of his injuries, he underwent skin grafts, and multiple surgeries to his left ankle and toes. The transcript stated that the settlement was for 60% permanent partial disability. A review of the total compensation provided to Mr. Gattenby by the stipulation supports the finding that his ankle injury was settled for 58% permanent partial disability of the 155 week level or 90 weeks of permanent partial disability.

Mr. Gattenby was released after recovery. He testified that his foot doesn't flex, which causes difficulty walking down stairs and prevents him from walking backward. He also notices aches in his left ankle when the weather changes. Mr. Gattenby testified that his most recent work injury occurred because he needed to turn around to walk forward due to his left foot and the surface he was walking on.

Mr. Gattenby was a journeyman plumber working full time and overtime after his recovery from the 1977 motor vehicle accident. Mr. Gattenby testified that he didn't miss work due to the left foot after his recovery.

In 2007, he suffered a left shoulder work injury and filed a workers' compensation claim. The injury resulted in left shoulder rotator cuff surgery performed by Dr. Key. Dr. Key released Mr. Gattenby without restrictions on May 9, 2008. He returned to work full time and worked overtime. Mr. Gattenby did not ask for accommodations at work for his left shoulder. Mr. Gattenby settled his workers' compensation claim for 17.5% of the left upper extremity at the 232 level. That is equivalent to 40.6 weeks of permanent partial disability of the left upper extremity.

Mr. Gattenby reported to Dr. Stuckmeyer on July 9, 2009, that he was improved from the pre-surgery status but had difficulty with overhead function and pain. He also complained of

difficulty with pushing, pulling, lifting, and reaching activities. He described his symptoms as fatigability and weakness.

At hearing, he testified that he had decreased strength in the left shoulder and is unable to use a screw gun in his left hand. He used his right hand to help raise the left hand because the ability to move his hand up and down wasn't there anymore. He also testified the left shoulder slowed him down.

On January 15, 2009, Mr. Gattenby suffered a work related right bicep rupture and filed a workers' compensation claim. Dr. Key performed surgery on the bicep on February 4, 2009. Dr. Key released Mr. Gattenby without restrictions on April 12, 2009. Mr. Gattenby returned to work full duty working full time and overtime.

Mr. Gattenby saw Dr. Stuckmeyer in 2009. Dr. Stuckmeyer performed an evaluation of Mr. Gattenby's shoulders for his workers' compensation claim, Exhibit 3. Dr. Stuckmeyer did not impose any restrictions on his right or left shoulders as a result of the 2007 and 2009 work injuries. Mr. Gattenby settled his right bicep claim for 17.5% of the right upper extremity at the 232 level. This is equivalent to 40.6 weeks disability of the right upper extremity.

In 2010, Mr. Gattenby suffered injury from a hard landing while parachuting into the T-Bones stadium. Mr. Gattenby had complaints of pain in his heels and ankles, left shoulder, and left knee. He had anterolisthesis of L5 on S1 with spondylosis and comminuted fracture of the tibia. Mr. Gattenby underwent multiple surgeries for the broken left tibia, which required open reduction internal fixation, a manipulation of the left knee under anesthesia with an epidural injection for pain control, and a second manipulation of the left knee under anesthesia with removal of a heterotopic ossification. He also had a second left shoulder surgery performed by Dr. Key on March 24, 2011. Mr. Gattenby reported to Dr. Fevurly that he never got stronger following the surgery and has no strength in the left shoulder with attempted work above shoulder level. On June 9, 2011, Dr. Key performed a right knee arthroscopy to repair a medial meniscus tear that was a result of the parachuting accident.

Mr. Gattenby went on Social Security Disability for two years when he was unable to work following the parachute injuries. He returned to work at Stanger in 2012 after which he worked full time and some overtime as a foreman plumber.

On March 3, 2014, Mr. Gattenby contacted his union health and welfare plan to file for long-term disability. (Ex. 2) The plan administrator sent a letter dated March 3, 2014, to Dr. Fevurly to perform an evaluation of Mr. Gattenby to determine his ability to continue his work activities as a plumber. (Ex F)

On March 5, 2014, Mr. Gattenby suffered a right knee injury when he twisted his right knee while retrieving a pipe at work. He performed office duties after his right knee injury due to restrictions from Corporate Care.

Mr. Gattenby saw Dr. Fevurly for his evaluation on March 22, 2014. He completed the Information and Instructions form for Dr. Fevurly's evaluation. (Exhibit 1) He listed his broken left leg, his left rotator cuff surgery, and his right torn bicep as prior injuries on Exhibit 1, but listed his problems as pain and stiffness in the left foot, left knee, left shoulder and pain in the right hip joint. (Exhibit 1, question 8) Mr. Gattenby testified the right hip was not a work-related issue.

