

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

Injury No.: 99-180805

Employee: Andrew Wiltse
Employer: Mary Engelbreit Co. (Settled)
Insurer: CNA Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, heard oral arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated May 13, 2009.

Preliminaries

Employee settled his claim against employer for 35% permanent partial disability of the right upper extremity rated at the right elbow, 30% permanent partial disability of the left upper extremity rated at the left elbow, and a 10% loading factor.

Although employee settled his claim against employer, he proceeded to final hearing against the Second Injury Fund. The administrative law judge heard this matter to consider what, if any, is the nature of Second Injury Fund liability.

The administrative law judge initially issued what was essentially an Order of Dismissal for want of subject matter jurisdiction, but entitled it an "Award." In dismissing employee's claim, the administrative law judge reasoned that the last exposure rule precluded employee from filing his claim against employer and, therefore, there is no primary "claim upon which contingent Second Injury Fund liability may be founded."

Employee filed an Application for Review from the administrative law judge's order. In an order dated December 30, 2008, we found that the administrative law judge erred in dismissing employee's claim against the Second Injury Fund and set aside the administrative law judge's order. Further, we found that the administrative law judge had subject matter jurisdiction to determine the Second Injury Fund claim and remanded the matter to the administrative law judge with instructions to make determinations on the substantive issues presented.

On remand, the administrative law judge issued a "Second Award" but reiterated his original determination that he lacked subject matter jurisdiction. Specifically, the administrative law judge stated that:

[Employee] has failed to establish a compensable injury against the employer named herein. He has failed to establish an accident or an occupational disease that arose out of an [sic] in the course of employment.

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He has failed to establish employment. Because he has failed to establish a compensable injury, the claim is dismissed for lack of subject matter jurisdiction because [employee] has failed to establish a compensable primary injury falling under the Worker's Compensation Laws. No compensable injury equals no jurisdiction. I once again find no compensable injury and once again deny the claim on the basis of a lack of subject matter jurisdiction.

Second Award p. 4.

Upon receiving this Second Award, employee again filed a timely Application for Review to the Commission. Therefore, the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

Findings of Fact

Employee began working as a laborer/carpenter in the early 1990s. He began working for employer in about 1994. Employee did general carpentry and construction work for employer.

Employee testified that, as part of this job with employer, he was required to carry heavy, awkward objects up three flights of a spiraling staircase.

In the latter part of 1998, employee began developing soreness in both of his elbows over the lateral epicondyle. Employee sought medical treatment for his elbows from Dr. Jesse Susi in April of 1999. The medical records of Dr. Susi indicate that employee experienced pain when grabbing objects and that his work in construction irritated his elbows. Employee denied any acute trauma to his elbows.

Employee treated with Dr. Susi for about 9 months. Dr. Susi prescribed stretching exercises, tennis elbow straps, cortisone injections and physical therapy for employee's elbows. Employee was not instructed to discontinue working while he received treatment for his elbows.

Employee later treated with Dr. Glen Johnson who referred him to Dr. James Emanuel. Dr. Emanuel noted that employee had been working in heavy, repetitive-type work for a number of years and developed pain in both of his elbows. Dr. Emanuel went on to state that employee continued to work and had been treated with cortisone shots in both elbows, 4-5 times each, with little improvement.

In June of 1999, employee was laid off by employer. Employee was still under the aforementioned treatment for his elbows at the time he was laid off. Following his layoff, employee did sporadic light-duty handyman work for several employees that worked for employer. The employees that hired him to do these odd jobs knew his condition and did not "push" him. If there were heavier issues on these jobs, employee had a subcontractor help him with the heavy lifting.

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After months of conservative treatment, employee's condition was eventually deemed to be chronic and "recalcitrant to medications, therapy and injections." Employee had left and right epicondyle surgical releases, performed by Dr. Emanuel, on July 6, 2001, and November 21, 2001, respectively. The surgeries did not relieve his pain and subsequent conservative treatment did not help either. The epicondylitis recurred. Dr. Emmanuel found that employee reached maximum medical improvement on October 14, 2002, and rated both elbows at 50% permanent partial disability and recommended a 3-5 pound lifting restriction for each arm.

