

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

Injury No.: 17-035499

Employee: Jody Sneed

Employer: Wal-Mart Associates, Inc. (settled)

Insurer: New Hampshire 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 parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

**Introduction**

The issues at hearing were 1) the nature and extent of permanent disability related to employee's alleged January 27, 2017, accident, and 2) the Second Injury Fund's liability, if any, for permanent partial disability or permanent total disability.

The administrative law judge found the Second Injury Fund liable for permanent total disability benefits pursuant to § 287.220.3 RSMo.

The Second Injury Fund filed a timely application for review with the Commission alleging that the administrative law judge misapplied § 287.220.3(2)(a)b by considering preexisting disabilities that do not meet the requirement of § 287.220.3(2)(a)a in determining the liability of the Second Injury Fund.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

**Findings of Fact**

Employee, a Wal-Mart cash office worker, sustained injury to her back on January 27, 2017, while she was lifting a bag of \$500.00 worth of quarters from a safe to put into a cash recycler machine.

On February 27, 2019, employee settled her claim with employer/insurer for \$41,888.22 based on 20% permanent partial disability of the body as a whole plus payment of out-of-pocket medical expenses of \$7,946.62. The administrative law judge found that employee sustained 20% permanent partial disability of the body as a whole related to her January 27, 2017, accident. No party disputes this finding.

Employee had several medical conditions prior to her January 27, 2017, primary injury. These conditions consisted of: (1) right and left hip pain requiring hip replacement surgeries, both related to workers' compensation injuries; (2) degenerative disc disease resulting in assessment of 10% disability based on the body as whole related to a

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workers' compensation claim; and (3) left knee problems due to a fall that required treatment in the form of injections and therapy.

Based on Dr. Mitchell Mullins' evaluation, the administrative law judge found that employee's preexisting compensable left hip injury resulted in 55% preexisting permanent partial disability at the 207 week left hip level. He found that this disability exceeded the fifty-week threshold to establish Second Injury Fund liability provided for in § 287.220.3(2). Employee's left hip disability was the subject of a 2001 workers' compensation claim that alleged occupational disease due to repetitive pushing and pulling of pallets of freight in order to stock shelves.

The administrative law judge further found, based on employee's credible testimony and her experts Dr. Mullins and vocational counselor Mr. Philip Eldred, that employee is permanently and totally disabled as a result of her January 27, 2017, injury combined with disabilities she had before that date.

We adopt the administrative law judge's factual findings relating to the nature and extent of employee's primary and preexisting disabilities and medical causation of her permanent total disability.

### **Conclusions of Law**

#### Second Injury Fund liability

Employee seeks an award of permanent total disability benefits from the Second Injury Fund. Because employee's primary injury occurred after January 1, 2014, we must apply the new criteria set forth under § 287.220.3(2) RSMo for establishing a compensable claim against the Second Injury Fund. See *Cosby v. Treasurer*, 579 S.W.3d 202 (Mo. banc 2019).

In relevant part, the statute provides as follows:

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* [emphasis added]; or
  - (iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-

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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[.]

§ 287.220.3(2) RSMo.

Pursuant to § 287.800.1 RSMo, we must strictly construe the language of Chapter 287. As our courts have instructed:

A strict construction of a statute presumes nothing that is not expressed. ... [I]t 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).

Preliminarily, we find the administrative law judge erred in considering disability attributable to employee's 2001 left hip workers' compensation claim as a qualified preexisting condition pursuant to 287.220.3 because employee's 2001 claim alleged an occupational disease due to repetitive pushing and pulling of pallets of freight in order to stock shelves. Pursuant to strict construction occupational disease claims must be excluded from consideration as a preexisting injury pursuant to § 287.220.3(2)(a)a(ii) because that section references a preexisting injury that is "A direct result of a compensable injury *as defined in section 287.020[.]*" Section 287.020.3(5) states that "injuries" and "personal injuries" "*shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form [emphasis added] . . .*"

We further find that even if employee's preexisting left hip disability were deemed a qualified preexisting disability pursuant to § 287.220.3, employee's Second Injury Fund claim must fail because she failed to demonstrate that her alleged permanent total disability resulted from a combination of disability attributable to her primary injury *and a single preexisting disability* that satisfies the enumerated criteria under § 287.220.3(a).

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Rather, based on the only evidence in the record, employee's alleged permanent and total disability is due to the combination of her primary injury and *various* claimed preexisting disabling conditions, including at least one (10% of the body as a whole attributable to degenerative disc disease) that clearly does not equal a minimum of fifty weeks of compensation according to medical standards used in determining such compensation.

It appears to us that employee invites us to presume something not expressed within the language chosen by our legislature. Specifically, it appears employee asks us to apply § 287.220.3(2)(a)b as if it read as follows:

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, **and all other disability existing at the time the last injury was sustained,** results in a permanent total disability as defined under this chapter[.]

(additions in bold).

Pursuant to the strict construction mandate, we cannot read the foregoing additional words into the language of § 287.220.3(2)(a)b. Employee's interpretation further requires us to ignore the plain language of the existing section, which clearly instructs us, by using singular rather than plural language, to consider "*the preexisting disability.*"

We acknowledge that a majority of the Missouri Court of Appeals, Western District, recently filed an opinion, not yet final, that is at odds with our interpretation of § 287.220.3(2)(a)b. See *Treasurer of the State of Missouri as Custodian of the Second Injury Fund v. Jonathan Parker* WD83030 (July 14, 2020). One member of the three-judge division that decided the case challenged the majority's interpretation in a strongly written dissenting opinion. For the reasons stated above, we fundamentally disagree with the Western District majority's recent interpretation of § 287.220.3(2)(a)b.