On March 25, 2014, Mr. Gattenby underwent right knee surgery by Dr. Thompson. He was released with no restrictions by Dr. Thompson on April 9, 2014.

Mr. Gattenby returned to office duties until after the first of May, 2014. Due to his injuries Mr. Gattenby decided he could no longer work and he retired on long term disability.

CONCLUSION OF LAW

The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. *Brenneisen v. Leach's Standard Service Station*, 806 S.W.2d 443, 445 (Mo.App.1991).

In 2005, the Workers Compensation Act was amended to eliminate the requirement of liberal construction. Section 287.800 now provides:

Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of **workers' compensation**, and *any reviewing courts shall construe the provisions of this chapter strictly.* (Emphasis added.)

This change requires the courts to use principles of strict construction in applying all provisions of the workers' compensation statute. 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 (Mo App. W.D. 2010) Citing. *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo.App.2009). The operation of the statute must be confined to "matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter." *Robinson v. Hooker*, supra Citing *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 828 (Mo.App.2009) (citing 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th

ed.2008)). “ ‘A strict construction of a statute presumes nothing that is not expressed.’ ” *Id.* (quoting *Sutherland, supra.*)

1. What is the liability of the Second Injury Fund for Permanent Partial or Permanent Total Disability, if any?

Mr. Gattenby has alleged he is permanently and totally disabled due to his combined injuries. In order to establish Second Injury Fund Liability for permanent total disability benefits, Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (E.D. 1990) overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony. *Id.* at 199. The Second Injury Fund has no burden in producing any evidence; rather the Claimant must establish permanent total disability by introducing evidence. *Teresa Carkeek v. Second Injury Fund*, 352 S.W. 3d 604 (Mo App W.D. 2001) citing *Clarks Harts Auto Repair*, 274 S.W. 3d 612, 616 (Mo. App. 2009)

Under the new provisions of §287.220.3.2 RSMo. enacted in 2013, the Claimant must establish pursuant to section that he meets the following conditions:

- 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 permanent total disability as defined under this chapter; (§ 287.220.3.2, Emphasis Added)

A. Medically Documented Pre-Existing Injuries

The Second Injury Fund in its brief concedes that Mr. Gattenby has three prior settlements of work-related claims that were the direct result of a compensable injury as defined in section 287.020. (SIF Brief p. 7) Pursuant to the dictates of §287.220 RSMo. the claimant has provided the medically documented disability ratings of Dr. Stuckmeyer who opined that:

(1) Mr. Gattenby has a 25% permanent partial disability of the left shoulder or 69.60 weeks of disability- Claimant's August 23, 2007, injury to the left shoulder settled for 17.5% of the left shoulder . (Ex. B.). This settlement represents 40.6 weeks of disability.

(2) Mr. Gattenby has a 25% permanent partial disability of the right shoulder or 69.60 weeks of disability. The January 13, 2009, injury to his right shoulder settled for 17.5% of the right shoulder. (Ex C.) This settlement is also representative of 40.6 weeks of disability.

(3) Dr. Stuckmeyer did not rate Mr. Gattenby's left knee.

(4) Dr. Stuckmeyer opined that Mr. Gattenby has a 40% permanent partial disability of the left ankle or 62 weeks of disability. The June 27, 1977, settlement for his pre-existing injury to his left foot between the ankle and the knee for approximately 60% of the left foot between the ankle and knee for a total of 90.5 weeks of disability. \$7,240.00 divided by \$80.00 is 90.5 weeks of disability or 58% of the 155 week level.

Dr. Stuckmeyer recommended a vocational evaluation to determine Mr. Gattenby's employability in the open labor market. Should Mr. Gattenby be deemed permanently and totally disabled, Dr. Stuckmeyer opined that it is due to the combination of preexisting disabilities and the last accident. There is no contrary medical documents or testimony and the court finds the report of Dr. Stuckmeyer credible.

Dr. Fevurly provided an opinion to the Plumbers Plan Administration that Mr. Gattenby was no longer qualified to perform the essential functions of the job of a plumber. (Ex. 6) Dr. Fevurly's report that Mr. Gattenby is unable to perform the essential functions of the job as a plumber is not based upon the accepted medical standard used to determine permanent total disability.

Second Injury Fund Arguments.

Prior Settlements.

Primarily, the Second Injury Fund argues that Mr. Gattenby's prior workers compensation settlements do not meet the threshold requirement of §287.220.3.2.(a)a. In this argument the Second Injury Fund is making a number of unstated assumptions. First, it assumes prior settlements are conclusive of disability. Prior to January 1, 2014, only those disability determinations made or approved by an administrative law judge or the commission were used in assessing second injury fund liability.