Up until January of 2003, employer had accepted all liability with regard to employee's elbows. However, in January of 2003, employee and employer reached an impasse on whether additional medical treatment was necessary and the level of permanent disability. Therefore, employee hired an attorney and formally filed his Claim for Compensation shortly thereafter on January 30, 2003.

Employer eventually agreed to authorize additional treatment and on March 19, 2003, Dr. Boyer performed a left radial tunnel release, debridement of the lateral epicondyle and a left anconeus flap. On October 1, 2003, Dr. Boyer performed a right lateral epicondyle debridement, right radial tunnel release and anconeus flap. On April 5, 2004, Dr. Boyer released employee from treatment with multiple permanent restrictions including no carrying greater than 7½ pounds.

Employee settled his claim against employer on December 2, 2004, for the aforementioned permanent partial disability ratings.

Employee testified that he is currently limited in his daily activities. He can only do limited amounts of dishes, laundry, or anything continuous.

Prior to employee's epicondylitis, he had carpal tunnel syndrome and severe recurrent depression. Although employee began experiencing pain in his elbows in 1991, his bilateral carpal tunnel syndrome was not diagnosed until several years later and he did not have decompression of his right and left carpal tunnel until April 14, 1998, and April 28, 1998, respectively. Employee was working for employer at the time of this treatment, but he did not file a Workers' Compensation Claim for Compensation with regard to the same.

As for employee's depression, he was referred to Dr. John Canale, by psychologist, Mary Cardez. Employee had been experiencing symptoms of depression for years prior to his employment with employer but had not sought treatment. Employee had a history of depression in his family and had suffered various forms of abuse as a boy. Employee was hospitalized twice for severe depression and thoughts of suicide, in October of 2002, and July of 2003.

Employee's psychiatric expert, Dr. Adam Sky, testified that employee's prior psychological issues rendered him 40% permanently partially disabled of the body as a whole. Dr. Sky further opined that employee's prior psychological disabilities combine with his physical injuries to render him permanently and totally disabled.

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Employee's vocational expert, James England, testified that considering employee's combination of physical and psychiatric problems, employee was not a candidate for vocational rehabilitation. Mr. England opined that absent significant improvement in his overall functioning, employee is likely to remain totally disabled from a vocational standpoint.

Conclusions of Law

First of all, because the administrative law judge, in his Second Award, again dismissed employee's claim for lack of subject matter jurisdiction, we must again address this issue. In light of the fact that the administrative law judge essentially reiterated his same determination in his Second Award that he did in his original order of dismissal, we reiterate our conclusions reached on the issue in our order dated December 30, 2008, as follows:

The administrative law judge erred in concluding he does not have subject matter jurisdiction in this matter. "Subject matter jurisdiction," means, "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." BLACK'S LAW DICTIONARY 870 (8th ed. 2004). "Subject matter jurisdiction is a tribunal's statutory authority to hear a particular kind of claim." *Sexton v. Jenkins & Assocs.*, 152 S.W.3d 270, 273 (Mo. 2004). The sole issue for determination in this matter is the liability of the Second Injury Fund under § 287.220 RSMo (1999).¹ The Division of Workers' Compensation and this Commission have statutory authority to decide Second Injury Fund claims. In fact, the authority is primary and exclusive.

The administrative law judge erred in concluding that, "[t]here is no primary claim upon which contingent Second Injury Fund liability may be founded," in that his conclusion is contrary to existing case law. Second Injury Fund liability must be founded upon a compensable injury but §287.220.1 contains no language making a claim against an employer a prerequisite to recovery from the Second Injury Fund. "The employee's claims against the employer and against the Second Injury Fund are separate proceedings,' as the liability of the employer is a distinct issue from the liability of the Second Injury Fund." *Tiller v. 166 Auto Auction*, 65 S.W.3d 1, 5 (Mo. App. 2001), citing *Strange v. SCI Bus. Prod.*, 17 S.W.3d 171, 173-74 (Mo. App. 2000). This rule applies even when the claimant simply chooses not to pursue his claim against employer.

A mere cursory reading of § 287.220.1 makes it clear that an employee/claimant must establish that he or she sustained a compensable injury and that the injury caused the requisite level of permanent partial disability as part of his or her claim against the Fund. But nothing in the statutory language requires that the employer still be a party to the action in order

¹ All statutory referenced are to the Revised Statutes of Missouri 1999, unless otherwise specified.