We instead find that the express language of § 287.220.3(2)(a)b requires that an employee prove permanent total disability resulting from the combination of the primary injury and a single, qualifying preexisting disabling condition, in order to receive permanent total disability benefits from the Second Injury Fund under the new statutory test.

There is no evidence on this record that would suggest (let alone persuasively demonstrate) that employee is unable to compete for work in the open labor market owing to the effects of her January 27, 2017, injury in combination with a single preexisting disability that meets the fifty-week requirement set out in § 287.220.3(2). Rather, as we have found, employee's permanent and total disability is due to a combination of the effects of the primary injury and various preexisting disabilities.

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Accordingly, based on the above analysis, we conclude, that employee has failed to satisfy the requirements of § 287.220.3 RSMo. We therefore deny employee's claim against the Second Injury Fund.

**Decision**

We reverse the award of the administrative law judge.

Employee's claim against the Second Injury Fund is denied because her evidence fails to satisfy the standard set forth under § 287.220.3 RSMo.

The award and decision of Administrative Law Judge Kevin A. Elmer, issued September 13, 2019, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 4th day of August 2020.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



*R. Cornejo*

Robert W. Cornejo, Chairman

*Reid K. Forrester*

Reid K. Forrester, Member

DISSENTING OPINION FILED

Shalonn K. Curls, Member

Attest:

*Pamela M. Hozman*  
Secretary

Employee: Jody Sneed

**DISSENTING OPINION**

After a review of the evidence, I am convinced that employee has met her burden of proving her entitlement to permanent total disability benefits from the Second Injury Fund. The facts of this case amply demonstrate that the Commission majority's reading of the statute is unworkable from the standpoint of protecting Missouri employers and encouraging the employment of the partially disabled.

*A compensable repetitive motion injury qualifies as a preexisting disability under § 287.220.3(2)(a)a(ii) RSMo.*

Employee meets the threshold requirement of § 287.220.3(2)(a)a because she has a preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation which is a direct result of a compensable injury as defined in § 287.020. Even though employee's preexisting conditions and injuries to her right and left hip resulted from repetitive motion and not a one-time accident, they should still qualify under the applicable statutory definitions. The statute refers to "As a direct result of a compensable *injury* as defined in section 287.020 [emphasis added]."

Section 287.020.3(1) indicates that for purposes of Chapter 287, the term "**injury**" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor 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. § 287.020.3(1).

Thus it is apparent that the word *injury* as used in § 287.220.3(2)(a)a(ii) refers to an injury arising out of and in the course of employment. Clearly, employee's work related injuries, albeit repetitive motion injuries to her left and right hip, qualify as injuries arising out of and in the course of her employment. The majority finds that repetitive motion injuries cannot qualify as preexisting conditions to meet the statutory threshold, but it is clear the word injury simply refers to an injury arising out of the course of employment, as were employee's preexisting hip conditions. All that is required under § 287.220.3 is that the compensable injury be one defined in § 287.020. Section 287.020 makes no attempt on its face to exclude occupational, repetitive motion injuries that are deemed compensable. If the legislature had intended to exclude these types of injuries from the threshold established in § 287.220.3(2)(a) it could easily specifically excluded them.

The majority construes the language of § 287.020(5) as excluding occupational disease cases from being eligible to meet the threshold requirement of § 287.220.3(2)(a)(ii). However § 287.020(5) does not say that. Rather, the statute says the term "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. . . These terms shall in no case *except specifically provided in this chapter* be construed to include occupational disease in any form [emphasis added]. The key words in this section are the terms "*except as specifically provided in this chapter.*" Certainly, Chapter 287 specifically provides for the compensability of repetitive motion injury claims as occupational disease cases. Thus, the majority's reliance on this particular statute to exclude repetitive motion injury claims from meeting the threshold is unfounded.

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Section 287.067 defines occupational disease and specifies the circumstances under which an occupational disease or an injury due to repetitive motion is compensable. Under § 287.067(3), an injury due to repetitive motion is an occupational disease recognized for purposes of this chapter. The section states, “[O]rdinary gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day to day living are not compensable.” These statutes taken as a whole do not exclude repetitive motion injury because such injuries are specifically provided for in § 287.067(3). A reading of these statutes together indicates that a repetitive motion injury fits the definition of “injury” as contained in § 287.020(3) as long as it arises out of and in the course of employment.

The purpose of § 287.020 is to define certain terms as used in Chapter 287, Missouri’s Workers’ Compensation Law. The reference to § 287.020 in § 287.220 simply indicates that the injury must be a compensable one that arises out of and in the course of employment which is the definition of injury contained in § 287.020. To adopt the majority’s interpretation of this statute is to relegate compensable occupational disease cases that arise out of the course of employment to a status inferior to that of “accident,” which is defined under § 287.020(2) as an unexpected traumatic event identifiable by time and place. Certainly, one cannot reasonably contend that occupational disease cases including repetitive motion injuries that occur over time are less significant or important than accidents triggered by a one-time traumatic event identifiable by place and time.

