

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

Injury No.: 09-080841

Employee: Debra Pitman
Employer: Sanofi Aventis (Settled)
Insurer: Zurich American Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read all briefs, reviewed the evidence, and considered the whole record, we find that the award and decision 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 and decision of the administrative law judge with this supplemental opinion.

The Second Injury Fund argues that the carpal tunnel syndrome in employee's right hand does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, because the term "injury" as defined in § 287.020.3 RSMo excludes occupational diseases.

The Commission offers this supplemental opinion to note that we have addressed and rejected an identical argument from the Second Injury Fund in a number of prior decisions. See, e.g., *Kathleen Peters*, Injury No. 07-114673 (LIRC, March 8, 2012); *Kelly Kirkpatrick*, Injury No. 09-071622 (LIRC, March 8, 2012); *Stephen Green*, Injury No. 07-129027 (LIRC, March 8, 2012); *Michelle Kitson*, Injury No. 09-000988 (LIRC, March 8, 2012); *Gloria Stiers*, Injury No. 08-095300 (LIRC, March 8, 2012); and *Kevin Hundelt*, Injury No. 09-044470 (LIRC, April 16, 2012). The parties are referred to those decisions for our analysis and reasoning pertinent to this argument from the Second Injury Fund.

We also note that the Western and Eastern Districts of the Missouri Court of Appeals have recently affirmed decisions from the Commission rejecting the same Second Injury Fund argument. See, respectively, *Treasurer of State v. Stiers*, WD75101 (Oct. 9, 2012), and *Peters v. Treasurer of State*, ED98300 (Nov. 6, 2012).

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued March 2, 2012, is attached and incorporated by this reference.

Employee: Debra Pitman

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We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 14th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Member

Attest:

Secretary

AWARD

| | | |
|------------------|--|--|
| Employee: | Debra Pitman | Injury No.: 09-080841 |
| Dependents: | N/A | Before the |
| Employer: | Sanofi Aventis (Settled) | Division of Workers' Compensation |
| Additional Party | Second Injury Fund | Department of Labor and Industrial Relations Of Missouri |
| Insurer: | Zurich American Insurance C/O Broadspire Services | Jefferson City, Missouri |
| Hearing Date: | January 5, 2012 | Checked by: KOB |

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: October 14, 2009
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
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:
Claimant developed repetitive trauma in her right wrist.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right wrist
14. Nature and extent of any permanent disability: 15% of the right wrist
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$6,666.87

Employee: Debra Pitman

Injury No.: 09-080841

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for applicable rates
- 19. Weekly compensation rate: \$380.47/\$380.47
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled.

22. Second Injury Fund liability: Yes

| | |
|---|------------|
| 13.705 weeks of permanent partial disability from Second Injury Fund: | \$5,214.34 |
|---|------------|

| | |
|---------------|-------------------|
| TOTAL: | \$5,214.34 |
|---------------|-------------------|

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: Sam Eveland

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|------------------|--|--|
| Employee: | Debra Pitman | Injury No.: 09-080841 |
| Dependents: | N/A | Before the |
| Employer: | Sanofi Aventis (Settled) | Division of Workers' Compensation |
| Additional Party | Second Injury Fund | Department of Labor and Industrial Relations Of Missouri |
| Insurer: | Zurich American Insurance C/O Broadspire Services | Jefferson City, Missouri |
| Hearing Date: | January 5, 2012 | Checked by: KOB |

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge on January 5, 2012 for a final hearing to determine the liability of the Second Injury Fund in the matter of Debra Pitman (“Claimant”). Attorney Sam Eveland represented Claimant. Assistant Attorney General Rachel Houser represented the Second Injury Fund. Sanofi Aventis (“Employer”), and its Insurer, previously settled with Claimant and did not participate in the hearing.

