

ORDER

Injury No.: 15-030849

Employee: Jimmy Mickelberry  
Employers: ICF and LG Holding (Settled)  
Insurer: Travelers Property Casualty Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

On July 6, 2018, an administrative law judge issued an award allowing compensation from the Second Injury Fund in this workers' compensation case.

On July 25, 2018, the Second Injury Fund filed a timely application for review with the Labor and Industrial Relations Commission (Commission).

On August 1, 2018, employee filed a document entitled Answer to the Second Injury Fund's Application for Review and Claimant's Cross Application for Review. Therein, employee generally denied each of the allegations set forth in the Second Injury Fund's application for review. Employee also requested that the Commission modify the administrative law judge's award with respect to the measure of compensation awarded.

On August 9, 2018, the Commission issued an order accepting employee's answer, but dismissing employee's attempted application for review as untimely.

On October 19, 2018, the Second Injury Fund filed its brief.

On November 19, 2018, employee filed a 40-page respondent's brief without previously requesting a page limit extension.<sup>1</sup> In his brief, employee argued for the first time that the Second Injury Fund's application for review should be dismissed, because the claim of error set forth therein does not pertain to any of the facts involved in this case.

On December 7, 2018, the Second Injury Fund filed a reply brief acknowledging the error in its application for review, but arguing employee did not timely object to the application for review, because he did not request dismissal in his answer. The Second Injury Fund also filed a Motion to Amend Application for Review (Motion), seeking to correct the erroneous allegations of error set forth in the original application for review.

On December 11, 2018, employee filed Claimant's Suggestions in Opposition to Applicant's Motion to Amend Application for Review, arguing the Commission lacks jurisdiction to accept the amended application for review, and that employee did not waive any jurisdictional objection to the Second Injury Fund's original application for review by failing to ask for dismissal in his answer.

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<sup>1</sup> Commission Rule 8 CSR 20-3.030(5) limits respondent's briefs to 25 pages.

Employee: Jimmy Mickelberry

- 2 -

### **Discussion**

#### *Second Injury Fund's motion to amend its application for review is denied*

The Second Injury Fund's original application for review lists the following allegation of error:

The Administrative Law Judge erred in finding that the claimant's bilateral primary shoulder injury and pre-existing injuries combined to make him more disabled, which is against the overwhelming weight of the evidence. The claimant returned to full-duty employment without restrictions after his pre-existing work injuries performing the same work as a firefighter that he had performed for the past two decades. Therefore the award should be reversed.

The Second Injury Fund concedes that the foregoing allegation of error, in its entirety, constitutes a clerical or scrivener's error.<sup>2</sup> The Second Injury Fund requests we allow it to substitute the new claim of error set forth in its amended application for review, as follows:

The Administrative Law Judge erred in finding that claimant's permanent and total disability arises as a result of a combination of medical conditions because the medical restrictions outlined by the treating physician resulted in permanent and total disability in isolation based on the expert opinion of claimant's vocational expert or the claimant's inconsistent testimony and statements results in a finding that he lacks credibility and is therefore not permanently and totally disabled.

The law in Missouri is clear that the Commission lacks authority to accept an amendment to an application for review beyond 20 days from the issuance of the administrative law judge's award. See, e.g., *Morris v. Christian Bd. of Publ'n*, 943 S.W.2d 249 (Mo. App. 1997), *Smith v. Smiley Container Corp.*, 997 S.W.2d 126 (Mo. App. 1999), *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568 (Mo. App. 2000), and *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234 (Mo. App. 2000). As recounted above, the administrative law judge's award was issued on July 6, 2018, while the Second Injury Fund's Motion was filed with the Commission on December 7, 2018. We conclude, therefore, that we lack authority to permit the Second Injury Fund to amend its application for review.

Because we lack authority to grant the Second Injury Fund's Motion, we hereby deny same.

#### *Employee's request to dismiss the application for review is denied*

We acknowledge employee's argument that the Second Injury Fund's application for review falls short of the specificity requirement under Commission Rule 8 CSR 20-3.030(3)(A), which provides as follows:

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<sup>2</sup> We note that the primary injury at issue in this case did not affect employee's bilateral shoulders, but rather his neck and hands; that employee does appear to have suffered some restrictions in connection with his preexisting conditions; and that employee has never been a firefighter.

Employee: Jimmy Mickelberry

- 3 -

An applicant for review of any final award, order or decision of the administrative law judge shall state specifically in the application the reason the applicant believes the findings and conclusions of the administrative law judge on the controlling issues are not properly supported. It shall not be sufficient merely to state that the decision of the administrative law judge on any particular issue is not supported by competent and substantial evidence.

Employee argues that the Second Injury Fund's failure to accurately identify the issues in its application for review deprives the Commission of jurisdiction to hear those issues, or the appeal as a whole. We disagree. The Commission has jurisdiction over this appeal because the Second Injury Fund filed a timely application for review following the issuance of the administrative law judge's award. See § 287.480.1 RSMo.

With regard to issues not raised in an application for review, the courts have instructed that the Commission is not precluded, on a jurisdictional basis, from considering such issues, provided that all parties are given notice and an opportunity to brief such issues before the Commission makes its award. See *Mell v. Biebel Bros., Inc.*, 247 S.W.3d 26 (Mo. App. 2008). Here, employee has been provided notice of the Second Injury Fund's various arguments via its brief. Employee has also had an opportunity to respond in his own brief. As a result, we conclude that due process has been satisfied, and that we are not precluded from entertaining the issues raised by the Second Injury Fund in this appeal.

Returning to employee's request that we dismiss the Second Injury Fund's application for review for failure to comply with Commission Rule 8 CSR 20-3.030(3)(A), we must note that employee has also failed to comply with our rules by filing a brief far in excess of the allowable page length, without first seeking leave to do so. Pursuant to 8 CSR 20-3.030(5)(B), "[a]ny brief submitted which is not in compliance with [our rules] may not be considered."

However, rather than decline to consider employee's brief for this deficiency, we instead accepted it, consistent with the longstanding directive from the Missouri courts that, in workers' compensation cases, "[p]rocedural rights are considered as subsidiary and substantive rights are to be enforced at the sacrifice of procedural formality." *Loyd v. Ozark Electric Coop., Inc.*, 4 S.W.3d 579, 586 (Mo. App. 1999). In this context, and consistent with the statutory mandate that "[a]ll proceedings before the commission or any commissioner shall be simple, informal, and summary," see § 287.550 RSMo, we hereby decline to dismiss the Second Injury Fund's application for review.

Instead, we will fully consider the merits of this appeal, as briefed by the parties, and issue our decision in due course.

**Order**

We deny the Second Injury Fund's Motion.

Employee: Jimmy Mickelberry

We deny employee's request to dismiss the application for review. We will issue our decision on the merits of the appeal in due course.

Given at Jefferson City, State of Missouri, this 18th day of March 2019.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



*Robert W. Cornejo*

Robert W. Cornejo, Chairman

*Reid K. Forrester*

Reid K. Forrester, Member

*Curtis E. Chick, Jr.*

Curtis E. Chick, Jr., Member

Attest:

*Pamela M. Hoffmann*  
Secretary