

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

Injury No.: 09-044470

Employee: Kevin Hundelt

Employer: R & F Tile and Marble Company, Inc. (Settled)

Insurer: Nationwide Mutual Insurance Company (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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The sole issue stipulated in dispute at the hearing before the administrative law judge was the liability of the Second Injury Fund. The administrative law judge found that the 2005 changes to the Missouri Workers' Compensation Law have the effect that the term "subsequent compensable injury" as contained in § 287.200.1 RSMo no longer includes injuries sustained by occupational disease, and denied employee's claim as a result.

Employee filed an Application for Review alleging the administrative law judge erred in concluding there is no Second Injury Fund liability when the primary injury relates to an occupational disease.

We reverse the award of the administrative law judge for the reasons set forth herein.

Findings of Fact

The parties stipulated the following. On January 1, 2009, employee sustained a compensable right shoulder injury by occupational disease. At the time of the last injury, employee suffered a 25% preexisting permanent partial disability of the body as a whole referable to the low back, and a 17.5% preexisting permanent partial disability of the left shoulder. The combination of the preexisting low back disability and the primary injury is best represented by a 10% load factor, while the combination of the preexisting left shoulder disability and the primary injury is best represented by a 15% load factor.

We find that the January 1, 2009, primary injury resulted in a 16% permanent partial disability of employee's right shoulder.

Employee presented expert medical testimony from Dr. Shawn Berkin, who opined that employee's preexisting low back and left shoulder conditions constituted hindrances or obstacles to his employment or reemployment at the time of the primary injury.

Dr. Berkin's testimony is uncontested. We find credible Dr. Berkin's opinion that employee's preexisting low back and left shoulder conditions constituted hindrances or obstacles to his employment or reemployment at the time of the primary injury.

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Conclusions of LawStipulated issues

We understand the chief contention in this matter is a legal argument as to whether occupational diseases can result in "injuries" for purposes of the phrase "subsequent compensable injury" as it appears in § 287.220.1 RSMo, and that it is the position of the Second Injury Fund that they cannot. But we wish to note that the parties stipulated, at the outset of the hearing before the administrative law judge, that employee "sustained an injury by occupational disease." *Transcript*, page 1. As a result, there would appear to be an inherent contradiction between the parties' stipulations and the position advanced by the Second Injury Fund in this matter. Of course, the Second Injury Fund may have wished to stipulate that, as a matter of fact, employee sustained an "injury" by occupational disease, while disputing that, as a matter of law, employee did not sustain an "injury" by occupational disease. But this is by no means obvious from the generalized issue identified by the parties ("the liability of the Second Injury Fund"), and only becomes clear upon a reading of the award by the administrative law judge and the parties' briefs.

We are not permitted to address issues which the parties have not specifically identified as in dispute on the record at the hearing before the administrative law judge. *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001). Given the parties' briefs and arguments on appeal, we are convinced the apparent contradiction between the parties' stipulations and the Second Injury Fund's argument was inadvertent, and given the circumstances, we are confident that we understand the issue we are asked to resolve in this matter. Nevertheless, the importance of precisely stating the disputed issues on the record cannot be overstated.

Second Injury Fund argument

The Second Injury Fund argues that employee's left shoulder injury by occupational disease does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, in relevant part, as follows:

...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,...receives 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, 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.

(Emphasis added).

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We summarize our understanding of the Second Injury Fund's legal reasoning. "Injury," as defined in § 287.020.3 RSMo, excludes occupational diseases. The primary injury in this matter is an injury by occupational disease of the left shoulder. Thus, the primary injury is not an "injury." A primary injury by occupational disease can never be a compensable "injury" that can trigger Second Injury Fund liability under § 287.220.1.

We conclude that the Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287.

Section 287.020.3(5) RSMo states:

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. *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.*

(Emphasis added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable.

Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

(Emphasis added).