To argue that the legislature intended to exclude occupational disease cases from being preexisting conditions that would meet the threshold requirement of the law is tantamount to favoring one type of compensable event over another under the Workers’ Compensation Law.

*The uncontroverted evidence demonstrates that employee’s preexisting medical conditions, including her left hip and right hip compensable injuries, combined with her primary low back injury to render employee totally and permanently disabled.*

The majority challenges the administrative law judge’s reliance on a preexisting medical condition (10% permanent partial disability of the body as a whole related to degenerative disc disease) that does not satisfy the four categories of threshold findings as contained in the statute. However, employee produced uncontroverted evidence that her left hip and right hip compensable injuries satisfy the fifty-week threshold required to qualify for Second Injury Fund liability. Once having met that threshold, it is appropriate to consider other medical conditions to determine whether the employee is totally permanently disabled. The majority contends that only one qualifying preexisting condition may be considered pursuant to § 287.220.3 to qualify for permanent total disability against the Second Injury Fund. While there is no question that, due to lack of funding, the legislature intended to limit the Second Injury Fund’s liability when it made legislative changes to § 287.220. Nonetheless, the fact remains that the legislature did not intend to disallow consideration of other conditions once an employee meets the threshold under one of the four statutory categories.

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Absolutely no language in the statute indicates that a *single* qualifying condition and the last work related accident alone must combine and that disallows consideration of any other condition. Rather, the legislature set forth four conditions precedent, one of which must be met that combine with the last accident to result in total permanent disability. The statute does *not* prohibit consideration of other medical conditions once an employee satisfies one of the four conditions precedent. The only time that preexisting injuries are mentioned in the statute is under the third condition precedent which states that if the preexisting injury that the employee is attempting to combine to result in Second Injury Fund liability does not stem from a compensable injury, then the preexisting disability must "directly and significantly aggravate or accelerate the subsequent work-related injury" and "shall not include unrelated pre-existing injuries or conditions that do not aggravate or accelerate the subsequent work related injury." Presumably, since the legislature specifically included that language only in subsection (iii) it only applies when the employee is utilizing that subsection for a non-compensable injury as the condition precedent for Second Injury Fund liability. Because the language in subparagraph (iii) which states "shall not include unrelated pre-existing injuries or conditions that do not aggravate or accelerate" does not relate back to the condition precedents set forth in subparagraphs one, two, or four arguably the legislature allows an employee who has met condition precedents one, two, or four to consider preexisting disability that does *not* aggravate or accelerate the subsequent work related injury.

The legislature presumably intended to set a threshold to reach Second Injury Fund liability where a preexisting condition must have been significant enough to equate to at least fifty weeks of disability and meets one of the subsections 1-4. If the employee satisfies one of these condition precedents, nothing in the language of the statute prohibits the administrative law judge from considering other unrelated conditions that do not necessarily qualify under one of the four condition precedents. Certainly, the statute would not intend to prohibit permanent total disability for an individual who was able to qualify under more than one subsection or condition precedent.

When interpreting statutes it is required to give words their plain and ordinary meaning whenever possible with a goal of giving effect to the legislature's intent. *St. Louis Police Officers' Association v. Board of Police Commissioners of the City of St. Louis*, 259 S.W.3d 526,528 (Mo. banc 2008). Statutes should be interpreted to avoid unreasonable or absurd results including those that might defeat the purpose of the legislature. *Leiser v. City of Wildwood*, 59 S.W.3d 597,603 (Mo. App. 2001). The adjudicator should presume that the legislature included every word of the statute for a purpose and that every word has meaning. *Hewitt v. St. Louis Rams P'ship*, 409 S.W.3d 572,574 (Mo. App. 2013).

In this case, certainly, when one considers employee's right and left hip injuries resulting in total hip replacements combined with the primary low back injury from the January 27, 2017, accident, employee is totally and permanently disabled. The Second Injury Fund has never challenged permanent work restrictions imposed by employee's expert Dr. Mitchell Mullins based on a combination of disability to employee's lumbar spine and hips.

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When interpreting statutes, courts must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible. *Mantia v. Missouri Department of Transportation*, 529 S.W.3d 804,809 (Mo. banc 2017). "In determining the intent and meaning of statutory language, words must be considered in context and sections of statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *S. Metro Fire Protection v. City of Lee's Summit*, 278 S.W.3d 659,666 (Mo. banc. 2009).

Conclusion

The statute does not distinguish between accidental injuries and repetitive motion injuries or occupational diseases. Both should be included in conditions that could meet the statutory threshold pursuant to § 287.220.3(2)(a)(iii). Employee's Second Injury Fund claim meets the statutory threshold as set out in § 287.220.3(2)(a) because she has preexisting left and right hip injuries which arose out of and in the course of her employment and were assigned disability ratings of greater than fifty weeks and met the statutory threshold. The statute does not preclude consideration of employee's other disabilities in arriving at the conclusion that she is permanently and totally disabled for purposes of Second Injury Fund liability.

The Commission should uphold the administrative law judge's award of permanent total disability benefits against the Second Injury Fund in this case. Because the majority finds otherwise, I respectfully dissent.



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Shalonn K. Curls, Member

## AWARD

Employee: Jody Sneed

Injury No. 17-035499

Dependents: N/A

Employer: Wal-Mart Associates, Inc.