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for the Commission to make factual findings regarding whether the claimed injury is compensable and the degree of any permanent disability resulting therefrom for which the employer would be liable.

The Fund has not directed us to any legal authority supporting its position, and we find no compelling reason why an employee/claimant should be precluded from pursuing his claim against the Fund simply because he or she elected not to continue pursuing compensation from his or her employer. "Pursuant to section 287.220, the employer is liable only for the percentage of disability for employee's last injury without any pre-existing disability, and the Fund is liable for the balance of the disability found to exist above that found for employee's last injury alone." *Conley v. Treasurer of Missouri*, 999 S.W.2d 269, 275 (Mo. App. E.D. 1999). Accordingly, "section 287.220.1 provides for a separate liability of the employer and the Second Injury Fund," and "the employee's claims against the employer and against the Second Injury Fund are separate proceedings." *Strange v. SCI Bus. Prods.*, 17 S.W.3d 171, 173-74 (Mo. App. E.D. 2000).

Nance v. Treasurer of Mo., 85 S.W.3d 767, 771 (Mo. App. 2002).

Finally, the last exposure rule has no bearing on the determination of Second Injury Fund liability. The rule explicitly applies only to employer liability for occupational disease: "The employer liable for the compensation *in this section provided* shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure." § 287.063.2 RSMo. (Emphasis added).

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and that disability is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, the focal point has not been on whether employee suffered from preexisting disabilities, but rather, whether employee suffered a primary injury. The Second Injury Fund argues that because employee filed his claim against employer after he had already worked for his own company for more than 3 months, subsequent to his employment with employer, that his claim is barred against employer under the last exposure rule,

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provided in § 287.063 RSMo. The Second Injury Fund then argues that because his primary injury claim is barred against employer, there can be no Second Injury Fund liability because it is a prerequisite that employee first establish he sustained a compensable primary injury before Second Injury Fund liability can be established with regard to his preexisting disabilities.

The Second Injury Fund's argument suffers from the same misinterpretation of § 287.220 as the two awards issued by the administrative law judge. Although Second Injury Fund liability must be founded upon a compensable injury, § 287.220.1 contains no language making a claim against an employer a prerequisite to recovery from the Second Injury Fund. "The employee's claims against the employer and against the Second Injury Fund are separate proceedings,' as the liability of the employer is a distinct issue from the liability of the Second Injury Fund." *Tiller v. 166 Auto Auction*, 65 S.W.3d 1, 5 (Mo. App. 2001), citing *Strange v. SCI Bus. Prod.*, 17 S.W.3d 171, 173-74 (Mo. App. 2000). Therefore, because employee already settled his claim against employer, the only relevant issues are whether he suffered a primary injury and whether that primary injury combined with preexisting disabilities to render employee's total permanent disabilities any greater than the primary injury alone.

The primary injury alleged by employer is an occupational disease in the form of bilateral epicondylitis. "An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020." Section 287.067 RSMo. The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994) (citations omitted). The employee bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999) (citations omitted).

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort.

Kelley v. Banta & Stude Const. Co., Inc., 1 S.W3d 43, 48 (Mo.App. 1999) (citations omitted).

In this case, it is clear based upon all the medical records, medical and vocational reports, medical and vocational expert testimony, and employee's own testimony, that employee developed bilateral epicondylitis as a result of his job in construction with employer. Employer never disputed this contention and accepted this claim from the beginning. There is no evidence suggesting that employee developed bilateral

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epicondylitis in any way other than his daily job duties with employer. For the foregoing reasons, we find that employee's job with employer exposed him to a greater risk of developing bilateral epicondylitis than the general public. Further, we find that the manner in which employee was required to carry heavy awkward objects up three flights of a spiraling staircase indicates a recognizable link to his bilateral epicondylitis which is not common to all jobs of construction.

In this case, it is also clear from the medical records, medical and vocational reports, medical and vocational expert testimony, and employee's own testimony, that he had preexisting disabilities in the form of bilateral carpal tunnel syndrome and severe recurrent depression. The existence of these preexisting disabilities is not disputed by the Second Injury Fund.

With the primary injury and preexisting disabilities established, the only remaining issue is the nature and extent of Second Injury Fund liability.

