BEFORE THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TREASURER OF THE STATE OF MISSOURI
CUSTODIAN OF THE SECOND INJURY FUND,
ADDITIONAL PARTY/APPELLANT,

v.

JAMES WITTE,
EMPLOYEE/APPELLANT

WD74644

APPEAL FROM THE MISSOURI LABOR AND INDUSTRIAL RELATIONS COMMISSION

REPLY BRIEF OF APPELLANT SECOND INJURY FUND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Shipp v. Treasurer does not allow stacking of below-threshold disabilities that are not to the same major extremity.

Employee argues that the Commission's decision is correct because whether "stacking" is allowed was decided in *Shipp v. Treasurer,* 99 S.W.3d 44 (Mo. App. 2003), and the Second Injury Fund's argument was "soundly rejected." Employee's Brief at 13. Employee's reliance on *Shipp* is misplaced.

Employee correctly points out that under *Shipp,* there is a basis for "stacking" of separate disabilities at different levels *to the same major extremity*. Employee's Brief at 13. However, Employee seeks to expand the ruling of *Shipp* to include stacking of below-threshold disabilities that are not to a major extremity. Such an expansion is not supported by statute or case law. Despite Employee's attempt to expand *Shipp,* this Court pointed out the limited nature of "stacking" allowed under that holding by stating that "*if a claimant has multiple injuries to a major extremity at various levels*, it may be appropriate, depending on the facts and circumstances, to rate the percentage of disability to the entire major extremity." *Shipp,* 99 S.W.3d at 53 (emphasis added). The Labor and Industrial Relations Commission here

stacked 10% body as a whole (BAW) (40 weeks)[1] diabetes, 10% BAW (40 weeks) gastrointestinal condition, 10% BAW (40 weeks) psychiatric problems, 10% of the right leg at the 207-week level (20.7 weeks), and 5% of the BAW (20 weeks) lumbar spine. *Shipp* does not allow this, nor does § 287.220.1, RSMo.

Similarly, employee seeks to expand the holding in *Motton v. Outsource Int'l,* 77 S.W.3d 669 (Mo. App. 2002), another case that deals only with major extremity injuries. The discussion of *Motton* by Employee at page 14 in his brief only further establishes that *Motton* precludes converting major extremity injuries to a number of weeks to reach the thresholds of § 287.220.1, RSMo, yet that is exactly what the Commission did here.

> Had the legislature intended to set the threshold for disability for a major extremity on a minimum number of "weeks," rather than a minimum percent of disability, it could have done so as it did when it set the threshold for disability of the body as a whole. [citation omitted] Rather, the legislature premised liability on a percentage of disability. The legislature's decision not to measure disability to a major extremity by weeks of compensation indicates that it did not intend to do so.

Motton, at 674-675.

[1] The Division of Workers' Compensation's graphic chart of the schedule of disabilities can be found at http://www.labor.mo.gov/DWC/Forms/WC-110-AI.pdf.

Employee has not set forth any facts or circumstances to warrant stacking and fails to provide any support for the stacking of a major extremity with body as a whole disability. The Commission has no authority for stacking disabilities that are not to the same major extremity and was incorrect in including Employee's 10% BAW diabetes, 10% BAW gastrointestinal condition, 10% BAW psychiatric problems, 10% of the right leg at the 207-week level, and 5% of the BAW lumbar spine disability in its calculation of the Second Injury Fund's liability.

Section 287.220.1, RSMo, does not allow for combining multiple *de minimus* disabilities to reach thresholds.

Employee also argues that the fourth sentence of § 287.220, RSMo, "provides the mechanics by which compensation may be determined" and supports the Commission's Award. Employee's Brief at 16. However, following the Employee and Commission's rationale gives no meaning to the third sentence of § 287.220.1, RSMo.

The third sentence of § 287.220.1 sets forth specific thresholds that a disability must meet to be considered in the Second Injury Fund calculation. It reads:

> If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining

> reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.

§ 287.220.1, RSMo.

Employee acknowledges that this sentence was added by the legislature in 1993 "to limit permanent partial disability awards against the Second Injury Fund to those cases where both the pre-existing disabilities

and the disabilities from the work injury are more than *de minimus.*" Employee's Brief at 15. Employee refers to this sentence as containing "protections intended by the legislature to shield the Second Injury Fund from liability for claimants with only *de minimus* pre-existing disabilities." Employee's Brief at 15. However, by the Commission's holding and the Employee's argument, the acknowledged purpose of this sentence is violated. Employee appears to argue that, in essence, the fourth sentence of § 287.220.1, RSMo, overrides the third sentence setting forth the thresholds and requires that "all injuries or conditions existing at the time the last injury was sustained," even *de minimus* ones, be taken into consideration for Fund purposes. Employee's Brief at 16. If Employee is correct, there is no purpose to the thresholds set forth in the third sentence at all.

If we understand Employee to argue that if any of his disabilities meet the threshold's set forth in § 287.220.1, RSMo, sentence three, then all disabilities can be included in the Fund's liability calculation, his argument still fails. None of Employee's disabilities meet the threshold requirements of § 287.220.1, RSMo, when considered individually. The Commission found 10% BAW diabetes, 10% BAW gastrointestinal condition, 10% BAW psychiatric problems, 10% of the right leg at the 207-week level, and 5% of the BAW lumbar spine. "This court defers to the Commission when it resolves issues concerning credibility and weight to be given to conflicting

evidence. In the absence of fraud, the factual findings made by the Commission within its powers are conclusive and binding on this court." *Shipp* at 50. (Citations omitted).

As the Supreme Court of Missouri noted in 2009, "the legislature intended that every word, clause, sentence, and provision of a statute have effect." and "the legislature did not insert verbiage or superfluous language in a statute." *State ex rel. Unnerstall v. Berkemeyer,* 298 S.W.3d 513, 519 (Mo. banc 2009). The Commission's holding and Employee's argument violate this long-standing tenent. Employee argues that the principles of strict construction support the Commission's holding, and he relies on *Robinson v. Hooker,* 323 S.W.3d 418 (Mo. App. 2010). Employee's Brief at 16. However, under strict construction the Commission has failed to give meaning to the "a" in front of "disability" and combines several *de minimus* disabilities together to reach the thresholds.

Finally, Employee makes no argument at all refuting *Cardwell v. Treasurer,* 249 S.W.3d 902 (Mo.App. 2008), and the recent cases issued by

this very same Commission in direct conflict with the holding in this case.

Respectfully submitted,

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Certificate of Service and Compliance with Rule 84.06(b) and (c)

I hereby certify that on May 11, 2012, a true and correct copy of the foregoing was filed electronically via Missouri Case Net to:

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The undersigned further certifies that the brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 1,548 words.

/s/ Jacinda A. Thudium
_____
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