§287.220.2 RSMo 2013 states:

2.All cases of permanent disability where there has been previous disability due to injuries occurring prior to January 1, 2014, shall be compensated as provided in this subsection. ... 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.

(§287.220.2 RSMo 2013, Emphasis Added)

“The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.” *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013) citing *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009) (quoting *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33, 37 (Mo. banc 2004)). If the language is unambiguous, this Court “must give effect to the legislature's chosen language.” *Witte Supra citing State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. banc 2008). Only where the language is ambiguous will the Court resort to other rules of statutory construction. *Witte Supra citing Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011). This Court must strictly construe the provisions of the workers' compensation statutes. Section 287.800.

The standards for assessing disability under §287.220 RSMo following the 2013 changes merely require: “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:” Id.

If this court follows the unambiguous instruction of the statute and looks at the medical documents in evidence, then all of Mr. Gattenby's pre-existing work injuries resulted in disability above the 50 week threshold.

Combining or Stacking Disabilities

Next, the Second Injury Fund argues that the statute doesn't allow for the combining or “stacking of disability” which do not individually meet the 50 week threshold. The Second

Injury fund urges the Court to restrictively read the phrase: “An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability...” 287.220.3RSMo 2013

An analysis of the singular use of the term “disability” was made in *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455 (Mo. 2013). In *Witte* the Supreme Court analyzed §287.220 as it existed before the January 1, 2014 changes. The Supreme Court noted: “It is possible that multiple injuries can give rise to a single disability.” *Id.* at 465 However, based upon the statute read as a whole “The commission's method of calculating the thresholds by combining injuries is not consistent with the language of section 287.220.1.” *Id.* at 464 (Mo. 2013)(emphasis provided). The court reasoned that “The legislature's use of the singular form is shown to be intentional when the language of the third sentence is contrasted with the language governing permanent total disability in the fifth sentence. The fifth sentence of section 287.220.1 discusses compensation for permanent total disability and provides that:

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 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....

The Supreme Court in *Witte* held that based upon the terms used in the statute each prior permanent partial injury had to reach a disability threshold to precipitate Fund liability. It is a rule of statutory construction that the legislature is presumed to know the existing case law when it enacts a statute. *Scruggs v. Scruggs*, 161 S.W. 3d 383 (Mo. App. W. D. 2005). As such, we must assume that the legislature knew that multiple injuries can give rise to a single disability and that the courts will look to the treatment of the term in discerning legislative intent.

In the 2013 statute before this court, there is little contrasting language to determine the legislature’s intent of the use to the singular term “disability.” However, in paragraph b. the legislature uses “the” in the phrase: “when combined with **the** preexisting disability, as set forth in items (i), (ii), (iii), or (iv) ...” 287.220.3.b RSMo 2013. Certainly, there is a reasonable scenario where an employee could have disabilities from both military service of greater than 50 weeks and a preexisting compensable work in jury of greater than 50 weeks that would combine to result in permanent total disability.

Furthermore, the Legislature demonstrated its ability and intent to limit disability from a single injury as evidenced by §287.220.3(3), which states:

When an employee is entitled to compensation as provided in this subsection, the employer at the time of the last work-related injury shall only be liable for the disability *resulting from the subsequent work-related injury considered alone and of itself.* 287.220.3(3) VAMS (2013)(emphasis provided)

No similar limiting language was used in §287.220.3(2)(a)a. Had the Legislature wanted to limit the term “disability” to a single injury, it could have included similar language.

Under plain interpretation of new section 287.220.3(2)(a), the disability arising from Mr. Gattenby’s compensable 1977 injury and both compensable shoulder injuries may be combined or stacked to meet the preexisting disability threshold.

Based upon the medical documentation in evidence and the combining preexisting disability, Mr. Gattenby has meet the elements of §287.220.3(2)(a)a. RSMo 2013.

B. The Claimant sustained a subsequent compensable work-related accident on March 5, 2014.

To prevail in a second injury fund claim, the Claimant must prove that he sustained a subsequent compensable work injury. The parties have stipulated that Mr. Gattenby did suffer a work injury that was reported and a claim was timely filed. The evidence is that on March 5, 2014, Mr. Gattenby suffered a right knee injury when he twisted his right knee while retrieving a pipe at work.