Employee claims that he is permanently and totally disabled. Permanent and total disability is defined by § 287.020.7 RSMo as the "inability to return to any employment"

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

Employee enlisted the expertise of psychiatric expert, Dr. Sky, and vocational expert, Mr. England, to evaluate employee and provide reports and testimony based thereon. Dr. Sky opined that employee's prior psychological disabilities combine with his physical injuries to render him permanently and totally disabled. Mr. England's opinion buttresses Dr. Sky's in that he testified that absent significant improvement in employee's overall functioning, he is likely to remain totally disabled from a vocational standpoint.

The Second Injury Fund did not offer any opposing medical evidence or expert testimony.

First, we find, as Dr. Sky and Mr. England opined, that employee's preexisting psychological issues and carpal tunnel posed a hindrance and obstacle to employee's employment or reemployment. Second, we adopt and incorporate employee and employer's agreed upon permanent partial disability ratings for the primary injury, as stated in their Stipulation for Compromise Settlement. Therefore, we find that the primary injury resulted in 35% permanent partial disability of the right upper extremity rated at the right elbow, 30% permanent partial disability of the left upper extremity rated at the left elbow, and a 10% loading factor. Lastly, we find that the combined effect of employee's

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preexisting disabilities combined with his primary injury render him permanently and totally disabled.

For the foregoing reasons, we find that employee has carried his burden of establishing that he is permanently and totally disabled as a result of a combination of his injuries. Therefore, we reverse the administrative law judge's award and find that employee is permanently and totally disabled as a direct result of the combination of his injuries. The Second Injury Fund is liable for employee's permanent total disability benefits.

We find that employee reached maximum medical improvement on April 5, 2004, the date employee was released from treatment by Dr. Boyer. Therefore, going forward from April 6, 2004, the Second Injury Fund is liable for the difference between the permanent total disability benefits and the permanent partial disability benefits (\$512.58 PTD rate - \$294.73 PPD rate) for 150 2/7 weeks (35% PPD of right elbow = 73.5 weeks + 30% PPD of left elbow = 63 weeks + 10% load factor = 13.7 weeks). Thereafter, the Second Injury Fund shall be liable for employee's weekly permanent total disability benefit of \$512.58 for the remainder of employee's life, or until modified by law.

Christopher Wagner, Attorney at Law, is allowed a fee of 20% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

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

The award and decision of Administrative Law Judge Matthew D. Vacca, issued May 13, 2009, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 17th day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

SECOND AWARD

Employee:	Andrew Wiltse	Injury No.:	99-180805
Dependents:	N/A		Before the
Employer:	Mary Engelbreit Company (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	CNA Insurance Company		Department of Labor and Industrial
Hearing Date:	January 9, 2008		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	MDV:cw

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? No
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Post June 1999
5. State location where accident occurred or occupational disease was contracted: Unknown
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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: N/A
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: N/A
14. Nature and extent of any permanent disability: 0
15. Compensation paid to-date for temporary disability: \$47,157.36
16. Value necessary medical aid paid to date by employer/insurer? \$53,272.23

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- 17. Value necessary medical aid not furnished by employer/insurer? 0
- 18. Employee's average weekly wages: \$785.00
- 19. Weekly compensation rate: \$512.58/\$294.73
- 20. Method wages computation: Agreed

COMPENSATION PAYABLE

- 21. Amount of compensation payable: (settled)
- 22. Second Injury Fund liability: NO

TOTAL: -0-

- 23. Future requirements awarded: None

Said payments to begin 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 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Andrew Wiltse	Injury No.:	99-180805
Dependents:	N/A		
Employer:	Mary Engelbreit Company (settled)		
Additional Party:	Second Injury Fund		
Insurer:	CNA Insurance Company	Checked by:	MDV:cw

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

SYNOPSIS

This claim was previously tried to a final conclusion and an award was issued on May 8, 2008 denying the claim on the basis of failure to prove an accident or an occupational disease.