Insurer: New Hampshire Insurance Company

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

Hearing Date: June 10, 2019

Checked by: KAE

### 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: January 27, 2017.
5. State location where accident occurred or occupational disease was contracted: Greene 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 employee was working in the cash office of a Wal-Mart store on the date of the accident and was in the process of filling a cash recycler machine with quarters. She had lifted a bag of \$500.00 worth of quarters from the safe to put into the cash recycler machine and when she did so she had back and leg pain.
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: Lower back.
14. Nature and extent of any permanent disability: 20% permanent partial disability to the body as a whole (400 week level) as a result of the January 27, 2017 injury.
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$7,946.62, plus payment of Benefit Recovery lien.

17. Value necessary medical aid not furnished by employer/insurer? \$0.00
18. Employee's average weekly wages: \$636.40
19. Weekly compensation rate: \$424.27
20. Method wages computation: Stipulation of the parties.

**COMPENSATION PAYABLE**

21. Amount of compensation payable as per February 27, 2019, Stipulation for Compromise Settlement:

80 weeks of permanent partial disability from Employer / Insurer: \$33,941.60

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: beginning 80 weeks from and after the date of August 15, 2017, when claimant reached maximum medical improvement and, thereafter, for Claimant's lifetime.

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: Robert T. Beezley, P.C.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Jody Sneed

Injury No. 17-035499

Dependents: N/A

Employer: Wal-Mart Associates, Inc.

Insurer: New Hampshire Insurance Company

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

Hearing Date: June 10, 2019

Checked by: KAE

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on June 10, 2019. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about July 15, 2019.

The employee appeared personally and through her attorney Robert T. Beezley. The employer and insurer did not appear due to a settlement agreement that was approved on February 27, 2019. The Second Injury Fund appeared through its attorney Skyler Burks, Assistant Attorney General.

### **STIPULATIONS**

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about January 27, 2017, Wal-Mart Associates, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by New Hampshire Insurance Company.
- (2) On the alleged injury date of January 27, 2017, Claimant was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about January 27, 2017, the employee sustained an accident, which arose out of and in the course of her employment with the employer.
- (4) The above-referenced employment and accident occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (5) The employee notified the employer of her injury as required by Section 287.420 RSMo.

- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430 RSMo.
- (7) At the time of the alleged accident of January 27, 2017, the employee's average weekly wage was sufficient to allow a compensation rate of \$424.27 for temporary total disability compensation, permanent total disability compensation and permanent partial disability compensation.
- (8) No temporary total disability compensation has been provided to the employee.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$7,946.62 in medical expenses plus satisfaction of a Benefit Recovery lien.
- (10) The employee reached maximum medical improvement on August 15, 2017.

### ISSUES

The issues to be resolved by hearing include:

- (1) Whether the employee sustained any permanent disability as a consequence of the alleged accident of January 27, 2017; and, if so, what is the nature and extent of the disability.
- (2) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation.

### EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. In addition, the employee offered for admission the following exhibits:

|                 |                                      |
|-----------------|--------------------------------------|
| Exhibit 1.....  | MR Lumbar Spine Records              |
| Exhibit 2.....  | Salim Rahman, MD Records             |
| Exhibit 3.....  | Lumbar Meyelogram Records            |
| Exhibit 4.....  | Boyd Crockett, MD Records            |
| Exhibit 5.....  | Erin Greer, MD Records               |
| Exhibit 6.....  | Ash Grove Family Care Center Records |
| Exhibit 7.....  | Cox Health MRI Records               |
| Exhibit 8.....  | Ash Grove Family Care Center Records |
| Exhibit 9.....  | Cox Health ER Records                |
| Exhibit 10..... | Dr. Rahman Operative Report          |
| Exhibit 11..... | MR Lumbar Spine Records              |
| Exhibit 12..... | Dr. Lennard IME                      |

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|-----------------|--|
| Exhibit 13..... | Dr. Mullins Medical Report                                   |
| Exhibit 14..... | Dr. Mullins Curriculum Vitae                                 |
| Exhibit 15..... | Southwest Spine & Sports Medicine Records                    |
| Exhibit 16..... | The Business & Industry Health Occ. Med Clinic Records       |
| Exhibit 17..... | Arnold Chiropractic Center Records                           |
| Exhibit 18..... | Ferrell Duncan Clinic Records                                |
| Exhibit 19..... | Dr. James Bolin Orthopedic Surgeon Records                   |
| Exhibit 20..... | MRI of Springfield Records                                   |
| Exhibit 21..... | Putnam Orthopedic Clinic Records                             |
| Exhibit 22..... | Ash Grove Medical Center Records                             |
| Exhibit 23..... | Springfield Neurological Institute Records                   |
| Exhibit 24..... | Volarich Medical Group Records                               |
| Exhibit 25..... | Dr. Lennard IME  |
| Exhibit 26..... | Department of Orthopedic Surgery Records                     |
| Exhibit 27..... | Bradley Walz, MD Records                                     |
| Exhibit 28..... | Dr. Bond Records   |
| Exhibit 29..... | Vocational Consulting Services, LLC Records                  |
| Exhibit 30..... | Phillip Eldred Curriculum Vitae                              |
| Exhibit 31..... | Stipulation for Compromise Settlement – Injury No.17-035499  |
| Exhibit 32..... | Social Security Notice of Award                              |
| Exhibit 33..... | Transcript of Compromise Settlement Injury No. 88-178672     |
| Exhibit 34..... | Stipulation for Compromise Settlement – Injury No. 01-167865 |
| Exhibit 35..... | Cox Health, Dr. Workman Records                              |