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The above sections specifically refer to a condition of ill caused by occupational disease, including one caused by repetitive motion, as an "injury." That is, the legislature specifically provided that the term "injury" includes occupational disease and that injuries by occupational disease, including injuries by repetitive motion, are compensable.

Based upon the foregoing, we construe the term "injury" as it appears in the phrase "subsequent compensable injury" in § 287.220.1 to include occupational diseases.

Nature and extent of Second Injury Fund liability

The parties' stipulations and the provisions of § 287.220.1 control our determination of the nature and extent of Second Injury Fund liability. That section requires employee to establish that, at the time of the primary injury, he suffered preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment. Where (as here), there is no contention that the employee is permanently and totally disabled, that section also requires that the preexisting permanent partial disabilities satisfy the applicable thresholds.

The parties have stipulated that employee suffered preexisting permanent partial disabling conditions of the low back and left shoulder that satisfy the applicable 50-week body as a whole threshold. Dr. Berkin opined that these conditions constituted hindrances and obstacles to employment, and we have found Dr. Berkin credible. We conclude that employee's preexisting conditions were of sufficient seriousness to constitute hindrances or obstacles to employment for purposes of § 287.220.1. We conclude the Second Injury Fund is liable for permanent partial disability enhancement owing to the combinative effect of employee's preexisting conditions of ill and his disability resulting from the primary injury. We proceed to a calculation of the extent of Second Injury Fund liability.

The parties stipulated special loading factors to represent the combinative effect of each of employee's preexisting conditions with the primary injury. The extent of permanent partial disability resulting from the primary injury is 16% of the right shoulder, or 37.12 weeks. The extent of permanent partial disability referable to the preexisting low back injury is 25% of the body as a whole, or 100 weeks. When we multiply the sum (137.12 weeks) by the loading factor stipulated by the parties (10%), the result is 13.71 weeks of enhanced permanent partial disability.

The extent of permanent partial disability referable to the preexisting left shoulder injury is 17.5%, or 40.6 weeks. The disability referable to this condition plus that referable to the primary injury is equal to 77.72 weeks. When we multiply this sum by the loading factor stipulated by the parties (15%), the result is 11.66 weeks of enhanced permanent partial disability.

Accordingly, the Second Injury Fund is liable for 25.37 weeks of permanent partial disability benefits.

Conclusion

We reverse the award of the administrative law judge. We conclude the Second Injury Fund is liable for permanent partial disability benefits.

The extent of Second Injury Fund liability is 25.37 weeks of permanent partial disability benefits. The stipulated rate of compensation is \$404.68 per week. Accordingly, employee is entitled to, and the Second Injury Fund is ordered to pay, \$10,266.73 in permanent partial disability benefits.

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

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

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The award and decision of Administrative Law Judge Edwin J. Kohner, issued December 27, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 16th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kevin Hundelt Injury No.: 09-044470
Dependents: N/A
Employer: R&F Tile and Marble Company, Inc. (Settled) Before the
Additional Party: Second Injury Fund Department of Labor and Industrial
Insurer: Nationwide Mutual Insurance Company (Settled) Division of Workers'
Hearing Date: September 29, 2011 Jefferson City, Missouri
Checked by: EJK/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 1, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:
The claimant, a tile setter, injured his right shoulder while setting floor tiles.
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 shoulder
14. Nature and extent of any permanent disability: 16% Permanent partial disability to the right shoulder
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$607.02
- 19. Weekly compensation rate: \$404.68
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Settled

22. Second Injury Fund liability: No

TOTAL:

None

23. Future requirements awarded: None

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

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: Scott L. Kolker, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Kevin Hundelt	Injury No.:	09-044470
Dependents:	N/A	Before the	
Employer:	R&F Tile and Marble Company, Inc. (Settled)	Division of Workers'	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial	Relations of Missouri
Insurer:	Nationwide Mutual Insurance Company (Settled)	Jefferson City, Missouri	Checked by: EJK/lsn

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related occupational disease in which the claimant, a tile setter, injured his right shoulder while setting floor tiles. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the Second Injury Fund.