Claimant worked for the Mary Engelbreit Company as general handyman from 1994 until June 1999. In April 1999 he developed pain in his elbows. In May 1999 he received injection into the elbows. He was laid off in June and started his own construction company in July 1999 and continued for the next several years to be exposed to the hazards of an upper extremity occupational disease as a self-employed carpenter and general construction laborer. Since this is a pre-2005 amendment case, the last exposure rule places liability for the occupational disease on the last employer to expose Claimant to the hazards of an occupational disease, himself, for whom Claimant worked in January 2003 when he filed his claim. I determined Mary Engelbreit has no liability and Claimant failed to prove a compensable injury against the defendant Mary Engelbreit Company. With no compensable injury viable against the defendant I issued an award based on a lack of subject matter jurisdiction. "There must be an accident or incidence of occupational disease upon which I can base my jurisdiction. Having found jurisdiction does not exist, the claim must be dismissed" (Award p.8.).

ISSUES

The L&IRC "remanded" the award for a different decision. The remand is dated December 30, 2008, but I did not receive the file until February 17, 2009. The L&IRC found I erred by using "jurisdiction" to deny the claim. The L&IRC found I possess jurisdiction and directed me to address the substantive issues. The L&IRC did, however, recognize that "Second Injury Fund Liability must be founded upon a compensable injury..." (Order, p 2).

I hereby adopt, and reissue as fully set forth herein, my entire award as previously found and as if it were herein set forth in full.

ADDITIONAL RULINGS OF LAW

1. Claimant has failed to establish a compensable injury against the employer named herein. He has failed to establish an accident or an occupational disease that arose out of an in the course of employment. He has failed to establish employment. Because he has failed to establish a compensable injury, the claim is dismissed for lack of subject matter jurisdiction because Claimant has failed to establish a compensable primary injury falling under the Worker's Compensation Laws. No compensable injury equals no jurisdiction. I once again find no compensable injury and once again deny the claim on the basis of a lack of subject matter jurisdiction

DISCUSSION

The L&IRC held my first award improper because it was not an award but rather “an order of dismissal for want of subject matter jurisdiction. I fail to see the distinction. A dismissal is an award denying compensation. State ex. Rel Doe Run Co., v. Brown, 918 S.W.3d 303 (Mo.App.E.D. 1996). My action could be termed a dismissal for lack of jurisdiction, or dismissal for failure to state a claim under the workers' compensation law or an award denying compensation for lack of a compensable injury. Nevertheless, I denominated it in the nomenclature of Chapter 287 and issued an Award dismissing the case for lack of jurisdiction. Whatever one may wish to call it, a rose is still a rose, and Claimant failed to establish a compensable injury, failed to state a claim upon which benefits could be granted, failed to name the proper defendant, failed to establish a primary injury or the time frames therefore, failed to establish wage rates, failed to establish the point of reference for a primary injury from which time prior disabilities could be adjudged. He named the improper employer, alleged improper exposure dates, improper job duties, improper average weekly wage, improper temporary, total and partial compensation rates, improper prior injuries and improper present injuries. In short, he has utterly failed to make a prima facie case for a compensable injury under Chapter 287. Call it whatever you like, but the fact I found is that there is no compensable primary injury against the named employer upon which Second Injury Fund liability might be predicated.

Claimant pled that he suffered from an “injury” that arose at Mary Engelbreit Company, the alleged employer's place of business. I found that any alleged occupational disease arose four years after Claimant's employment with Mary Engelbreit Company. The Commission did not dispute this finding or reverse it. I found Claimant was not at Mary Engelbreit when the occupational disease arose. “When one is not at work, the workers' compensation law does not apply.” Harris v. Westin Management Co., 230 S.W.3d 1, 3 (Mo. 2007). Claimant was not at work at Mary Engelbreit when his occupational disease arose, therefore the worker's compensation laws do not apply and I do not have jurisdiction over injuries not occurring at Mary Engelbreit.

The requirement an accident or occupational disease arise in the course of employment is jurisdictional. Id. Missouri's Workers' Compensation Law pre-empts judicial resolution of injury claims arising “out of and in the course of” employment because they fall within the jurisdiction of Worker's Compensation. State ex rel. Larkin v. Oxenhandler, 159 S.W.3d 417, 420 (Mo.App.W.D.2005). Since Claimant's alleged accident or occupational disease did not come from his employment with Mary Engelbreit Company, it cannot be said to arise in the

course and scope of his employment with Mary Engelbreit. Course and Scope are jurisdictional issues to the Workers' Compensation law and therefore the requirements for a compensable claim have not been met.