On March 25, 2014, Mr. Gattenby underwent right knee surgery by Dr. Thompson. He was released with no restrictions by Dr. Thompson on April 9, 2014. Dr. Stuckmeyer rated Mr. Gattenby’s knee injury at 30% permanent partial disability. The Employee and Employer settled the primary claim based upon a 15% permanent partial disability to the right knee at the 160 week level.

This court finds that Mr. Gattenby sustained a subsequent work-related injury.

3) Does the work injury combine with the preexisting disability to result in permanent total disability.

The determination of whether plaintiff was totally and permanently disabled was a question of fact for the Commission. *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274, 275 (Mo.App.1994). The Commission does not have to make its decision only upon testimony from physicians, it can make its findings from the entire evidence. *Id.*

§287.220.3.2 states: “Such employee (with a qualifying pre-existing injury) 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 permanent total disability as defined under this chapter;

§287.020(7) RSMo (2000) defines total disability as “an inability to return to any employment and not merely...inability to return to the employment which the employee was engaged at the time of the accident.” *Reese v. Gary & Roger, Inc.*, 5 SW 3d 522 (Mo. App. 1999); *Fletcher v. Second Injury Fund*, 922 SW 2d 919, 921 (Mo. App. 1982); *Groce v. Pyle*, 315 SW 2d 482, 490 (Mo. App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability.

It is necessary, however, that they be unable to compete in the open labor market. See *Reese v. Gary & Roger Link, Inc.* 5 SW 3d 522 (Mo. App. 1999); *Carlson v. Plant Farm*, 952 SW 2d 369, 373 (Mo. App. 1997); *Fletcher v. Second Injury Fund*, 922 SW 2d 402 (Mo. App. 1996); *Searcy v. McDonnell Douglas Aircraft*, 894 SW 2d 173 (Mo. App. 1995); *Reinver v. Treasurer*, 837 SW 2d 363 (Mo. App. 1992); *Brown v. Treasurer*, 795 SW 2d 478 (Mo. App. 1990). Missouri courts have repeatedly held that the tests for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the Employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. See *Garcia v. St. Louis County*, 916 S.W.2d 263 (Mo. App. 1995); *Lawrence v. R-VIII School District*, 834 S.W.2d 789 (Mo. App. 1992); *Carron v. St. Genevieve School District*, 800 S.W.2d 6 (Mo. App. 1991); *Fischer v. Arch Diocese of St. Louis*, 793 S.W.2d 195 (Mo. App. 1990).

In other words, a determination of permanent total disability should focus on the ability or inability of the Employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit*, 908 S.W.2d 849 (Mo. App. 1995). The courts of the State have held that various factors may be considered including a claimant’s physical and mental condition, age, education, job experience and skills in making the determination as to whether a claimant is permanently and totally disabled. See e.g., *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo. App. 1997); *Olds v. Treasurer*, 864 S.W.2d 406 (Mo. App. 1993); *Brown v. Treasurer*, 795 S.W.2d 439 (Mo. App. 1990); *Patchin v. National Supermarkets Inc.*, 738 S.W.2d 166 (Mo. App. 1987); *Laturno v. Carnahan*, 640 S.W.2d 470 (Mo. App. 1982); *Vogel v. Hall Implement Co.*, 551 S.W.2d 922 (Mo. App. 1977).

The Commission “ ‘may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses *who are not shown by the record to have been impeached*, and

the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence.' ” *Kuykendall v. Gates Rubber Co.* 207 S.W.3d 694 (MO App. S.D. 2006), citing *Houston*, 133 S.W.3d at 179–80(quoting *Corp*, 337 S.W.2d at 258).

Mr. Gattenby is 56 years old, and is currently not working and on Social Security Disability. Mr. Gattenby’s testimony is credible. Mr. Gattenby testified that he has never worked any other job other than that of plumber. The work of a plumber involves lifting heavy pipe, working in sewers, in ditches, climbing in and out of ditches, working overhead to soldering or sweat pipe.

The evidence in this case is that Mr. Gattenby sustained a 1977 injury to his left ankle that caused difficulty walking, stairs, carrying things is difficult. Mr. Gattenby testified that his foot aches a lot which is caused by work or weather changes. The pain feels like he has permanently twisted his ankle. Mr. Gattenby testified that he was known as the hobbling plumber. He doesn’t recall missing work because of his ankle; he would work through pain. Mr. Gattenby believes that his 2014 knee injury was a result of the fact that he can’t walk backwards and by twisting instead of walking backwards, he injured his right knee.

Mr. Gattenby testified that as a result of the 2007 left shoulder injury he couldn’t raise it like before. He testified that he lost strength in the arm and could not lift a screw gun. As a result this made him slower on the job. Due to his seniority, he assigned others to do work he couldn’t perform.