At the hearing, the claimant testified in person and offered a medical report from Shawn L. Berkin, D.O., two Workers' Compensation settlements, correspondence from defense counsel, and medical records from Michael J. Milne, M.D., and Richard Rende, M.D. The defense offered no evidence beyond cross examination of the claimant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

The parties stipulated to the facts in this case, and the significant issue is a legal issue whether the Second Injury Fund statute, Section 287.220, RSMo 2000, applies to compensable occupational diseases. Based on the stipulated facts, the claimant suffered a 16% permanent partial disability to his right shoulder as a result of a compensable occupational disease. The claimant suffered from pre-existing partial disabilities of 25% of the low back that combines with a 10% load and a 17 ½% of the left shoulder that combines with a 15% load. The pre-existing permanent partial disabilities are of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. If the Second Injury Fund bears liability for this occurrence, the SIF liability is calculated as follows:

46.4 weeks for last injury x 15% loading factor =	6.96 weeks
40.6 weeks for pre-existing left shoulder disability x 15% loading factor =	6.09 weeks
100 weeks for pre-existing disability associated with his low back x 10% load =	10.00 weeks
Total	23.05 weeks

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).
6. In cases arising after August 27, 1993, the extent of both the pre-existing permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A

condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "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."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

The specific issue is whether the claimant's disability resulting from a combination of his various permanent partial disabilities is to be compensated by his employer or by the Second Injury Fund. In cases where the claimant's combination of his various permanent partial disabilities results from an accidental injury, that additional disability is to be compensated by the Second Injury Fund, because Section 287.220.1, RSMo 2000, as amended, specifically relieves the employer of such liability and commands that the compensation is to be paid by the Second Injury Fund. However, the Second Injury Fund has taken the position that the 2005 changes to the Workers' Compensation Act preclude liability against the Fund where the last injury was due to an occupational disease. The logical import is that the employer is not relieved of the liability to provide permanent partial disability benefits when the last occurrence of permanent partial disability results from a condition that is considered an "occupational disease." In support of its position the Fund argues that one of the elements establishing its liability is a showing that the injured worker sustained "a subsequent compensable injury." Section 287.220.1, RSMo Supp. 2009. According to the Fund, if one strictly construes Section 287.020.3(5), which defines the term "injury", occupational diseases are specifically excluded.

Thus, if the term "injury" specifically excludes occupational diseases, then an occupational disease cannot constitute "a subsequent compensable injury" for purposes of Fund liability. The Fund does not dispute that prior to 2005, it had liability even when the primary

work injury was due to an occupational disease. Of particular note is the fact that the 2005 amendment to the Act did not change any of the sections that the Fund relies on in making this argument, other than Section 287.800 that now requires the Act to be strictly construed. The Fund is not suggesting that there were any substantive changes to the Act that eliminated its liability where the primary injury is an occupational disease. On the contrary, it is merely arguing that the same language that imposed liability on the Fund for occupational diseases prior to the 2005, now should be interpreted differently to relieve it of liability and impose liability on the claimant's employer.

When Missouri first enacted the Workers' Compensation Act it only covered injuries by accidents. Occupational diseases were specifically excluded from coverage. Prior to the addition of occupational disease claims to the Act in 1931, the definition of "injury" or "personal injuries" was essentially identical to what it is today. Staples v A. P. Green Fire Brick Company, 307 S.W.2d 457, 459-60 (Mo. 1957). In the original enactment, as is true today, the Act stipulated that the "terms 'injury' and 'personal injuries' ...shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form..." Section 287.020.3(5) RSMo. The legislature did not amend the definition of "injury" or "personal injury" when it added coverage for occupational disease claims. Renfro v Pittsburgh Plate Glass Co., 130 S.W.2d 165 (Mo. App. 1939).