The necessary implication in the L&IRC's "order of remand" is that Commission wants me to search through the record and Claimant's work history looking for compensable injuries he *might* have established at the hearing. Employee alleged injuries against Mary Engelbreit at a certain wage rate, while Employee performed certain work, during a certain time period, with certain injuries precedent. But at the presentation of evidence, he not only failed to prove any of these allegations, he actually disproved them. Hence my finding he failed to establish a compensable claim. A claimant bears the burden of proving all the essential elements of a claim, and here he failed to do so.

For further instruction as to jurisdiction, I turn to §287.120.

As to when the WCL applies, § 287.120 states, in pertinent part, as follows:

1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever....
2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee ... at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

Burns v. Employer Health Services, Inc. 976 S.W.2d 639, 642 (Mo.App. W.D.,1998).

The cases are clear that "arising out of and in the course of employment" are jurisdictional issues.

Whether claimant suffered an injury compensable under the Workers' Compensation Law depends upon whether the injury arose out of and in the course of her employment. This is a question of law. *Id.* "The general rule is that an injury 'arises out of' the employment if it is a natural and reasonable incident thereof and it is 'in the course of employment' if the accident occurs within the period of employment at a place where the employee may reasonably be fulfilling the duties of employment." *Automobile Club Inter-Insurance Exchange v. Bevel*, 663 S.W.2d 242, 245 (Mo. banc 1984). An injury arises "out of" the employment when there is a causal connection between the nature of the employee's duties or conditions under which he is required to perform them and the resulting injury. *Ford v. Bi-State Development Agency*, 677 S.W.2d 899, 901 (Mo.App.E.D.1984).

Regarding whether claimant's injury arose "in the course" of her employment, it must be determined if the injury occurred within the period of employment at a place where the employee may reasonably be, while she is engaged in the furtherance of the employer's business, or in some activity incidental to the employment. *Id.* at 573. "Activities within reasonable limits of time and place, for the comfort and convenience of the employee, are considered incidental to employment because they benefit the employee and thereby indirectly benefit the employer. Therefore, injuries which occur during these incidental activities are held to have been in the course of the employment." *Id.*

James v. CPI Corp. 897 S.W.2d 92, 95 (Mo.App. E.D. 1995).

Since Claimant's injuries did not occur at Mary Engelbreit, the injury is not a rational and reasonable incident of employment at Mary Engelbreit Company. Since the injuries did not

occur at Mary Engelbreit Company, the injuries were not within the period of employment with Mary Engelbreit Company or at a place Claimant may be while reasonably fulfilling his duties with Mary Engelbreit Company. There is no causal connection between Claimant's injuries and the nature of his duties at Mary Engelbreit Company or the conditions under which he performed his duties at Mary Engelbreit Company. His injuries did not occur within his period of employment with Mary Engelbreit Company or in furtherance of Mary Engelbreit Company's business.

While the Commission may desire it, I cannot go back and reconstruct compensable claims the Employee could have made, rather than the one he tried to make. That would require me to advocate on behalf of a party; to plead, establish and find new job duties, times, rates, employers, prior injuries, and re-order the entire primary claim in order to make The Second Injury Fund liable. I cannot just ignore or sweep away all the failures of evidence and key elements of a compensable claim and establish a claim for the employee. I have exercised my statutory power and my ruling remains the same. If the L&IRC chooses to exercise its power to the contrary, that is its right. The Claim is denied at this level.