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case, however, it offered for admission the following exhibits:

Exhibit I ..... Deposition Transcript of Jody Sneed, September 20, 2017

The exhibit was received and admitted into evidence

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

## DISCUSSION

### *Background & Employment*

Claimant is currently 62 years of age, having been born on January 12, 1957. At the time of the accident on January 27, 2017 she was an employee of Wal-Mart Associates Inc. located in Greene County, Missouri. Her job duties at Wal-Mart Associates Inc. included working in the cash office and making sure that the clerks at Wal-Mart had sufficient cash to run their cash registers. Claimant had worked for Wal-Mart for 21 years in a total of three different stores and in various departments. She last worked for Wal-Mart on February 7, 2017, shortly after her accident of January 27, 2017.

Currently, Claimant is receiving Social Security Disability payments, said payments having started on February 7, 2017, when she was last gainfully employed at Wal-Mart. Claimant has not worked, nor has she looked for work, since that date.

With respect to Claimant's educational background, she testified that she received her high school diploma, but had no vocational training nor schooling after that time.

#### *Accident*

On January 27, 2017, Claimant was working at Wal-Mart in the cash office and was in the process of filling a cash recycler machine with quarters. She had lifted a bag of \$500.00 worth of quarters from the safe and put it on a cabinet, so she could lift it again to put into the cash recycler machine. A cash recycler machine allows other employees at Wal-Mart to access cash to run their registers. As Claimant lifted the bag of quarters to place them in the machine, she began to notice a problem with her back. Within 10 to 15 minutes she experienced back and leg pain. That occurred between 9:00 and 9:30 a.m. The pain in her back was just below the middle of her back in an area where she had never experienced pain before. Although in pain, she was able to finish her work shift on January 27, 2017.

Since this event occurred on a Friday, she was off work on Saturday, January 28, 2017. Claimant rested that day at home and her condition seemed to worsen.

#### *Treatment for January 27, 2017 Accident*

On Sunday, January 29, 2017, Claimant first sought medical care for this injury. She went to Cox Medical Center South emergency room and an MRI was performed at the facility. The MRI showed a large disc extrusion in the lumbar area (Exhibit 1). The radiologist read the MRI as showing a new large disc extrusion at the level of L1-2 causing severe spinal canal stenosis and nerve root impingement.

Claimant was then referred to a neurosurgeon, Dr. Rahman, who first saw her on February 7, 2017 (Exhibit 2). Dr. Rahman in that medical record commented that Claimant had developed progressive neurological deficit with significant motor weakness. He immediately recommended that she undergo a surgery to remove a large herniated disc that was impinging upon the nerve root at L1-2. On February 13, 2017, Dr. Rahman performed surgery that consisted of a L1-L2 microdiscectomy (Exhibit 10).

Following surgery, Claimant underwent physical therapy for a period of time and was released by Dr. Rahman in March of 2017. Following that, however, she had some worsening symptoms with respect to her lower back and ultimately had an epidural injection by Dr. Workman in August of 2017. That was the last treatment she had with respect to the injury occurring on January 27, 2017.

*Current Complaints*

Ms. Sneed testified at the hearing that she currently has less radiation of pain down her left leg than she had prior to surgery, although she continues to have low back pain on a very constant basis. She did report increased left leg pain at night time or after walking a prolonged amount of time and she has pain and numbness down and into her left foot and gets some relief by using Gabapentin. Her symptoms of low back and left leg numbness and pain increase by standing, walking, bending, and twisting.

She reports that she can only lift and carry light objects and can only walk short distances and has difficulty climbing a flight of stairs.

Activities such as gardening or light housework increase her pain. Although she can perform these activities for a very short time, she must then rest. Claimant has not gone fishing since the accident occurred as she had enjoyed doing before.

*Pre-existing Injuries*

Before the January 27, 2017, accident involving her low back, Claimant suffered from several pre-existing medical conditions that were a hindrance or obstacle to her employment or reemployment.

One of those conditions involved her left hip. While working at Wal-Mart in 2001, Claimant sustained an injury to her left hip. At that time she was working in the ammunition department at Wal-Mart and her activities such pulling, pushing, and moving pallets of freight in order to stock shelves over a period of time caused injury to her left hip. That workers' compensation claim resulted in a total hip replacement surgery that was performed by Dr. Putnam on October 8, 2002. The case was settled under Workers' Compensation for 13% permanent partial disability to the hip (Exhibit 34).

Ms. Sneed testified at the hearing that since that time she has had difficulties working because of the hip, doing activities such as squatting and bending. In addition, she stated that standing and walking for prolonged periods of time would cause pain. Significantly, her testimony was that after her hip replacement in 2002 she had to change jobs at Wal-Mart. At the time of the injury in 2001, she was working in the sporting goods department doing stocking. After that she moved to another Wal-Mart located on South Campbell street in Springfield, MO, to a more sedentary position. In spite of having to change jobs, because of the injury she still continued to have difficulties and pain in her left hip, even when she was sitting for prolonged periods of time.