In the eighty years since occupational disease claims have been added to the Act, Missouri Courts have addressed the apparent incongruity between the definition of injury and its application to occupational disease claims in other parts of the Act. See Staples at 459-60; Renfro at 171; Marie v. Standard Steel Works, 319 S.W.2d 871, 874-75 (Mo. 1959). In Renfro the Court noted:

The Workmen's Compensation Act, as it was originally passed in this State, expressly excluded occupational disease and covered accidental injuries only. The words "accident," "injury," and "personal injuries" were carefully defined in the original Act, but, of course, were not intended to apply to occupational disease in any form because such disease was specifically excluded from the operation of the Act. [Sec. 3305, R.S. Mo. 1929 (Mo. Stat. Anno., sec. 3305, pp. 8238, 8239).] In 1931 the Legislature amended the above section of the Act by providing that an employer could elect to come under the Act as to occupational diseases. The amendment, however, did not change the definitions contained in said section and did not define "occupational diseases." It is, therefore, the duty of the courts to determine and apply the meaning of the terms mentioned in the above section in connection with occupational disease cases, even though they were not originally intended to apply to such cases. Renfro at 171.

In Renfro, the Court was faced with the issue of construing the term "injury" in the context of applying the statute of limitations to an occupational disease claim. Since the statute of limitations required a determination of the date of injury the Court concluded by implication the term "injury" applied to occupational disease claims. Id. The Court referred to cases that decided the issue in accident claims and it noted:

It has been held that an injury is not an accident but the result of an accident; and that the Statute of Limitations provided for in the compensation act does not begin

to run until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. [Wheeler v. Missouri Pacific R. Co., 328 Mo. 888, 42 S.W. (2d) 579; Kostron v. American Packing Co., 227 Mo. App. 34, 45 S.W. (2d) 871. See also Bridges v. Fruin-Colnon Const. Co., (Mo. App.), 52 S.W. (2d) 582.]

The last above-cited cases were decided upon the law as it existed before the "occupational disease" amendment of 1931 was in force, but the rule they apply with respect to the time of the "injury" we think is applicable to an occupational disease case in the absence of a definition in the amendment of 1931 as to the "time of the injury" in that kind of a case." Id.

Thus, the Renfro Court concluded that the term "compensable injury" includes occupational disease claims, at least to the extent of determining the statute of limitations.

The Missouri Supreme Court reaffirmed this concept in Staples v. A. P. Green Fire Brick Company. 307 S.W.2d 457 (Mo. 1957). The Court noted that by virtue of the addition of occupational disease claims to the Act it assumes the existence of an injury in all occupational disease cases.

"The legislature has enacted an amendment for the very purpose of authorizing employers and employees to elect to bring occupational disease claims and injuries under the Act, and, respectively, to pay and receive compensation therefore, in lieu of all common-law rights of action. The very bringing of such claims under the Act presupposes an 'injury,' and, therefore, an injury has generally been recognized as present and existing in all compensable occupational disease cases." Id. at 462.

Thus before 2005 even if one assumes that the definition of "injury" specifically excluded occupational diseases, then by implication from the addition of those claims to the Act and subsequent court decisions there was no question that the term "injury" as used in the Act included both accidents and occupational diseases. Id.; See also: Marie v. Standard Steel Works, 319 S.W.2d 871, 875 (Mo. 1959). This was clearly the understanding prior to the 2005 changes to the Act.

When the legislature enacted changes to the Act in 2005, Sections 287.020.3(5) and 287.220.1 were not changed in any way. The language in those sections was the same both before and after the 2005 amendments. The claimant argues very persuasively that it is a fundamental principal of statutory construction that if a law is amended, those portions of the law that remain unchanged continue to have the same meaning and interpretation after the amendment. Kelly v. Hanson, 984 S.W.2d 540, 544 (Mo.App. 1998); Sell v. Ozarks Med. Ctr., 333 S.W.3d 498, 508 Mo.App. S.D. 2011). Section 1.120 RSMo provides:

"The provisions of any law or statute which is reenacted, amended, or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

The logical result of this position is that, since the 2005 changes to the Act did not in any way alter the language of Sections 287.020.3(5) or 287.220.1, the prior judicial interpretations indicating that the term “injury” applied to both accidents and occupational diseases continued in full force and effect using the rule of construction cited above.