Generally, I find there is a failure of jurisdiction whenever a claimant has failed to establish an essential element of a claim, whether that issue is raised or not. The commissions' "remand order" suggests I went to extraordinary lengths to look behind the primary settlement in order to deny the claim, that I took unusual steps in order to defeat it. That is not the case. The fact is, I am required to listen to the testimony and read the documents offered and received into evidence. When it appears from that evidence that jurisdiction is lacking, I cannot proceed, whether the parties have recognized the fatal flaw or, whether they knew jurisdiction failed or not and whether they agreed to proceed this way anyway for expedience. "The defense of lack of subject matter jurisdiction may not be waived," Sisk v. Molinaro, 376 S.W.2d 175, 177 (Mo.1964); Subject matter jurisdiction cannot be conferred by consent or agreement of the parties, Simmons v. Friday, 359 Mo. 812, 825, 224 S.W.2d 90, 98 (1949); State ex rel. Lambert v. Flynn, 348 Mo. 525, 532, 154 S.W.2d 52, 57 (Banc 1941), by appearance or answer, United Cemeteries Co. v. Strother, 342 Mo. 1155, 1161, 119 S.W.2d 762, 765 (1938), or by estoppel, Simmons, 359 Mo. at 825, 224 S.W.2d at 98. The lack of subject matter jurisdiction may be raised at any stage in the proceedings, even for the first time in this Court. State v. Rogers, 351 Mo. 321, 325, 172 S.W.2d 940, 942 (1943); Strother, 342 Mo. at 1161, 119 S.W.2d at 765. The parties cannot agree to jurisdiction or confer jurisdiction where there is none." State Tax Comm'n v. Administrative Hearing Comm'n 641 S.W. 2d 69, 72-73 (Mo.1982). I do not have jurisdiction over this claim.

The question becomes, what elements of a claim are jurisdictional. Administrative tribunals have only the jurisdiction provided for by law, and just because a case originally appears to be within Worker's Compensation subject matter jurisdiction doesn't mean it always remains so. The court recognized in Sodipo v. University Copiers, 23 S.W.3d 808 (Mo.App.E.D. 2000), that failure to have status as an employee for any reason under Chapter 287 denies the tribunal of subject matter jurisdiction. "The tribunal under 287 is not like courts of general jurisdiction. ...The commission like all administrative bodies, maintains only limited jurisdiction as is conferred by statute". Id. At 810. "Moreover, the commission exercises limited jurisdiction, and if the legislature exempts any cases from the Commission's purview, then claimant's workers' compensation claim falls outside such class of cases over which the commission maintains

jurisdiction. Id. At 820. Notice and the statute of limitations are jurisdictional in Workers' Compensation cases. Schrabauer V. Schneider Engraving, 25 S.W.2d 529, 534 (Mo.App.1930). Failure to prove a Missouri contract of employment is jurisdictional. Liberty v. Second Injury Fund, 218 S.W.3d 7 (Mo.App.W.D. 2007). Statutory employment is a jurisdictional issue, requiring 1) proof of work performed pursuant to a contract, 2) on or about the employers premises, and 3) the work is in the usual course and scope of the business. Richter v. Union Pacific R.R., 265 S.W.3d 294, 301 (Mo.App.E.D. 2008). All of Section 287.120.1 is jurisdictional. Goodrum v. Asplundh Tree, 824 S.W.3d 6 (Mo 1992):

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefore whatsoever, whether to the employee or any other person. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

Id.

In the instant case, Claimant alleged he was an employee of Mary Engelbreit Company when he developed an occupational disease. Because of the operation of the last exposure rule as determined in my original award, I found Claimant was not an employee of Mary Engelbreit Company and I did not have subject matter jurisdiction. Thus my award or "dismissal" was proper. The LIRC complains my award was a mere dismissal based on lack of subject matter jurisdiction. I agree. Sodipo, supra, commands it. Further a dismissal is an award. State ex. Rel Doe Run v. Brown, 918 S.W.3d.(Mo.App.E.D. 1996). Any failure of accident, occupational disease or arising out of and in the course of employment is a failure of subject matter jurisdiction and I have and will exercise the power to issue an award denying compensation for a lack of subject matter jurisdiction or to "dismiss" for lack of subject matter jurisdiction or upon failure of any of these elements at any hearing when the facts are thus shown.

On an entirely separate jurisdiction note, I doubt I have jurisdiction to write this second award. 287.610.1 provides:

The administrative law judges appointed by the division shall only have jurisdiction to hear and determine claims upon original hearing and shall have no jurisdiction upon any review hearing, either in the way of an appeal from an original hearing or by way of reopening any prior award, except to correct a clerical error in an award or settlement if the correction is made by the administrative law judge within twenty days of the original award or settlement.