Ms. Sneed also testified that over the years the condition of her hip affected her work at Wal-Mart. At times she had to have assistance in performing certain tasks and she was also slower on occasion as she would walk throughout the store. She indicated that she had missed six

to eight weeks of work due to her hip surgery.

A second medical condition which Claimant had issues with over the years involved her right hip. At the hearing she testified that around 2012 she started developing issues with her right hip and over the years, the condition of her right hip became more painful. Finally, in March of 2014, she underwent right hip surgery under the care of Dr. Bradley Walz, who performed a total hip replacement surgery of the right hip.

Ms. Sneed continued to have issues with her right hip, even after the surgery in 2014, and had more difficulties sitting because of it. Squatting and bending were also difficult. She stated that she started walking much slower than before and continued to have pain especially when standing or walking for prolonged periods of time.

Ms. Sneed could not work at the same pace as she had before and she needed help from time to time. She testified that she missed eight to 10 weeks of work following her right hip surgery and has continued to have right hip pain since that time. She described her pain in the right hip as being "sciatica" and she would have pain that would go down into the right leg.

Ms. Sneed's testimony at the hearing in regards to the difficulties she has suffered because of her left and right hip are supported by the medical reports in this case. For example Exhibit 21, the office records of Dr. John Putnam beginning in November 2001 indicated Claimant had had left hip pain for about one year and had difficulty getting on and off ladders at work or picking up items with her hips flexed. In 2002, according to Dr. Putnam's records, her pain had worsened and her osteoarthritis in her hip was much more advanced. (Exhibit 21)

David Volarich, who performed an independent medical examination on Claimant on August 2, 2004 (Exhibit 24), indicated that since the year 2000 Claimant had described performing jobs stocking shelves and climbing up and down ladders five to 25 times per day, and in doing these activities she had developed left hip pain. Dr. Volarich rated her injury and the aftermath of her total hip replacement surgery at 65% permanent partial disability to the hip. He placed restrictions on Claimant so as to avoid or to limit repetitive stooping, squatting, crawling, kneeling, and climbing. According to Dr. Volarich, she was to avoid standing and walking for more than thirty minutes at a time.

With respect to the right hip, Exhibit 2 are the records of Dr. Walz beginning in March 2014. His record had indicated that Claimant had experienced right hip pain for over one year at that point, that injections and physical therapy had not helped improve her situation, and diagnosed her with having severe osteoarthritis of the right hip.

A third medical problem that Claimant testified to and which is reflected in the medical records in this case is pre-existing degenerative disc disease. Claimant had problems with her lower back as far back as 1988, when she suffered an on-the-job injury while working at Captain

D's. The location of her low back pain in this injury was different than the injury she sustained in January of 2017. In 1988, her injury affected the L5-S1 area of the lumbar spine. On the other hand, the accident that occurred in January 2017 affected the L1-L2 disc space. Claimant indicated that following the on-the-job injury at Captain D's, she continued to have periodic low back pain and had difficulties over the years because of the condition. She had to have help from co-workers from time to time with lifting and carrying heavy, large objects. She was also slower at performing certain tasks. She also required more frequent breaks compared to other employees, because of the back pain. Her treatment over the years for the low back pain has included chiropractic treatments, traction, pain medication, and also muscle relaxers. Exhibit 33 is the stipulation for settlement for the 1988 low back injury at Captain D's. This case was settled for 10% partial permanent disability to the body as a whole.

Claimant testified that before the injury occurring in January of 2017, that she could sit for approximately 20 to 30 minutes, could stand for approximately 20 to 30 minutes, could walk for approximately 30 to 45 minutes, and could lift up to 25 pounds.

Now at the present time those activities are even further limited and she has to lie down or recline on a daily basis two to three times per day, for approximately 45 minutes at a time at varying times throughout the day.

Finally, a fourth problem that existed before the January 27, 2017, occurrence involves Claimant's left knee. She testified that in November of 2016 she had an accident in the state of Arkansas that injured her left knee when she fell. However, she did not receive any medical treatment for this condition until after the January 27, 2017, accident that occurred at Wal-Mart. In April of 2017 she was treated by Dr. Boyd Crockett, who gave her injections in the knee (Exhibit 4). In addition, Dr. Crockett prescribed a knee brace and physical therapy.

Currently, Claimant takes several different medications, but the most pertinent medications for this proceeding include Gabapentin for pain and Disclufenac, an anti-inflammatory.

Finally, Claimant testified that as a result of all her medical conditions her day-to-day activities are limited to light housework, which she can do on a very limited basis for only short periods at a time.

#### *Independent Medical Exam and Vocational Opinions*

Phil Eldred, a certified vocational counselor, evaluated Claimant, and his report appears in Exhibit 29. He indicated in his report that he was retained to evaluate Claimant's employability in the workforce and met personally with her. He indicated that he had reviewed her medical records listed in his report, (Exhibit 29).

It was Mr. Eldred's professional opinion, that Claimant is totally and completely disabled,

as a result of her pre-existing medical conditions and injuries existing before January 27, 2017, combined with her low back injury sustained at that time. Mr. Eldred explained in his report that he had relied on the restrictions given by Dr. Mitchell Mullins ( Exhibit 13). Now, Mr. Eldred indicated that Dr. Mullins' restrictions would not allow work at even the sedentary work level and thus would preclude all gainful employment.