Mr. Gattenby testified that in 2009 he tore his right biceps tendon. As a result he has lost strength in the arm. He has reported that the bicep tore loose again and is not currently attached. This has prevented him from carrying things like a bucket of gravel.

In 2010, Mr. Gattenby was at the company picnic and he and some others volunteered to parachute into the T-Bones stadium in Kansas City, Kansas. While landing he hit concrete hard resulting in a left tibia fracture and left shoulder injury. As a result of the accident he was off work for a year and collected SSDI. Mr. Gattenby testified that he went back to work mainly as a foreman. In this position, he was supervising journeymen plumbers and assigning jobs. He continued to work full time. He testified that he would not always work as the foreman and occasionally would work by himself.

Following the March 5, 2014, injury in which he injured his right knee, Mr. Gattenby went back to work in the warehouse performing light duty. He testified that he had difficulty doing the work assigned. For instance, some of his tasks were cleaning racks and sorting. If he

stood too long his knee hurt. The sorting hurt his shoulders. He testified that he couldn't work all day and would stop when in pain.

Mr. Gattenby testified that currently his right knee is painful and sore to touch. He can't squat or kneel. He has a work bench at home but he doesn't use it. He has joined a fitness club where he works out on the elliptical for ten to fifteen minutes and then goes and sits in the steam room. He can't use the treadmill because it hurts his knees.

Mr. Gattenby testified that he performs light jobs around the house for about an hour per day. He doesn't carry groceries or laundry. If he does too much one day, the next day is very painful and he takes pain medications. He takes ibuprofen for pain. If he is moving around he takes more. Also, he stated that some days he just hurts and that he can't predict when that will happen. Mr. Gattenby testified that he does not believe he can work eight hours a day.

Mr. Gattenby was evaluated by Dr. James Stuckmeyer. The evaluation was on August 2, 2014. Dr. Stuckmeyer is of the opinion that as a direct, proximate and prevailing factor of the accident on March 5, 2014, Mr. Gattenby has a 30% permanent partial disability to the right knee.

Pre-existing the last accident, Dr. Stuckmeyer was of the opinion that the Employee had a 40% permanent partial disability to the left ankle, 25% permanent partial disability to the left shoulder and 25% to the right shoulder. Dr. Stuckmeyer was of the opinion that Mr. Gattenby is permanently and totally disabled due to the combination of the significant pre-existing disabilities and the disability from the most recent workplace accident. Dr. Stuckmeyer's opinion is unimpeached and uncontroverted.

Mr. Cordray, who is a vocational expert, also evaluated Mr. Gattenby and his testimony via deposition was credible. The Second Injury Fund emphasizes that Mr. Cordray opines that Mr. Gattenby was unable to return to work based on the left shoulder, right shoulder, right knee, left knee, and left ankle in combination. (Exhibit E, p. 24). Despite the Second Injury Fund's best efforts to isolate Mr. Gattenby's parachute accident as the cause of his permanent total disability, Mr. Cordray opined that Mr. Gattenby's bilateral work-related lower extremity and upper extremity disabilities would make it very difficult for him to work given his lack of keyboarding skills. (Ex. E, pp.35) Mr. Cordray testified that Mr. Gattenby was of an age of individuals that are not to be considered as a candidate for vocational rehabilitation based upon his combined physical limitations. Mr. Cordray also testified that based upon Mr. Gattenby's age, education and skill that there are no jobs available for him. This testimony is not controverted by any evidence.

There is no evidence in this case to refute the conclusion that Mr. Gattenby is permanently and totally disabled, nor is there any evidence which would sustain a finding that the Second Injury Fund is not liable based upon his prior work-related accidents. Accordingly, the Fund is liable for permanent total disability benefits to the Claimant for the rest of his life.

CONCLUSION

I find that the Claimant is permanently and totally disabled and that such disability is the result of the combined effect of the disability resulting from Mr. Gattenby's subsequent work injury to his right knee and the disability to his left ankle, right and left shoulders.

The Claimant's permanent total disability commenced on April 9, 2014. The Fund is liable for weekly benefits of \$853.08 commencing on April 9, 2014 and continuing on for the rest of Claimant's life so long as he is permanently and totally disabled, minus a credit for the disability paid by the Employer in the amount of \$10,724.40 for 15% at the 160 week level at \$446.85 per week.

Claimant's attorney Patrick Starke has requested a fee equal to 25% of all amounts awarded. I find that such request is fair and reasonable and order a lien to attach to this award for sums due and owing at present and for sums accruing in the future.

Made by: _____
Lawrence G. Rebman
Administrative Law Judge
Division of Workers' Compensation