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THE SECOND INJURY FUND

JAMES B. SLUSHER*

INTRODUCTION

The second injury fund is established to assist in the continuing fight against the unemployment of those who are sufferers of some disability at the time of their employment. The fund relieves an employer or his insurer of the responsibilities of liability to an employee for any disability which is not specifically attributable to an injury suffered while in the employment of that particular employer. The obvious, although not necessarily the only, basis for this type of legislation rests in the belief that an employer will not hire a job applicant for work involving danger to the extremities if that applicant has previously become disabled in an extremity. A man with only one leg might easily become permanently and totally disabled if he were to lose his other leg in the roundhouse, and his employer might choose to forego the risk of payments for this permanent and total liability by using the simple expedient of hiring another switchman. Therefore, the creation of such a fund, and they exist in many states, is a positive measure. It serves to encourage the hiring of individuals who are already disabled to an extent which might render them susceptible to further injury and disability.

For those not familiar with the Missouri Workmen's Compensation Law it should be noted that there are two conditions of disability existing which implicate the fund: (1) permanent partial disability; and (2) permanent total disability. Permanent partial disability is that disability to an employee which is permanent in its duration, but which is an impairment of his bodily function only to a degree that does not preclude some form of gainful occupation by that employee.¹ Permanent total disability is that disability which is permanent in duration and which renders an employee industrially unemployable. Section 287.020(8)² defines "total disability" in general terms as follows:

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1. § 287.190(5), RSMo 1959.
2. § 287.020(8), RSMo 1959.

The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

I. PERMANENT PARTIAL DISABILITY

That portion of section 287.220(1)³ which is applicable to permanent partial conditions of disability states:

. . . If any employee who has a permanent partial disability whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by a referee or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that referee or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. . . .

The simplest method of explanation of the meaning of this portion of the law is to recite an example involving a claimant, John Doe. From whatever cause, either a congenital condition or a loss through some injury during life, Doe has suffered the loss of his right thumb at the proximal joint. This is a loss which is permanent in nature, and it is a partial disability of Doe's body as a whole. Section 287.190⁴ allows compensation for the loss of a thumb at the proximal joint for the value of 60 weeks.

Although Doe has the existing disability of the loss of his right thumb he is nevertheless employed by his local city lumber yard, which is subject

3. § 287.220(1), RSMo 1959.

4. § 287.190, RSMo 1959.

to the Workmen's Compensation Law, for the purpose of chopping down small trees. One cold winter day, while working in his usual employment, Doe erringly lets his left thumb slip into the path of his moving axe, and he thereupon suffers a compensable disability by the loss of his left thumb at the proximal joint.

John Doe has properly proceeded to a workmen's compensation hearing before a referee of the Division, and presents his uncontested medical report to the effect that his combined disability, his disability which is the result of the loss of both thumbs, is 35 per cent of the body as a whole, or 140 weeks disability.

The referee accepts the facts and finds that John Doe has suffered a compensable disability. The problem is in the apportionment of the liability for this disability between the employer-insurer and the second injury fund. In the words of section 287.220(1): ". . . 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 pre-existing disability." Had Doe not previously lost his right thumb his disability for the loss of the left thumb would have been adjudged to be 60 weeks. Therefore, the employer-insurer is liable for 60 weeks. This period when added to the 60 weeks determined by the referee to be Doe's preexisting disability, equals 120 weeks. This 120 weeks disability is then subtracted from the combined disability, adjudged to be 140 weeks, and leaves the second injury fund liable for 20 weeks disability. This disability is allowed when Doe's resulting condition is permanent and partial.

II. PERMANENT TOTAL DISABILITY

That portion of section 287.220(1) which pertains to the liability of the fund in permanent and total disability cases states:

. . . If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable, is less than the compensation provided in this chapter for permanent total disability then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the second injury fund

Assume John Doe, at the time of his employment, is suffering from a preexisting disability which is permanent and partial in kind. He enters upon his employment and has an accident which, had it not been for his preexisting disability, would have rendered him 35 per cent disabled. However, as a result of the combination of his disabilities, Doe is rendered permanently and totally disabled. In these circumstances the employer-insurer becomes liable only for the disability which would have resulted had Doe not already been partially disabled. This liability is computed under section 287.190(3),⁵ which provides that in case of permanent partial disability compensation shall be paid for a period not to exceed 400 weeks. Thirty-five per cent of 400 weeks would place the liability of the employer-insurer at 140 weeks. The liability of the fund is then computed by subtracting the 140 weeks of disability for the injury suffered while in Doe's present employment from a total of 300 weeks, the period of compensation provided by section 287.200(1) in cases of permanent total disability. This would render the fund liable for 160 weeks of disability payments at one salary rate, and then for the lifetime disability payments at another rate provided by section 287.200(1).⁶

The above methods would appear to be the unquestioned meaning of the statutes in computing the liabilities of the employer-insurer and the fund in those or similar circumstances. There has been some contention that when a permanent and total disability case exists the number of weeks allowed for the last injury should be added to the weeks allowed for the percentage of preexisting disability, and the sum of these two subtracted from the 300 weeks allowed for a permanent and total case. This position would be consistent with that used in computing the liabilities in a permanent and partial case, but it would be contrary to the apparent wording of the statute.

That the two cases should be treated differently is somewhat substantiated by the case of *Goebel v. Missouri Candy Co.*,⁷ in which the St. Louis Court of Appeals considered the situation in which the claimant had a preexisting disability to his right hand, and then became a permanent total disability case after the loss of his left hand. In considering the 1929 law which made the same distinction as the present section, the court stated:

5. § 287.190(3), RSMo 1959.

6. § 287.200(1), RSMo 1959.

7. 227 Mo. App. 112, 50 S.W.2d 741 (St. L. Ct. App. 1932).

It must be conceded, therefore, that it was the intention of the Legislature in dealing with cases of permanent disability, where there had been a previous disability, to make separate provision for that class of cases in which the condition resulting from the last injury is a permanent partial disability as against that class of cases in which the resulting condition is a permanent total disability.⁸

Although there may be those who would oppose such a change it would not appear to create an inequitable method of payment if in a permanent and total disability case the number of weeks allowed for preexisting disability, plus the weeks allowed for the injury over which the claim has arisen, were subtracted from the 300 weeks allowed in a permanent and total case. As the law stands today the fund may be liable for practically the entire 300 week allowance for disability, as well as for the lifetime payments. Assume that John Doe has previously suffered, and has been paid for, a 95 per cent permanent and partial disability to the body as a whole. He would have been paid the value of 380 weeks disability. John Doe, still suffering from his 95 per cent permanent and partial disability now goes to work for a new employer and suffers another injury which would have rendered him a 5 per cent disability had he not been previously disabled. However, this 5 per cent disability when combined with his preexisting disability renders Doe permanently and totally disabled. The employer-insurer under these circumstances would be liable only for 5 per cent disability to the body, which would be 20 weeks, and the fund under the existing law would have to pay the difference between 20 weeks and 300 weeks, or 280 weeks plus the lifetime payments. There is a distinction, however, between this situation and one in which the 95 per cent preexisting disability was from a non-compensable disability. In the example Doe will have been paid a total of 660 weeks compensation for his disability which was not attributable to his latest injury. Perhaps the Missouri Legislature should give this matter its further attention.

III. PROCEDURE

Appeals involving the state treasurer as custodian of the second injury fund must be brought from the circuit courts to the Supreme Court of Missouri.⁹

8. *Id.* at 119, 50 S.W.2d at 744.

9. MO. CONST. art V, § 3; § 287.220(2), RSMo 1959; *Mossman v. St. Joseph Lead Co.*, 254 S.W.2d 241 (St. L. Ct. App. 1953).

From January 1959 to January 1961 there were from 80 to 90 claims filed annually against the fund. Of these, approximately 75 per cent were filed in the St. Louis area, 10 per cent in Kansas City, and 15 per cent in the other areas of the state. The Attorney General's office entered into settlement agreements in the bulk of the claims, and of the number of the decisions rendered by the referees upon a formal hearing only a relatively few cases were appealed to the Industrial Commission by the claimants. From the full Commission's decisions there were two appeals in the circuit courts of the state at the end of December 1960. The number of claims being filed against the fund is increasing every year, not only because of the growing work force covered by the Workmen's Compensation Law, but also because of a growing consciousness on the part of claimants' attorneys that the fund exists.

One of the problems most frequently encountered has been that of the applicability of the statute of limitations to a claim filed against the fund. Section 287.430¹⁰ states:

No proceedings for compensation under this chapter shall be maintained unless a claim therefor be filed with the commission within one year after the injury or death, or in case payments have been made on account of the injury or death, within one year from the date of the last payment. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the one year period provided in this section. In all other respects such limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a guardian shall be deemed the termination of legal disability from minority or insanity.

This discussion will not deal with the problem of the time when an injury should reasonably be discoverable. Sufficient case law exists, although not involving the fund, to cover most cases involving this problem. The primary question involving the fund would appear to be whether the fund is to be considered a separate and distinct party which should be brought into a case by a separate and distinct claim or amended claim. It has been urged by some that once an original claim has been filed with the Commission in accordance with the Workmen's Compensation Law the filing of an amended claim making the fund a party defendant is merely an amendment to the original claim, and that the time of filing the amended claim relates back to the date of the filing of the original claim. It has been suggested

10. § 287.430, RSMo 1959.

that in this situation the statute of limitations is not a bar to the remedy against the fund even though the fund is not made a party to the cause until after the twelve month period has elapsed. These positions would hardly appear to be correct. The Kansas City Court of Appeals said, in 1942, that where a new party defendant is brought into the case by amendment the statute of limitations continues to run until he is made a party and the action is commenced against him.¹¹ It has also been held that if an amendment sets up an entirely new and distinct claim or cause of action from that embraced in the original petition or complaint, the running of the statute is not arrested but instead may be interposed in bar of the new claim or cause of action.¹² This would appear to be appropriate when an amended claim is filed against the fund.

It should not be difficult to concede that the fund should be considered a separate defendant from any insurer against whom a claim is filed by virtue of chapter 287. The law creates the fund, and the circumstances of liability are not necessarily the same as those creating the liability of an employer-insurer. The state treasurer is the custodian of the fund, and he should be allowed the protective right of the statute of limitations with respect to claims made against the fund.

There has also been an objection, in behalf of the state treasurer, to the contention that when payments have been made, on account of an injury to a claimant, by an employer-insurer, the statute of limitations is tolled against the fund. In objecting to this contention it was felt that the legislature intended that the payments referred to therein were only the payments by an employer-insurer and that the statute would only be tolled against a claim which would be filed against this employer-insurer. There is no authorization for the fund to make any payments prior to a decision or order by the Division of Workmen's Compensation, except under circumstances involving the Board of Rehabilitation.¹³ When payments have been made by order of the Board the question remains with respect to whether these payments toll the statute of limitations against the fund. In all probability our courts would so decide.

Section 287.220 requires that before liability is affixed a compensable injury must have been suffered. Failure to establish a compensable injury would not only defeat a claim filed against an employer-insurer, but would

11. *Martinson v. Schutte Lumber Co.*, 162 S.W.2d 312 (K.C. Ct. App. 1942); *Daiprai v. Moberly Fuel & Transfer Co.*, 223 S.W.2d 474 (Mo. 1949).

12. *Mitchell v. Health Culture Co.*, 349 Mo. 475, 162 S.W.2d 233 (1942).

13. § 287.141(3), RSMo 1959.

as well preclude recovery from the fund. Therefore, it can easily be seen that any defense which might be available to an employer-insurer, such as a defense setting forth a failure of compliance with the statutory requirements, would also be available as a defense by the fund. It has been the usual practice of the Division of Workmen's Compensation not to authorize the settlement of a claim between a claimant and an employer-insurer unless the claim is also settled and concluded against the fund. In the normal situation there would be no reason for an independent settlement or a hearing which would not include the fund, and there should be no reluctance upon the part of an employer-insurer to assert those defenses which would benefit both him and the fund. If the injury arising from the second accident is not compensable there is liability neither by the fund nor by an employer-insurer.

CONCLUSION

In conclusion it should be stated that other problems exist in the application of the law to factual circumstances implicating the second injury fund. This writing does not attempt to enlarge upon those cases involving sight and hearing, nor upon those cases which arise because of multiple injuries. They have not been predominant in the number of claims filed.

It may also be stated that to this time the law has apparently served its purpose, and has been susceptible to fair application. It should be anticipated that cases involving the second injury fund will become an expanding facet in the administration of the Workmen's Compensation Law.