It is clear the L&IRC has "remanded" this case to me for the purpose of reopening this award for a decision on the merits. I have no authority to do so. Chapter 287 allows the Labor Commission limited options after hearing an appeal of the ALJ's decision:

287.480. 1. If an application for review is made to the commission within twenty days from the date of the award, the full commission, if the first hearing was not held before the full commission, shall review the evidence, or, if considered advisable, as soon as

practicable hear the parties at issue, their representatives and witnesses and shall make an award and file it in like manner as specified in section 287.470. ...

And,

278.610.6 ...The labor and industrial relations commission may remand any decision of an administrative law judge for a more complete finding of facts. The commission may also correct a clerical error in awards or settlements within thirty days of its final award.

...

I can find no authority for the L&IRC to remand a case for a different decision on the merits. The only power to remand involves inadequate facts to support the rulings of law. The statute does not grant authority for the L&IRC to remand for more complete rulings of law. There has been no allegation the findings of fact are insufficient to support the ruling of law in the first award of a lack of jurisdiction. The findings of fact are sufficient to support the award and it complies with the mandate for legally sufficient findings of fact and rulings of law from an administrative body. See, Lisa Stegman, v. Grand River Ambulance District, 274 S.W.3d (Mo.App.W.D.2008).

Commission opinions are generally not binding and have no precedential value. AG Processing v. PSC, 276 S.W.3d (Mo.App.W.D 2008). Missouri Soybean Assc. v. Clean Water Commission, 102 S.W.3d 10, 23, (Mo. 2003) By the Courts of law, however, I am commanded to deny any claim where jurisdiction fails. Sodipo. I must follow the decisions of the Constitutional Courts.

Thus, since the remand is not for more findings of fact to support a conclusion already made, I don't believe I have jurisdiction to make a second decision in this case. The commission may make its own decision on new facts adduced before it, or it may make its own decision based on the facts I found or make a decision based upon other facts it may summon from the record. I do not have that power or authority. I cannot follow the rulings of both the courts and the order of the commission. I will follow the authoritative rulings of the courts.

The L&IRC held: "[T]he last exposure rule has no bearing on the determination of Second Injury Fund Liability" (Order, p.3), For the L&IRC to assert the last exposure rule has nothing to do with an SIF claim is surprising. "This argument has no merit because the date of disability is an essential issue in the determination of SIF liability." Garrone v. Treasurer, 157 S.W.3d 237, 242 (Mo.App.E.D.2005).

The fund is only liable for disabilities that preexist the date of the primary injury and in order to determine this liability the bright line date of the primary injury is the first essential date that must be established and this is an inherent issue in every Fund Hearing.

Id. At 243

The last exposure rule also has quite a lot to do with establishing a compensable occupational disease claim in a jurisdictional sense. For example, if the last employer to expose any hypothetical Claimant to the hazards of an occupational disease is not covered under §287 because of insufficient numbers of employees, there is no compensable injury and no SIF claim. If the last employer to expose an employee to an occupational disease hazard was a wharf, dock or barge on the Mississippi River or on a railroad, then the injuries are simply not compensable

under Worker's Compensation, though they may constitute a claim under the LHWCA or Jones Act or FELA. The instant Claimant could have gone to work for the Alton Belle Casino after Mary Engelbreit Company instead of self-employment and the cases hold exposure there may cause him to fall under Federal Maritime law. He could have gone to work after Mary Engelbreit Company as a carpenter for the Federal Government and his injuries would be covered under the FECA. He could not then claim Second Injury Fund benefits in Missouri. The Last Exposure Rule is integral to determining whether a claimant has a compensable claim against an employer under Missouri's Work Comp Act.

In the instant case, the Commissions' overlooking the last exposure rule highlights the predicament in which the Commission has put me. Claimant failed to establish the date of injury. He pled it was while working for Mary Engelbreit four years before the last exposure rules fixes the date in January of 2003. How do I get past this issue to address the substantive issues? Do I now pick another primary injury date? Doing so would seem to be advocating on behalf of the claimant. He chose one date, but I'll pick the correct one to make his claim viable? He also pled prior injuries. Shall I reorder that aspect of the claim also? He may have made less money in his own employ when at Mary Engelbreit, shall I just make up a wage? His experts testified the cause of the syndrome was work at Mary Engelbreit, shall I ignore the causation requirement? I cannot make the claim employee should have made but didn't. I am not his lawyer.

The claim is denied for a lack of subject matter jurisdiction.

Date: _____

So Ordered: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation