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Second Injury Fund Update

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Overview:

Section 287.220.3

Other case law of significance

Practical considerations



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287.220.3:

- (1) All claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection. (emphasis added).
- (2) If the claim (regardless of whether arising from an accident or occupational disease) is for a date of injury after January 1, 2014, Section 287.220.3 applies. Date of filing does not control.

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Cosby v. Treasurer
Weibrecht v. Treasurer
Coffer v. Treasurer



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Section 287.220.3

(2) 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:

Cosby v. Treasurer:

There are no Fund PPD benefits under the new law.

**also absent from Section 287.220.3 are second job wage loss and uninsured benefits.*



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Requirements for Preexisting Injuries and Conditions

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



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Medically Documented Preexisting Disability

- Medically documented:
 - Must preexist the primary injury, but does not have to be at MMI before the date of the primary injury
 - Requires authoritative support of a preexisting disability
 - Unsupported statements (e.g. self-reports to a doctor) of a preexisting disability are not enough - “The provided authoritative support for a preexisting disability must be authoritative *in the medical field*”
- Disability
 - Cannot combine multiple body parts to meet 50 week threshold; each must meet on its own

Treasurer v. Parker

Dubuc v. Treasurer
→

Adams v. Treasurer
→



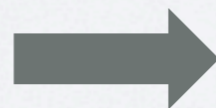
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Minimum of 50 Weeks

- “Stacking” or adding disabilities
 - Each disability must reach 50 weeks itself
 - Cannot “stack” different body parts from single work injury to meet 50 weeks
 - Ex: stip for 15% BAW referable to bilateral legs *and* lower back
- Cannot combine compensable injury and non-compensable injuries to the same body part to meet 50 weeks

Adams v. Treasurer



Phelps v. Treasurer



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287.220.3(a)(i):

- (i) *A direct result of active military duty in any branch of the United States Armed Forces; (emphasis added)*





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287.220.3(a)(ii):

(ii) A direct result of a compensable injury as defined in section [287.020](#)

- The Fund's position is that category 2 does not include occupational diseases.
- Issue was raised before Supreme Court in *Lexow* which was dismissed on the brief. (see Commission decision).



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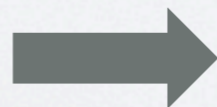
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287.220.3(a)(iii):

- (iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or
- The impact of the preexisting disabilities on the primary injury must be more than incidental; they must clearly exacerbate the primary injury in a meaningful way.
 - Direct relationship between preexisting and primary

Swafford v. Treasurer

Schebaum v. Treasurer





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287.220.3(a)(iv):

- (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
- Under plain and ordinary meaning, opposite extremity is opposite limb, not just opposite side (left shoulder is not opposing extremity of right knee)

Phelps v. Treasurer



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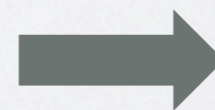
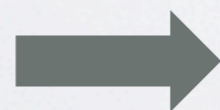
287.220.3(2)(a)b:

- 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
 - The Employee's total disability must result from the combination of the primary and only *qualifying* preexisting conditions.
 - The existence of non-qualifying disabilities does not count for or against the claimant when he meets the second threshold condition.
 - 287.220.3 does not prohibit consideration of life factors (i.e. age, education, transferable skills, physical appearance)

Treasurer v. Parker

Klecka v. Treasurer

Phelps v. Treasurer





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SIF v Employer Liability:

- (3) When an employee is entitled to compensation as provided in this subsection, the employer at the time of the last work-related injury shall only be liable for the disability resulting from the subsequent work-related injury considered alone and of itself.
- (4) Compensation for benefits payable under this subsection shall be based on the employee's compensation rate calculated under section [287.250](#).



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287.220.3(3) and Employer Liability:

- (3) When an employee is entitled to compensation as provided in this subsection, the employer at the time of the last work-related injury shall only be liable for the disability resulting from the subsequent work-related injury considered alone and of itself.
- Fund's Position: *McCoy v. Meridian Medical Tech.*, ED 111299
- Employee argument: *Federal Mut. Ins. Co. v. Carpenter*



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More Caselaw; Rule 84.04:

- ***Lexow v. Treasurer*** – briefing requirements are mandatory; court cannot act as advocate for claimant to overcome deficiencies
- ***Lewis v. Treasurer*** – dismissal for failure to comply with Rule 84.04



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More Caselaw; Election of Remedies:

- ***Hood v. Treasurer*** – Claimant barred from recovery against Fund after filing civil suit due to election of remedies doctrine



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More Caselaw; Remand:

- *Weibrecht v. Treasurer*— Section 287.220.3, by its plain language, governed at the time of the claim; ALJ's denial of motion for additional evidence was not an abuse of discretion
- *Dubuc v. Treasurer* — Section 287.220.2 and 287.220.3 were in effect at the time of the injury, and the latter section governed claimant's claim by the plain language of the statute; claimant could have argued in the alternative



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More Caselaw; Weight of the Evidence:

- A weight of the evidence challenge under § 287.495.1(4) triggers a specific analytical process through which Employee *must*:
 1. Identify a factual proposition needed to sustain the result;
 2. Marshal all evidence supporting that factual proposition, subject to the Commission's authorized factual and credibility determinations, explicit or implicit, and viewing the record objectively where there were no explicit or implicit findings;
 3. Demonstrate why the evidence from the second step lacks sufficient probative force on the issues, such that the Commission could not have reasonably believed the factual proposition set forth in step one.



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Weight of the Evidence, Contd:

- § 287.495.1 (4) challenge will succeed only in the “*absence* of sufficient competent evidence[.]” *Nichols*, 528 S.W.3d at 928.
- “The testimony of one witness, even if contradicted by the testimony of other witnesses, may be sufficient competent evidence to support an administrative decision.” *Thompson v. Treasurer*, 545 S.W.3d 890, 893 (Mo. App. E.D. 2018).
- The existence of evidence supporting an alternate conclusion is irrelevant in a § 287.495.1 (4) challenge. *Nichols*, 528 S.W.3d at 922.



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More Caselaw; Burden of Proof:

- *March v. Treasurer* – Claimant's burden of proof includes both production and persuasion
- *Annayeva v. SAB of TSD of City of St. Louis*
Court is bound by Commission's credibility determinations and the weight the Commission gives to conflicting evidence
- *Schlereth v. Aramark Uniform Services, Inc.*
Findings of fact made by the Commission within its powers shall be conclusive and binding



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More Caselaw; Employee Death:

- Requirements:
 - Suggestion of Death
 - Determine Dependents
 - Substitute Party
- Resources:
 - Section 287.230
 - *Butterball v. Doubrac*



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Practical Considerations(Or: How to Get Your Demand to the Front of the Line):

- Put it in writing
- Requirements:
 - Records for primary and preexistings
 - All IMEs
 - All vocational reports
 - EE depo
 - Any stips or awards (primary and/or preexisting)
- Is the ER/IR still in?
 - Tentative settlement amount/breakdown
 - PPD and PTD rates
 - Amount/dates of TTD paid
 - Monthly SSD amount



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More Practical Considerations:

- Vocational expert opinion generally required for consideration of authority greater than \$30k
- Review meetings are periodic and have deadlines for submission
- Request and complete a blank template to expedite the process

Credit goes to Keyla Rhoades for preparing the Fund's 2023 Mo Bar presentation which was the basis also for this presentation.



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Questions or Comments?

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