The parties stipulated to the following:

1. On or about October 14, 2009, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant. The accident occurred in Saint Louis County.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.; Venue is proper in the City of Saint Louis; Employer received proper notice of the claim; and Claimant filed the claim within the time allowed by law.
3. The average weekly wage at the date of injury was sufficient to result in compensation rates of \$380.47 for temporary total disability (“TTD”), and \$380.47 for permanent partial disability (“PPD”).
4. Employer did not pay any TTD, but did pay medical expenses totaling \$6,666.87.
5. Claimant and the Second Injury Fund stipulated to certain degrees of PPD, as indicated later in this Award.

The issue to be determined is the liability of the Second Injury Fund. The Second Injury Fund alleges it has no liability because an occupational disease is not a compensable “injury.”

Claimant offered the following exhibits, which were received into evidence without objection:

- A. Stipulation for Compromise Settlement – Primary Injury
- B. Dr. Shawn Berkin – Medical Report
- C. Dr. David Brown – Medical Records
- D. Signature Health Services – Medical Records

The Second Injury Fund did not offer any additional exhibits

FINDINGS OF FACT

Live Testimony

1. Claimant testified live. Her testimony was credible. She is a woman in her mid-50's who worked as a packaging agent for Employer.
2. In October 2009, Claimant sustained an injury due to repetitive motion arising out of and in the course of employment that resulted in injury to Claimant's right hand. The diagnosis was carpal tunnel syndrome.
3. Claimant received medical care as described in Exhibits B and C, including surgery.
4. Claimant and Employer settled the workers' compensation claim arising out of the accident for 15% of the right wrist.
5. Claimant has the following limitations or complaints regarding the work injury: She has pain in her hand to her elbow; She wears a brace and cannot open jars; She has numbness, swelling and weakness.
6. Prior to the date of injury, Claimant had the following disabling injuries or conditions:
 - a. In 2005, Claimant sustained an injury to her left knee, which was problematic prior to that time. Claimant received medical care as described in Exhibits B and D, including surgery and injections. She has symptoms of pain, swelling, popping, limited range of motion, and the inability to squat or kneel. The injury was disabling and constituted a hindrance and obstacle to employment. Claimant and the Second Injury Fund agreed that the preexisting permanent partial disability associated with Claimant's left knee was 17 ½% PPD of the left knee.

- b. In 2006, Claimant was diagnosed with osteonecrosis of the right hip, and in June 2006, she underwent a right total hip arthroplasty. Claimant received medical care as described in Exhibits B and D. She continues to have pain, sleep disruption, trouble getting up and down from the floor, and difficulty climbing steps. The condition was disabling and constituted a hindrance and obstacle to employment. Claimant and the Second Injury Fund agreed that the preexisting permanent partial disability associated with Claimant's right hip is 40% PPD of the right hip.

Opinion Evidence

7. Dr. Shawn Berkin examined Claimant, took a history, and issued a report. He found Claimant sustained an accident arising out of and in the course of employment that resulted in injury to Claimant. He provided the following ratings of permanent partial disability, and opined the combination of disabilities was significantly greater than their simple sum:
 - a. With respect to the primary injury: 30% of the right wrist.
 - b. With respect to the preexisting disabilities, which constituted a hindrance and obstacle to employment:
 - i. 45% of the left knee; and
 - ii. 65% of the right hip.

RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. § 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004).

Although it has stipulated to the basic elements of the case, the Second Injury Fund asserts a legal defense that would absolve it of any liability in cases such as this. The Second Injury Fund argues that when the legislature changed the construction of the Missouri Workers' Compensation Law from "liberal" to "strict", they eliminated the Second Injury Fund's liability when the primary claim is an occupational disease. 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, 423 (Mo.App. W.D.2010). A strict construction of a statute presumes nothing that is not expressed. *Id.*

The Second Injury Fund argument is crafted by viewing two portions of the Missouri Workers' Compensation Law through the lenses of strict construction: §287.020.3(5), which provides in relevant part, "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...."; and the part of §287.220 RSMo that provides for Second Injury Fund liability when a worker with preexisting disability "receives a subsequent compensable *injury*." If a "compensable *injury*" is necessary for Second Injury Fund liability, and "injury" cannot be construed to include "occupational disease," the logical conclusion, says the Second Injury Fund, is there is no Second Injury Fund liability when the primary claim is for an occupational disease. For the reasons herein, I find the Second Injury Fund's argument is without merit.