Dr. Mullins rated Claimant's impairments at 35% permanent partial disability to the body as a whole as the result of the low back injury that occurred on January 27, 2017. He also rated her pre-existing conditions at the level of 55% for the left hip, 48% to the right hip, and 15% to the body as a whole for pre-existing degenerative disc disease. He offered an opinion that Claimant is totally and permanently disabled from a combination of her work injury of January 27, 2017, and her pre-existing medical conditions. Finally, in Exhibit 13 he gave work restrictions to include occasional lifting of no more than 20 pounds and no frequent lifting. He indicated that Ms. Sneed could sit two hours in an eight hour work day, but would have to alternate sitting, standing, and walking and would have to do that every 15 to 30 minutes at a time. Her reaching in all directions would be limited because of her lumbar spine. Again, Mr. Eldred was under the opinion that these restrictions would preclude all gainful employment.

## **FINDINGS AND CONCLUSIONS**

The burden of establishing any affirmative defense is on the Second Injury Fund. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

### **I. THE NATURE AND EXTENT, IF ANY, OF DISABILITY FROM THE ACCIDENT OCCURRING ON JANUARY 27, 2017**

As previously mentioned, Claimant suffered a low back injury as a result of a traumatic event occurring while working at Wal-Mart in January 2017. This eventually required surgery by Dr. Rahman, a neurosurgeon. Dr. Rahman indicated that Claimant had suffered an acute large disc herniation in the L1-2 lumbar spine. On February 7, 2017 he performed a surgery to remove that disc at that level. Following that Claimant underwent physical therapy and an injection from Dr. Workman and did not receive any treatment afterward.

It is my opinion that while Claimant suffered a permanent partial disability to her low back as a result of the accident that occurred in January of 2017, this disability did not result in total permanent disability, but is only when combined with the pre-existing medical conditions that it rendered her totally disabled.

The case was settled with the employer for 20% permanent partial disability of the body as a whole (Exhibit 31, stipulation for settlement)., I find that 20% disability total permanent disability of the body as a whole is a correct and fair evaluation for the disability suffered by Ms. Sneed as a result of the January 27, 2017, occurrence. While of course this settlement is not binding on the undersigned, I do believe this is the disability that Claimant suffered and it is a fair and reasonable settlement for this injury.

## II. THE LIABILITY OF THE SECOND INJURY FUND

The claimant suffered a significant low back injury as a result of the accident on January 27, 2017, while working at Wal-Mart. This injury has resulted in pain and numbness down the leg that is continuing. However, the last injury alone to the low back in and of itself did not cause total permanent disability to the employee. It is only when combined with the significant pre-existing medical conditions that the employee became totally and permanently disabled following the last accident.

I find that the overwhelming weight of the evidence in this case is clear that prior to January 27, 2017, the claimant had several medical conditions which constituted a hindrance or an obstacle to her employment or re-employment. Specifically, the claimant had suffered from right and left hip pain ultimately requiring hip replacement surgeries which significantly hindered her ability to stand, walk, sit, bend and stoop. In addition, prior to 2017 Claimant suffered from degenerative disc disease and had been treated for pain and injury to her low back at the level of L5-S1, all resulting in a workers' compensation claim where a 10% total permanent partial disability body as a whole rating was assessed. Finally, Claimant suffered from left knee problems as a result of a fall requiring treatment in the form of injections and therapy.

Over the years Claimant's medical conditions caused her to be slower at work than other employees, caused her to leave work early or miss work, and caused her to need help when lifting heavy objects.

I find credible the testimony not only of the claimant but also Mr. Philip Eldred, the vocational counselor. Mr. Eldred's opinion, which has not been challenged by the Second Injury Fund is that Claimant is totally permanently disabled as a result of a combination of her low back injury at the level of L1-2 requiring surgery occurring in January 27, 2017 and combined with the pre-existing medical conditions and injuries she had before that date. Mr. Eldred's opinion is fortified by the opinion of Dr. Mitchell Mullins who has indicated in his medical report that Claimant is totally permanently disabled and has provided such severe work restrictions that she could not work even at sedentary work activities. Since both the opinion of Mr. Eldred and Dr. Mullins are totally unchallenged by the Second Injury Fund and because that is the only evidence in this case reflecting total permanent disability, I find those opinions to be credible and support the fact that Claimant is totally and permanently disabled as a result of the combination of pre-

existing medical conditions with her injury on January 27, 2017.

Claimant has testified that she has not worked since February 7, 2017, and she has to recline or lie down on a daily basis, two to three times a day for approximately 45 minutes at varying times throughout the day. This certainly would preclude her being employed in and of itself.

Claimant has two pre-existing medically determinable conditions which were as a result of workers' compensation claims. By far the most significant of these is the disability involving her left hip, which occurred in approximately 2001 according to her testimony. At that time she was working in the ammunition department of Walmart, and due to repetitive pushing and pulling of pallets of freight in order to stock shelves she injured her left hip in the scope and course of her employment.

Ultimately, Claimant underwent a total left hip replacement on October 8, 2002, by Dr. John Putnam an orthopedic surgeon in Springfield, Missouri (Exhibit 20).

Claimant testified at the hearing that since that time in the early 2000's, she had difficulties performing her job over the years as a result of her left hip problem. For example, she testified that she had problems squatting and bending and also standing, walking, and sitting as result of her left hip.

