

IN THE SUPREME COURT OF MISSOURI

Supreme Court No.: SC 85456

—
**LARRY HAMPTON,
Employee/Respondent,**

v.

**BIG BOY STEEL,
Employer/Appellant,
and
LIBERTY MUTUAL INSURANCE COMPANY,
Insurer/Appellant**

**SUBSTITUTE REPLY BRIEF IN RESPONSE
TO BRIEF FILED BY RESPONDENT LARRY HAMPTON**

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POINTS RELIED ON WITH AUTHORITIES

I

THE EASTERN DISTRICT COURT OF APPEALS ERRED, AS A MATTER OF LAW, IN HOLDING THAT THEIR POWER TO REVERSE A COMMISSION AWARD AS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE ONLY REQUIRES THE REVIEWING COURT TO FIND WHETHER THE COMMISSION COULD HAVE REASONABLY MADE ITS FINDINGS AND REACHED ITS RESULTS UPON ITS CONSIDERATION OF ALL OF THE EVIDENCE BEFORE IT, BECAUSE DAVIS V. RESEARCH MEDICAL CENTER APPROPRIATELY ARTICULATES THE STANDARD OF REVIEW AS REQUIRING THE REVIEWING COURT TO CONSIDER THE OVERALL EFFECT OF THE RECORD, INCLUDING EVIDENCE WHICH DETRACTS FROM THE AWARD, IN THAT ARTICLE V, SECTION 18 OF THE MISSOURI CONSTITUTION SETS FORTH THE MINIMUM STANDARD THAT THE REVIEWING COURT MUST CONSIDER THE WHOLE RECORD

Seabaugh v. Garver Lumber Mfg. Co., 200 S.W.2d 55, 62 (Mo.banc.1947).

Vaught v. Vaughns Inc. & Southern Missouri Construction, 938 S.W.2d 931, 941 (Mo.App.S.D.1997).

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Davis v. Research Medical Center, 903 S.W.2d 557 (Mo.App.W.D.1995).

ARGUMENT

Introduction

In their Substitute Reply Brief in Response to the Brief Filed By Respondent Larry Hampton, Appellants Big Boy Steel and Liberty Mutual Insurance Company will limit their arguments to the most salient points contained in the Substitute Respondent's Brief filed on behalf of Respondent Larry Hampton (hereinafter "claimant"). Such limitation, however, should not be understood as an abandonment of any argument previously asserted by Appellants.

Statement of Facts

Before addressing the merits of claimant's Substitute Respondent's Brief, Appellants will discuss the deficiency of the Statement of Facts contained therein. Rule 84.04 prescribes the requirements for appellate briefs. *Vodicka v. Upjohn*, 869 S.W. 2d 258, 260 (Mo.App.S.D.1994). The requirements of Rule 84.04 are mandatory and, absent substantial compliance, nothing is preserved for appellate review. *Jefferson v. Bick*, 872 S.W.2d 115, 118 (Mo.App.E.D.1994).

Rule 84.04 governs the nature of the statement of facts to be included in an appellate brief. It requires the statement of facts to be a fair and concise statement of the facts relevant to the questions presented for determination, without argument. Mo.R.Civ.Pro. R.84.04; *Decker v. National Accounts Payable*, 993 S.W.2d 518, 521 (Mo.App.S.D.1999). The primary purpose of the statement of facts in an appellate brief is

to afford an immediate, accurate, complete and unbiased understanding of the facts of the case. *Snelling v. Southwestern Bell*, 996 S.W.2d 601, 603 (Mo.App.E.D.1999).

All statements of fact shall have specific page references to the legal file or the transcript. Mo.R.Civ.Pro. R.84.04(i). The requirement that there be page citations to the transcript and to the record is critical. The statement of facts should be a road map from which the court can quickly and accurately find where the record supports particular statements. *Dors v. Wulff*, 522 S.W.2d 325, 326 (Mo.App.1975).

The Statement of Facts contained in claimant's Substitute Respondent's Brief fails to satisfy the requirements of Rule 84.04(c), in that claimant's Substitute Respondent's brief contains statements that are not fair and concise. For example, page 13, paragraph two contains the following statement: "He testified that prior to January of 1998 he was aware that he had a degeneration in his low back. (Tr., Page 72)." On page 72 of the transcript, claimant testified that he did not know about his degenerative low back prior to January of 1998. (Tr., Page 72, line 20).

Page 17 of claimant's Substitute Respondent's Brief contains the following statement: "It was his testimony that the claimant would reach a point before long where he would be unable to do any type of lifting." This statement is in reference to the testimony of Dr. Mirkin. On page 310 of the transcript, Dr. Mirkin testified that at some point, claimant would not be able to do any *heavy* lifting. (emphasis added). (Tr., Page 310, line 24).

Moreover, the Statement of Facts contained in claimant's Substitute Respondent's Brief fails to satisfy the requirements of Rule 84.04(i), in that several alleged facts do not

contain references to the legal file or transcript. Without a citation to the transcript, they appear argumentative. The following statements of fact are missing references: claimant testified that he was forced to retire (Respondent's Substitute Reply Brief, page 9, paragraph 1); the claimant told Dr. Larson that he was attempting to continue to work despite a continuing increase in back pain (Page 9, paragraph 3); he knows of no job that he can handle within his restrictions (Page 13, paragraph 1).

Claimant's Statement of Facts contains misstatements of testimony and is missing specific references to the record. In light of the foregoing, Appellants respectfully request that the Court strike the Statement of Facts contained in claimant's Substitute Respondent's Brief. Appellants refer the Court to the Statement of Facts set forth on pages 7 to 18 of its Substitute Appellants' Brief.

POINT I

THE EASTERN DISTRICT COURT OF APPEALS ERRED, AS A MATTER OF LAW, IN HOLDING THAT THEIR POWER TO REVERSE A COMMISSION AWARD AS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE ONLY REQUIRES THE REVIEWING COURT TO FIND WHETHER THE COMMISSION COULD HAVE REASONABLY MADE ITS FINDINGS AND REACHED ITS RESULTS UPON ITS CONSIDERATION OF ALL OF THE EVIDENCE BEFORE IT, BECAUSE DAVIS V. RESEARCH MEDICAL CENTER APPROPRIATELY ARTICULATES THE STANDARD OF REVIEW AS REQUIRING THE REVIEWING COURT TO CONSIDER THE OVERALL EFFECT OF THE RECORD, INCLUDING EVIDENCE WHICH DETRACTS FROM THE AWARD, IN THAT ARTICLE V, SECTION 18 OF THE MISSOURI CONSTITUTION SETS FORTH THE MINIMUM STANDARD THAT THE REVIEWING COURT MUST CONSIDER THE WHOLE RECORD

In his Substitute Respondent's Brief, claimant misstates Appellants' argument. Appellants are not arguing that the Eastern District Court of Appeals applied a one-step analysis in reviewing the appropriateness of the Commission's award, as suggested by claimant. (Claimant's brief, 26). Rather, Appellants have argued, and continue to argue, that the Eastern District explicitly disagreed with the Western District in *Davis v. Research Medical Center*, 903 S.W.2d 557 (Mo.App.W.D.1995) in the application of the second prong of a two-prong test.

Claimant asserts that Article V, Section 22 of the Missouri Constitution does not explicitly require that an award not be against the overwhelming weight of the evidence. (Claimant's Brief, 27). Nor does the statutory framework, Section 287.495 of the Workers' Compensation Act, create such a requirement. (Claimant's Brief, 27). Claimant later characterizes the requirement that an award be set aside if it is against the greater weight of the evidence as a creature of case law. (Claimant's Brief, 28).

The phrase "overwhelming weight of the evidence" may very well be a creature of case law. However, the requirement of whole record review is directly traceable to Article V, Section 22, which references the whole record.

In his brief, claimant articulates a concern that no decision has articulated what quantum or quality of evidence will overwhelm the Commission's findings and award. (Claimant's Brief, 29). Several cases have attempted to do so.

In *Vaught v. Vaughns Inc. & Southern Missouri Construction*, 938 S.W.2d 931, 941 (Mo.App.S.D.1997), the Southern District held the phrase "overwhelming weight of the evidence" connotes evidence that is more persuasive than that which is merely of greater weight or more convincing than the evidence which is offered in opposition to it. *Vaught* at 941. Defining the extent to which "overwhelming weight of the evidence" exceeds "preponderance of the evidence" is a task which the Court left to others. *Id* at 942.

In *Degraffenreid v. R.L. Hannah Trucking Co.*, 80 S.W.3d 866, 880 (Mo.App.W.D.2002), the Western District held that, in the context of review of a Commission award, the phrase "overwhelming weight of the evidence" connotes evidence

that is more persuasive than that which is merely of greater weight or more convincing than the evidence which is offered in opposition to it. *Degraffenreid* at 880.

Claimant argues that the standard of review set forth in Article V, Section 22 and Section 287.495.1 (R.S.Mo), is closely analogous to the standard of reviewing a jury verdict. (Claimant's Brief, 30). The Missouri Supreme Court addressed this in *Seabaugh v. Garver Lumber Mfg. Co.*, 200 S.W.2d 55, 62 (Mo.banc.1947). In *Seabaugh*, the Supreme Court acknowledged that the reviewing court utilized oft-cited rules governing the review of compensation cases to the effect that the award has the force of a verdict of jury. However, the Supreme Court noted that the rules were modified by the provisions of the Constitution of 1945, Article V, Section 22, to the extent that the Supreme Court viewed the award as having more nearly the force and effect of a judgment in a *non-jury* case under the Civil Code. *Seabaugh* at 62. (emphasis added).

Claimant writes in his brief that there has not been a decision or analysis which provides a compelling argument for altering the *Davis* standard of review. (Claimant's Brief, 32). Further, he argues that the standard should not be disturbed. (Claimant's Brief, 32). Appellants agree.

Claimant argues that under any application of the standard of review, the opinion of the Eastern District should be affirmed. In their Substitute Brief, Appellants stated their position that either standard of review should result in a reversal of the Eastern District's opinion. That argument will not be reiterated here. Rather, Appellants respectfully refer this Court to their Substitute Brief for their argument that the Commission decision is not

supported by competent substantial evidence or is against the overwhelming weight of the evidence.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the Award of the Commission.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 23rd day of October, 2003 to:
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CERTIFICATE OF COMPLIANCE

1. Appellant's Attorney: Brad L. McChesney, Valentine and Rouse, 10733 Sunset Office Drive, Suite 410, St. Louis, MO 63127, Missouri Bar No.: 50287.
2. This reply brief contains 1706 words in compliance with Rule 84.06(b).
3. This reply brief contains 177 lines.
4. The disc has been scanned and is virus free.

Brad L. McChesney