The flaw in the Second Injury Fund's position is that it ignores seven key words: "except as specifically provided in this chapter." Chapter 287 is replete with provisions specifically providing that "injury" includes "occupational disease."¹ Section 287.067.2 provides that 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" (emphasis added). Likewise, §287.067.3 provides, "An **injury** due to repetitive motion is recognized as an **occupational disease** for purposes of this chapter" (emphasis added).

Furthermore, by ignoring the important qualifying language, the Second Injury Fund's position corrupts the rules of statutory construction that mandate, "all provisions of a statute must be harmonized and every word, clause, sentence, and section thereof must be given some meaning." *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 215 (Mo.App. W.D. 2002). It is only by ignoring and discounting other words, phrases and clauses throughout the Chapter that the Second Injury Fund can assert their argument.

As recently explained in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 18 (Mo.App. W.D. 2011), the qualifying language of §287.020.3 has further significance. In *KCP & L*, the court held that the definition of "accident" in Chapter 287 did NOT include "occupational disease" for purposes of the application of the exclusivity provision of §287.120.² The court noted at page 23:

¹ Other provisions include §287.420 ("No proceedings for compensation for any **occupational disease** or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the **injury**."), §287.063.3 ("The statute of limitation referred to in section 287.430 shall not begin to run in cases of **occupational disease** until it becomes reasonably discoverable and apparent that an **injury** has been sustained related to such exposure")

² The focus on the definition of "accident" and the application of the exclusivity provision distinguishes the *KCP & L* case from the case at hand, which turns of the definition of "injury" and the Second Injury Fund statute.

The 2005 amendments eliminated the qualifier that the statutory definition of “accident” applied “unless a different meaning is clearly indicated by the context.” In contrast, the 2005 legislature *retained* similar qualifying language in the definitions of an “injury” and an “occupational disease.”³

The removal of the qualification from the definition of “accident” resulted in a single, narrow definition, whereas the retention of the qualifying language for “injury” and “occupational disease” indicates the legislature intended to maintain the established, broader definition of injury. The retention of the qualifying language and the lack of any substantive change to the Second Injury Fund or “occupational disease” portion of the statutes is further evidence the legislature had no intention to change the type of disability that triggers Second Injury Fund liability as the Second Injury Fund suggests.

In interpreting statutes, the purpose is to ascertain the intent of the legislature. *State ex rel. Feltz v. Bob Sight Ford, Inc.* 341 S.W.3d 863, 865 (Mo.App. W.D. 2011). The Second Injury Fund can point to nothing other than its precarious argument to suggest the legislature intended to change Second Injury Fund liability for occupational disease cases. An injury by occupational disease, particularly an injury by repetitive motion, which rises to a compensable level as against the employer, is a “compensable injury” for purposes of the Second Injury Fund. Claimant has met the burden imposed by law.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained a compensable last injury by repetitive motion that resulted in permanent partial disability equivalent to 15% of the right wrist (26.25 weeks).
2. At the time the last injury was sustained, Claimant had the following preexisting permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 17 ½% of the left knee (28 weeks).
 - b. 40% of the right hip (82.8 weeks).

Total for preexisting disabilities: 110.8 weeks

³ See § 287.020.3(5) (“The [] terms [‘injury’ or ‘personal injuries’] shall in no case *except as specifically provided in this chapter* be construed to include occupational disease in any form.” (emphasis added)); § 287.067.1 (“the term ‘occupational disease’ is hereby defined to mean, *unless a different meaning is clearly indicated by the context*, an identifiable disease arising with or without human fault out of and in the course of employment” (italics added)).

3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 10% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 26.25 weeks for last injury + 110.8 weeks for preexisting injuries = 137.05 weeks x 10% = 13.705 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$5,214.34 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Made by: _____
KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

Dated this _____ day of _____, 2012.