Moreover, Claimant was forced to change the type of work she performed at Walmart after the left hip surgery. She moved to a location located on South Campbell Avenue to work for Walmart in a more sedentary job than she was doing previously. Finally, Claimant testified that her hip has bothered her over the years so much that she had to have a second surgery involving the hip in November 2017 and that she would miss work at Walmart because of the condition of the hip and was much slower in performing her job duties.

The Second Injury Fund argues that in this case Claimant settled her workers' compensation claim involving her left hip for 13% permanent partial disability to the hip (Exhibit 34). Thus, Ms. Sneed's pre-existing disability to the left hip of 13% does not meet the statutory threshold as contained in Section 287.220(3)(2)(a).

Section 287.220(3)(2)(a) indicates that "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 pre-existing disability equaling a minimum of 50 weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is; (ii) a direct result of a compensable injury as defined in Section 287.020."

While it is true that Ms. Sneed settled her left hip workers' compensation claim for 13% permanent partial disability to the left hip, it is Claimant's position that this settlement does not reflect the true disability that should be assigned to this left hip injury, and is in no way controlling, so that the true disability to the left hip is certainly greater than 13% and a finding should be made in this case of the true disability, rather than just simply using the percentage of disability that was agreed upon by the parties in 2001 in settlement of that case.

As mentioned earlier, the testimony at the hearing was convincing and unrefuted that Ms. Sneed suffered significant limitations both in her work and in her day to day living activities as a result of her left hip injury. The mere fact that she settled the case with the employer for 13% is only indicative of a compromise settlement agreement reached in that case, but is not binding in this proceeding to determine what her true disability is for purposes of Section 287.220(3).

The settlement by stipulation for settlement agreement that is approved by an Administrative Law Judge is nothing more than an explanation of why the payment of compensation in a lump sum is being made. In no way does it serve as a judgment on the merits to be binding in subsequent hearings. Seiferner vs. Treasurer of the State, Custodian of the Second Injury Fund, 362 SW 3<sup>rd</sup> 59-64 (MO.App.W.D.2012). In a case involving the Second Injury Fund where there has been a prior settlement agreement that is in no way binding upon a judge in a subsequent proceeding.

Although Section 287.390 requires an ALJ or the Commission to approve a settlement, the administrative body need only to determine that the settlement is in accordance with the parties' rights. It does not engage in any independent fact finding regarding the parties' stipulations. Thus, a settlement agreement reached in a workers' compensation claim is not a judgment on the merits for the issue of collateral estoppel.

Since an Administrative Law Judge is not bound by the prior percentage of disability found in the stipulation for settlement of the left hip injury case in 2001, in this proceeding it can be found that the disability for the left hip injury is much higher. There is evidentiary support in this record to indicate that Ms. Sneed's disability to her left hip is certainly much higher than 13%. For example Dr. Mullins in his report rated Ms. Sneed's left hip condition at 55% (Exhibit 13). Moreover, Dr. David Volarich, who evaluated Ms. Sneed's left hip had rated her disability at the level of 65% to the hip, because she demonstrated ongoing weakness, loss of motion, and pain (Exhibit 24). Consequentially, not only is there support in the testimony of Ms. Sneed as to the nature and extent of the involvement of her left hip in her day-to-day working activities and day-to-day living activities, but there is certainly medical support in the record which would indicate that the left hip should be rated much higher than 13% permanent partial disability.

This court has the ability to find and should find based upon the overwhelming weight of the evidence, that Ms. Sneed's left hip pre-existing disability is in excess of the threshold of 50 weeks as provided in Section 287.220(3).

Looking at the plain meaning of the statute, Section 287.220(3), there is no mention that the pre-existing work-related injury has to be based only on a prior stipulation for settlement. To the contrary, the section in issue reads "An employee has a medically documented pre-existing disability equaling a minimum of 50 weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is a direct result of a compensable injury as defined in Section 287.020." The terms "according to medical standards that are used in determining such compensation" have a plain meaning that such pre-existing disability has to be supported by medically determinable standards, which is the case based upon Dr. Mullins' and Dr. Volarich's ratings of pre-existing left hip disability.

I find that the opinions provided by Dr. Mullins to be most compelling and determine that at the time of January 27, 2017, injury Ms. Sneed had 55% preexisting permanent partial disability at the level of the left hip. Thus, the claimant meets the statutory threshold for compensability against the Second Injury Fund based upon a pre-existing medically determinable disability for a work-related injury that occurred before the last accident in this case.

In essence, the claimant has met her burden of proof that the elements under Section 287.220(3) are met in this case. Thus, I find Ms. Sneed has suffered permanent partial disability as a result of the January 27, 2017, accident and I find that disability is at the level of 20% of the body as a whole. That combined with disabilities pre-dating the accident in January 2017 render Ms. Sneed totally and permanently disabled. The claimant is awarded weekly benefits to be paid by the Second Injury Fund beginning 80 weeks from the date of August 15, 2017, and continuing for the employee's lifetime.

Robert T. Beezley, P.C., is allowed a fee of 25 percent of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein. Interest on all sums awarded hereunder shall be paid as provided by law.

I certify that on 9-13-19,  
I delivered a copy of the foregoing award  
to the parties to the case. A complete  
record of the method of delivery and date  
of service upon each party is retained with  
the executed award in the Division's case file.

By MP

Made by: Kevin A. Elmer  
Kevin A. Elmer  
Administrative Law Judge  
Division of Workers' Compensation