The language of other sections of the Workers’ Compensation law create a patchwork of confusing and difficult muddle of statutory provisions necessary to administer the statute. For instance, in Section 287.020.3(5), the definition of “injury” or “personal injury” only excludes occupational diseases “except as specifically provided in this chapter.” (Emphasis added). The definition of “injury” contemplated in the past that it would include occupational diseases under some circumstances. Section 287.067, RSMo Supp 2009, contains provisions that appear to include occupational diseases as injuries:

“An injury” by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.2, RSMo Supp 2009 (Emphasis added.) “An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (Emphasis added). Section 287.067.3 RSMo.

Thus, by its very terms the section of the Act defining an occupational disease recognizes that conditions caused by an occupational disease are specifically referred to as, and considered to be, injuries but to be “recognized as occupational diseases.”

This position will produce very difficult and strained conflicts with the rest of the Workers’ Compensation law that are not considered in this case. First, the statute of limitations for occupational diseases could not be determined if the Fund’s position prevails since it requires a showing of when it became “reasonably discoverable and apparent that an “injury” has been sustained...” (Emphasis added). Section 287.063.3 RSMo. Second, the average weekly wage could not be determined for occupational disease cases since it requires a calculation starting with the week immediately preceding the date of injury. Section 287.250.4. Third, occupational disease claims would be precluded from death benefits since that provision of the Act only allows for death benefits when the “injury causes death.” (Emphasis added). Section 287.240.1 RSMo. Fourth, the weekly compensation rates for temporary total disability, permanent partial disability and permanent total disability could not be calculated for occupational disease claims since they are all based on when the injury occurs. Sections 287.140, 287.190 and 287.200. Fifth, employers would have no responsibility to provide medical care to cure and relieve from the effects of an injury by occupational disease. Section 287.140.1, RSMo Supp. 2009. Sixth, medical providers would be allowed to bill the employee directly for medical services authorized by the employer, because the admonition of billing for those services would not apply to occupational diseases. Section 287.140.13, RSMo Supp. 2009. The Fund’s position that the term “injury” when used in the Act does not include occupational diseases would have the effect of removing occupational disease claims from the Act.

Certainly, by specifically altering the burden of proof for occupational disease claims from “a substantial factor” to “the prevailing factor” shows that the Legislature intended that occupational disease claims continue to be a part of the Workers’ Compensation Act. However, it does not follow that the term “subsequent compensable injury” as is contained in Section 287.200.1 includes both accidents and occupational diseases. This finding is consistent with the

Supreme Court's dicta in Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations, 277 S.W.3d 670 (Mo. Banc 2009) and the Court of Appeals decision in State ex rel. KCP&L Greater Missouri Company v. Cook, Slip Op., Case No. WD73462, -- S.W.3d -- (Mo.App. W.D. September 13, 2011).

The impact of this decision will be to make this area of the law more litigious, because parties will have substantial difficulty determining whether Section 287.220, RSMo 2000, releases the employer from certain aspects of liability for permanent disability benefits, just as determination of the forum for determination of compensation for occupational diseases has become hotly contested. Unfortunately, the Division of Workers' Compensation does not write the statutes that govern Workers' Compensation claims. Further, the final decision in this case will be determined by learned jurists in the Courts which have the expertise in our system to interpret those statutes. Until there is a legislative resolution to this controversy or a judicial conclusion, the undersigned hopes that the process will move toward a prompt resolution.

CONCLUSION

Both attorneys in this case submitted exceptionally well-written briefs with very powerful legal contentions. However, based on the above, the claim for Second Injury Fund benefits is denied.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation