IN THE SUPREME COURT OF MISSOURI

Supreme Court No. 85456

LARRY HAMPTON,

Employee/Respondent,

v.

BIG BOY STEEL ERECTION,
Employer/Appellant,

and

TREASURER OF THE STATE OF MISSOURI
AS CUSTODIAN OF THE SECOND INJURY FUND,

Additional Party/Respondents.

SUBSTITUTE BRIEF AND APPENDIX OF ADDITIONAL PARTY/RESPONDENT SECOND INJURY FUND

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Claimant's Testimony

Larry Hampton ("claimant") was injured on January 9, 1998 while working for Big Boy Steel Erection. (Transcript from Hearing, "Tr." at 18, 30-31). The claimant is 54 years old and is a high school graduate. He was employed as an ironworker for 31 years. (Tr. 17, 19). His last employer was Big Boy Steel Erection, for whom he worked since 1978, he was last employed on February 18, 1999. (Tr. 19, 46).

On January 9, 1998, the claimant was working at a construction site when he slipped on a beam, fell, and caught himself. (Tr.30-33). He immediately felt pain in his low back pain and stopped working. (Tr. 33-34). When he did not improve after resting at home, he was sent by his employer to Acute Care, where he was seen by Dr. Joseph Prusaczyk on January 12, 1998. (Tr. 34-35). The claimant first complained to Dr Prusaczyk of pain localized to his lower back that increased with lifting, bending, pulling, prolonged sitting and standing. (Tr. 179). Dr. Prusaczyk diagnosed the claimant with acute lumbar strain, and gave him pain medication and muscle relaxers, and told him to attend physical therapy. (Tr. 35-36,179).

When the claimant's symptoms continued, he underwent a MRI. (Tr. 38). The MRI revealed marked flattening of the intervertebral disc at L4-L5, a posterior bulge of the intervertebral disc at that level, and hypertrophic changes in the ligamenta flava that produced relative narrowing of the transverse diameter of the spinal canal at that level. The MRI further identified a posterior bulge of the intervertebral disc at L3-L4. There was also an intervertebral disc bulge at L5-S1 that was asymmetric in the left paracentral location. The final opinion of the radiologist was that the claimant suffered from degenerative disc

disease with multilevel disc bulge and relative narrowing of the transverse diameter of the spinal canal at the level of L4-5. (Tr.178).

Following the MRI, the claimant continued to treat with Dr. Prusaczyk until March 18, 1998, when Dr. Prusaczyk released the claimant to return to work without restrictions. (Tr. 182). But, because the claimant was unable to work due to the pain in his low back, he requested additional medical treatment and his employer sent him to Dr. Peter Mirkin. (Tr. 37-38).

When the claimant first saw Dr. Mirkin on April 10, 1998 his complaints were low back pain and right buttock pain. The claimant denied any history of back pain or problems. (Tr. 200). Dr. Mirkin interpreted the x-ray films taken by Dr. Prusaczyk to show moderate degenerative changes in the lumbar spine, while he interpreted the MRI to reveal severe degenerative disc disease, particularly in the lower lumbar spine. Dr. Mirkin identified several areas of disc bulging at L3-4, L4-5, and L5-S1. Dr. Mirkin recommended a trial of epidural steroid injections, and stated that not much else could be done for the claimant. (Tr. 200-201).

Dr. Steven Granberg then administered the epidural injections. (Tr. 212-213). The epidural injections did not relieve the claimant's symptoms. (Tr. 202).

When the claimant last saw Dr. Mirkin on July 27, 1998 the doctor noted that the claimant was limping during the evaluation, that the claimant had lost 40% of his range of motion, and that straight leg raising produced back pain bilaterally. (Tr. 203). Dr. Mirkin again noted that claimant had degenerative spine disease and indicated that his prognosis

was poor, and that the claimant could expect pain and at some point would be unable to do any heavy lifting. (Tr. 203). Dr. Mirkin released the claimant from care. (Tr. 203).

The claimant worked light duty, acting as a supervising foreman, while he was treating with Dr. Mirkin. (Tr. 39-41). The claimant had problems sitting, standing, and performing any lifting; these limitations created problems with his employer. (Tr. 47, 48). When the claimant became a working foreman in February of 1999, his pain became so severe that he could no longer work. (Tr. 40-41, 46-47). The claimant requested that his employer provide additional treatment. (Tr. 41). But he was told by his employer that he should see his own doctor. (Tr. 41-42).

Following his accident, the claimant treated periodically with Dr. Larson, his family physician. (Tr. 42-43). On visits from May 1998 through March 1999, the claimant complained to Dr. Larson of continuing back pain. (Tr. 265-270). Dr. Larson noted that the low back pain would be stable only if the claimant did not over exert himself. (Tr.267). In March 1999, the claimant saw Dr. Larson again and reported stabbing pains in his back. Eventually, Dr. Larson referred the claimant to a neurosurgeon. (Tr. 270).

The claimant was seen by Dr. Carl Lauryssen, a neurosurgeon, on April 6, 1999. The claimant reported to Dr. Lauryssen that until his accident in January of 1998 when he injured his back at work, he had no previous complaints of back pain. The claimant reported that he had continuing intractable and incapacitating back pain since that accident. (Tr. 216-217). After examining the claimant and reviewing his diagnostic testing, Dr. Lauryssen determined that the only procedure that might improve the claimant's condition was a

surgical fusion. (Tr. 217). Following additional testing and treatment, Dr. Lauryssen concluded that the claimant needed an L3 through S1 decompression and stabilization and that it would take at least six months to return to normal activity. (Tr. 218-219).

The claimant chose not to have the surgery because he could control his pain if he was careful with his activities. Further, the doctor told him that even after the surgery, he could not be an ironworker. (Tr. 46).

The claimant has been unable to work since his last visit with Dr. Lauryssen and has not received any additional treatment other than pain medication. (Tr.46-47). The claimant is in constant pain in his low back, with numbness down his right leg. (Tr. 48-49). He takes pain pills and anti-inflammatory medication on a daily basis. (Tr. 50). He cannot sit for longer than one hour, and cannot stand for longer than 30 minutes before his back pain becomes intractable. (Tr. 52). The claimant is extremely limited in any activities that require lifting, bending, stooping or driving. (Tr.51-52). The claimant's back pain results in sleep disturbances as well. (Tr. 53-54). Because of his back pain, the claimant does not believe that he would be able to work in any job or activity. (Tr. 53).

The claimant had not experienced back problems prior to his January, 1998, work injury. (Tr. 30, 68-69) He did undergo surgery for a hernia in 1996, but recover fully and was able to perform all of the job duties of an ironworker. (Tr. 28-30, 68). Occasionally, the area of the hernia would be sore after he had to bend over a lot in a workday (2,000 times). When that occurred, he would take over-the-counter medication and would be okay the next day (Tr.30).

Medical Testimony

Dr. Robert Margolis

Dr. Margolis, a neurologist, evaluated the claimant on April 28, 2000 at his attorney's request. The claimant gave Dr. Margolis a history of the accident, including complaints of intractable and unremitting back pain. The claimant denied any back problems prior to the accident of January 9, 1998. The claimant complained of constant lumbar pain that he graded as three to four out of ten. (Tr.82-83). Dr. Margolis performed a physical examination, and reviewed all of the claimant's medical records concerning his low back. (Tr. 84-87). Dr. Margolis concluded that the claimant's fall at work in January of 1998 exacerbated a pre-existing degenerative disease resulting in a symptomatic low back injury. (Tr. 87). Dr. Margolis further found that the pre-existing back condition was longstanding and that the activities that the claimant performed as an ironworker for 31 years were a substantial factor in the development of the degenerative disease in his lower spine. (Tr. 88-90). Dr. Margolis also found that the claimant's need for surgery was substantially caused by his occupation or by the event he described on January 9, 1998. (Tr. 92). Dr. Margolis concluded that the claimant had a 30% disability. (Tr.88).

Dr. Peter Mirkin

The employer offered testimony of Dr. Peter Mirkin on the issue of causation. Dr. Mirkin found that the claimant had severe degenerative disc disease, mild stenosis, and a lumbar strain. (Tr. 298). Dr. Mirkin found that the claimant suffered no permanent partial disability from the January 9, 1998, work-related event, and that the degenerative disc

disease was not related to work. (Tr. 301-302). Dr. Mirkin believed that the claimant's degenerative disk disease was more related to the claimant's smoking than it was to physical activity. (Tr. 307-308). Dr. Mirkin testified that the claimant's prognosis was quite poor, and that he expected the degenerative condition in the claimant's back to continue. It was his opinion that the claimant would reach a point before long where he would be unable to do any type of lifting. (Tr. 310).

Vocational Experts

Samuel Bernstein, PhD.

Claimant offered the testimony of Dr. Samuel Bernstein, a licensed vocational rehabilitation specialist and a licensed psychologist. Dr. Bernstein found that the claimant was unemployable in the open labor market. (Tr. 171-172). He based his opinion on the claimant's age in combination with his physical impairments. (Tr.171-172). Dr. Bernstein identified the claimant's main problem as degenerative joint disease that impacted his ability to lift even ten or fifteen pounds, affected his ability to sit for prolonged periods of time, and affected his ability to walk, stand, repetitively bend, stoop, balance and climb. (Tr. 168-169). Dr. Bernstein also indicated that the claimant had mitral valve prolapse, hypertension, obesity, and degenerative joint disease in the lumbar spine, hips and knees. (Tr. 169). Furthermore, the claimant had a semi-skilled work background and had not acquired any skills transferable to other areas of work. (Tr.171). Dr. Bernstein found that when all of those factors were considered, the claimant was unable to compete in the open labor market. (Tr. 130).

Karen Kane

The employer offered the testimony of Karen Kane, a vocational consultant, regarding the issue of employability. (Tr. 327). Ms. Kane did not see or evaluate the claimant personally. (Tr. 347). Instead, she reviewed medical records that described the limitations expressed by different physicians. (Tr. 331-333). Based on her review of the claimant's medical records, Ms. Kane determined that the claimant could compete in the open labor market and perform jobs such as a shipper and receiver, checker, bench work, and assembler. (Tr.340-341). Ms. Kane agreed that the claimant would not be able to perform the duties of an ironworker and that he had attempted to return to the open labor market after his injury, but was unable to do so. (Tr. 347-349). While Ms. Kane did concede that the claimant was prohibited from frequent bending, twisting, squatting, and climbing, she did not consider the claimant's inability to sit for prolonged periods, stand for prolonged periods, and his need to rest after any exertional activity in her analysis of his ability to compete in the open labor market. (Tr. 353-355).

The Commission's Decision

On August 2, 2002, the Labor and Industrial Relations Commission modified the Award of the Administrative Law Judge, who had awarded permanent partial disability from the employer, and awarded permanent total disability from the employer. The Commission found that the claimant was entitled to weekly payments of $531.52 beginning February 18, 1999, to continue for his life. The Commission found that the Second Injury Fund had no liability. (Appellant's Appendix to Brief, hereinafter "A." at 25-27).

The Court of Appeals affirmed the Commission's finding that the claimant was permanently and totally disabled against the employer. (A. 37-41). However, the Court of Appeals then discussed the appropriate Standard of Review when reviewing cases from administrative bodies. The Court of Appeals determined that the standard set forth in *Davis v. Research Medical Center*, 903 S.W.2d 557 (Mo.App. W.D. 1995), was incorrect as overly broad. (A. 36-37). The employer then appealed that decision to this Court.

Argument

The standard of review for administrative decisions as set forth in *Davis v. Research Medical Center*, 903 S.W.2d 557 (Mo.App. W.D. 1995), more clearly follows the constitutional mandate and statutory guidelines for appeals from the Commission. However, the Court of Appeals correctly ruled that, if the claimant is permanently and totally disabled, it is the result of his January 9, 1998 work injury alone.

ARGUMENT

1. The longstanding rule in *Davis vs. Research Medical* correctly states the standard of review for Commission decisions.

Since 1995, the standard of review in Worker's Compensation cases has been clearly established. That year the Court of Appeals, Western District, sitting *en banc*, established the benchmark for that review in *Davis vs. Research Medical*, 903 S.W.2d 557 (Mo.App. W.D. 1995). In *Kincade v. Treasurer of Missouri*, 92 S.W.3d 310 (Mo.App. E.D. 2002), the Eastern District applied that rule. *Kincade*, 92 at 311. But in this case, the Eastern District disagreed with *Davis* even *Kincade*. It established a new standard of review. That standard departs not just from *Davis*, but from the constitutional requirement that review be on "the whole record." That departure is both unwarranted and unwise.

History of the Standard of Review

The judicial review of administrative decisions was considered sufficiently important that a provision in the Missouri Constitution provides the minimum standard for review. The Constitution provides:

> All final decisions, findings, rules and orders of any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

Mo. Const., Art. V, sec. 18.

This Court held in *Wood v. Wagner Electric Corp.*, 355 Mo. 670, 197 S.W.2d 647, 649 (Mo. banc 1946) that the phrase allowing direct review "as provided by law" refers to the method, not to the scope of the review. Thus the Constitution requires review, but allows the legislature to define how it will proceed. The Constitution does not give the legislature such authority with regard to the scope of the review. Scope is defined by a different phrase: that the decision must be "supported by competent and substantial evidence upon the whole record." *Wood*, 355 at 674,197 at 649. Significantly, the Court indicated that this is the mandatory minimum standard of review to be employed. *Id.* While this standard does not allow the reviewing court to substitute its judgment for that of the administrative tribunal, it does require the court to consider all of the evidence before it. *Id.* Any statute purporting to dictate the scope of review in administrative matter must be read in light of the constitutional dictate for that review.

The statute setting forth the standard of review in Workers' Compensation cases is found at §287.495, RSMo. (2000). In the absence of fraud, factual findings made by the Commission within its powers are conclusive and binding. *Id.* The court on appeal shall review only questions of law and may disturb the Commission's award only for the following reasons: that the Commission acted without or in excess of its powers, that the award was procured by fraud, that the facts found by the Commission do not support its award or, that there was not sufficient evidence in the record to warrant the making of the award. *Id. See, Curry v. Ozarks Elec. Corp.*, 39 S.W.3d 494, 495 (Mo. banc 2001). That statute, then, must be interpreted and applied in light of Article V, Section 22 and *Wood*.

Davis v. Research Medical Group

In *Davis,* the Court of Appeals, Western District, considered, at length, the history of judicial review of administrative decisions. The court noted that following the pivotal *Wood* case, the districts of the courts of appeal developed a two step process to review administrative decisions. First, the court considers whether the Commission's decision was supported by competent and substantial evidence. During this first step, the court considers only whether there is competent and substantial evidence to support the Commissions's decision; all contrary evidence is disregarded. If the court finds any competent and substantial evidence to support the Commission's decision, then it proceeds to the second step of the process. *Davis*, 903 at 565.

In the second step, the court considers whether the Commission's decision is supported by the record as a whole. *Davis*, 903 at 565-566. In other words, the court must decide whether the Commission's decision is supported by the whole record, or is against the overwhelming weight of the evidence. The court in *Davis* found that this second step, the review of the record as a whole, is mandated by the Constitution. *Id.* Significantly, the *Davis* court also found that the review process in the second step differs if the Commission overturns the findings of the ALJ regarding the credibility of a witness who gave live testimony. *Davis,* 903 at 567-568. The court indicated that there should be closer analysis in cases in which the Commission overturns an ALJ's determination of credibility.

In *Davis*, the court cited to *Michler v. Krey Packing Co.*, 363 Mo. 707, 253 S.W.2d 136 (Mo. banc 1952), for the appropriate standard of review when the Commission overturns the ALJ's decision regarding credibility. When this occurs, the court must give "due consideration" to the ALJ's contrary findings. Further, the ALJ's finding of credibility may need less substantial supporting evidence than the Commission's because the "impartial experienced" ALJ had an opportunity to observe the

witness and draw his/her conclusion. *Davis*, 903 S.W.2d at 570-571. The court in *Davis* recommended that the appellate court review the Commission's reason for disagreeing with the ALJ's credibility determination. *Davis*, 903 S.W.2d at 571.

Soon after *Davis* was decided, the Eastern District cited it as establishing the standard for reviewing Commission decisions. *Cook v. Sunnen Products Corp*., 937 S.W.2d 221, 223-224 (Mo.App. E.D. 1996). All of the Courts of Appeal accepted *Davis* as the controlling standard for reviewing Commission decisions. *Thomas v. City of Springfield*, 88 S.W.3d 155, 158 (Mo.App. S.D. 2002); *McCormack v. Carmen Schell Construction Co.*, 97 S.W.3d 497, 502-503 (Mo.App. W.D. 2002); *Minies v. Meadowbrook Manor*, 105 S.W.3d 529, 534 (Mo.App. E.D. 2003). Even after the Eastern District's decision in this case, the Western District continues to cite *Davis* as the controlling case on the appropriate standard of review. *Cunningham v. Research Medical Center*, 108 S.W.3d 177, 179-180 (Mo. App. W.D. 2003), *Hornbuckle Heating and Cooling, Inc. v. Pickering, slip opinion* (Mo. App. W.D. September 30, 2003).

Hampton v. Big Boy Steel Erection

The issue of the appropriate standard of review was not raised by any of the parties in this case, nor was it addressed at the time of oral argument. The Eastern District chose to address the standard of review *sua sponte.*

The Eastern District noted that the term "weight of the evidence" refers to the probative value of the evidence, not the amount of evidence introduced. *Hampton* at A. 35. The Eastern District then found that when the Commission weighs the evidence, the Commission determines what evidence is credible. Then, because a court defers to the Commission on matters of credibility, the court cannot

undertake the same process as the Commission and weigh the evidence and determine credibility. *Id.* Thus, when reviewing a Commission decision, a court should consider the issue of substance and not the credibility. "Substantial evidence" is "evidence which, if true, would have a probative force upon the issues" and "implies and comprehends competent, not incompetent, evidence." *Id.*, quoting, *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 64-65 (Mo. banc 1949). Therefore, the Eastern District concluded that the appropriate standard of review is to determine "whether the Commission could have reasonably made its findings and reached its result upon consideration of all of the evidence before it." *Hampton* at A.36. Apparently to demonstrate that the change in the standard of review will have little effect, the *Hampton* court pointed out that very few cases are reversed for being against the weight of the evidence. *Hampton*, at A.36.

Davis should be retained as the standard of review

Davis should be maintained as the standard of review for administrative decisions for at least three reasons.

First, *Davis* more closely follows the dictates of the Constitution than the Eastern District standard, in that *Davis* requires that the court review the whole record. *Davis*, 903 at 571; *Missouri Constitution, Article V, Section 18.* Twice in its opinion, the Eastern District states that the appellate court should not consider the "evidence contrary to the Commission's award." (A.36, A.37). Under this directive, the whole record, which includes contrary evidence, would not be considered. This would violate the Constitution.

Second, the Eastern District's determination to preclude consideration of contrary evidence is incompatible with the court's own statement of the proper standard of review. According to the

Eastern District, the question for the appellate court is "whether the Commission could have reasonably made its findings and reached its result upon consideration of all the evidence before it." *Hampton*, A.36. All of the evidence necessarily includes contrary evidence. It is impossible to understand how a court could determine if the Commission's decision was reasonable if the court did not consider all of the contrary evidence and determine whether it is overwhelming. The Commission is only going to cite to the evidence that supports its decision, therefore, it is imperative that the court review the whole record, including the contrary evidence, to determine whether the Commission's decision should be upheld.

Third, the Eastern District totally disregards the discussion in *Davis* regarding credibility determinations. In *Davis*, the court indicated that judicial review of Commission decisions must be more strenuous when the Commission has overturned the credibility determination of an ALJ. *Davis*, 903 at 568-571. It is rare to see such review occur, yet, the analysis in *Davis* explains why such a review is imperative. The *Davis* court noted that ALJs are impartial and experienced and therefore their findings of credibility deserve deference. *Davis*, 903 at 571. Apparently, under *Hampton*, this deference would no longer occur. That is truly an issue - because the two adjectives used in *Davis* to describe ALJs cannot be used to describe the Commission. First, the Commission is not impartial - by its very nature two if its three members are partial to a party in the matter before them. The Commission has one member representing employers, and another member representing employees, the third member is designated as the public representative. Further, the public member is the only Commissioner who must be an attorney. 8 CSR 20-1.010 (2000). Thus, the appellate court is reviewing a decision made by an administrative tribunal where two of the three members are designated to represent particular interests

and with only one member with the legal experience and training of an attorney. These factors alone should make the courts scrutinize more closely a Commission decision that reverses the ALJs credibility determination.

Therefore, the standard of review as set forth in *Davis* should be maintained. It more closely follows the constitutional mandate. The *Davis* standard ensures that the appellate court will review all of the relevant evidence - including evidence that is contrary to the Commission's decision. Further, *Davis* provides necessary guidelines for review when the Commission overturns the ALJ's findings of credibility.

II. The finding of the Commission that Employer is liable for permanent total disability as result of the last injury alone is correct under either the *Davis* or *Hampton* standards of review in that the decision is supported by competent and substantial evidence and is not contrary to the overwhelming weight of the evidence, and it is also reasonable based upon all of the evidence.

(Responding to Points II, III and IV of Employer's Brief).

The claimant alleges that he is permanently and totally disabled and unable to compete in the open labor market. Permanent total disability is defined in the statue as the "inability to return to any employment and not merely ... [the] inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.220. Both the Commission and the Court of Appeals found that the claimant was permanently and totally disabled. An both tribunals correctly found that the claimant's disability is due to the last injury alone.

Standard - Permanent Total Disability

The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. S.D. 1992); *Talley v. Runny Mead Estates, Ltd.*, 831 S.W.2d 692, 694 (Mo.App. E.D. 1992); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App. E.D. 1990) ; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. E.D. 1990); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 504 (Mo.App. 1989). Because the test for permanent and total disability considers whether the

employee would be able to compete in the open labor market, the test measures the employee's prospects for obtaining employment. *Reiner,* 837 S.W.2d at 367; *Brown,* 795 S.W.2d at 483; *Fischer,* 793 S.W.2d at 199.

Once it is determined that an employee is permanently and totally disabled, the focus shifts to which party, the employer or the Fund, bears the responsibility for the claimant's inability to compete in the open labor market. Section 287.220 RSMo., provides that the Fund bears responsibility only when the employer's liability for the last accident alone is less than that for permanent total disability. When that occurs, the employer's liability is determined first, and then the remaining compensation due for permanent total disability is paid from the Second Injury Fund. *Id.* Thus, if the employer's liability is equal to the compensation for permanent total disability, the liability of the Fund is not considered, and the work injury alone caused the claimant's permanent and total disability. *Moorehead v. Lismark Distributing Co.*, 884 S.W.2d 416, 419 (Mo.App. E.D. 1994).

Therefore, the first determination to be made is the extent of the compensation liability of the employer for the last injury, considered alone. *Hughey v. Chrysler Corp. and Treasurer of Missouri*, 34 S.W.3d 845, 847 (Mo.App. E.D. 2000); *Vaught v. Vaughts, Inc.*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997); *Roller v. Treasurer of State of Mo.*, 935 S.W.2d 739 (Mo.App. S.D. 1996). The next step is to determine the extent of preexisting disabilities. Only then does the fact finder determine whether the preexisting disabilities combine with disabilities from the primary injury to create permanent total disability. Where the combination of those disabilities cause permanent total disability, the Second Injury Fund is liable for permanent total disability, but only after the employer has paid the compensation due for the disability resulting from the primary injury. *Searcy v. McDonnell Douglas*

Aircraft Co., 894 S.W.2d 173, 177-78 (Mo.App. E.D. 1995). But if the last injury considered alone renders Claimant permanently and totally disabled, then the Second Injury Fund has no liability, the employer is liable for the whole amount, and an analysis of the nature and extent of the preexisting injuries is moot. *Hughey*, 34 S.W.3d at 847.

Evidence of Last Injury Alone

In the present case, the competent and substantial evidence in the record establishes that the primary January 9, 1998 accident injured the claimant's back and aggravated his pre-existing, asymptomatic degenerative disc disease causing the claimant to be permanently and totally disabled. Following the primary accident, the claimant experienced immediate back pain. (Tr. 33-34). Within three days, he sought medical treatment. (Tr. 34-35). Eventually, his treatment consisted of diagnostic testing, epidural injections and medication. (Tr. 35-38, 42-43). Finally, a recommendation was made that the claimant undergo back surgery. That surgery was never performed, however, because the doctors could not state with any certainty that the surgery would improve the claimant's condition enough to allow him to return to work at his chosen occupation. (Tr. 218-219, 46).

As a result of this accident, the claimant has constant pain in his low back with numbness down his right leg. (Tr. 48-49). He takes pain pills and anti-inflammatory medication on a daily basis. (Tr. 50). He cannot sit for longer than one hour, and cannot stand for longer than 30 minutes before his back pain becomes intractable. (Tr. 52). The claimant is extremely limited in any activities that require lifting, bending, stooping, or driving. (Tr.51-52). The claimant's back pain results in sleep disturbances as well. (Tr. 53-54). Because of his back pain alone, the claimant does not believe that he would be

able to work in any job or activity. (Tr. 53). Thus, the inquiry focuses on who is responsible for that back pain - the employer or the Fund

Until January 9, 1998, the claimant had never had back pain, back problems, or limitations due to his back prior to the primary injury. Further, there was no evidence of treatment of the claimant's back prior to the primary accident. (Tr. 30, 68-69). Arguably, the MRI and x-ray films taken after the accident revealed pre-existing degenerative changes in the claimant's back. (Tr. 178, 200-201). Those pre-existing degenerative changes were considered by some of the experts, and rated as a disability against the Second Injury Fund. (Tr. 88, 171). However, that condition was asymptomatic prior to the January 1998 accident. (Tr. 30, 68-69). In *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. E.D. 1990), the court held that a pre-existing condition that had never caused actual and measurable disability at the time the work accident was sustained could not be considered a pre-existing disability necessary to trigger Fund liability. *Messex*, 989 at 215. There is absolutely no evidence that the claimant's back was ever symptomatic prior to his work injury. Therefore, the claimant's alleged pre-existing degenerative disk disease cannot be used to trigger Fund liability because it was asymptomatic up to the time of the primary injury. Thus, if the claimant is permanently and totally disabled, that disability must fall on the employer.

Certainly, the claimant's testimony is persuasive evidence of the amount of disability he sustained. Such testimony is considered substantial and competent evidence even if there is medical testimony to the contrary. *Jost v. Big Boys Steel Erection*, 946 S.W.2d 777, 779 (Mo.App. E.D.1997). Even though no medical doctor found that the claimant could not work, a vocational expert did make that finding. Claimant offered the testimony of Dr. Samuel Bernstein, a licensed vocational

rehabilitation specialist and a licensed psychologist. Dr. Bernstein found that the claimant was unemployable in the open labor market. (Tr. 171-172). He based his opinion on the claimant's age in combination with his physical impairments. (Tr.171-172). Dr. Bernstein identified the claimant's main problem as degenerative joint disease which impacted his ability to lift even ten or fifteen pounds, affected his ability to sit for prolonged periods of time, and affected his ability to walk, stand, repetitive bend, stoop, balance and climb. (Tr. 168-169). Furthermore, the claimant had a semi-skilled work background and had not acquired any transferable skills to other areas of work. (Tr.171). Dr. Bernstein found that when all of those factors were considered, the claimant was unable to compete in the open labor market. (Tr. 130). Therefore, the testimony of the claimant, the medical treatment he received following his accident, and the expert testimony of Dr. Bernstein all provide competent and substantial evidence to support the Commission's decision.

The evidence contrary to Court's last accident alone finding is minimal. Dr. Mirkin, the employer's doctor, not only found that the claimant was able to work, but also found that all of the claimant's limitations and complaints were related his pre-existing degenerative disk disease. (Tr. 301-302). However, Dr. Mirkin's opinion is weakened by the claimant's testimony regarding the severity of the problems with his back following his work injury, and the total lack of problems prior to the work injury.

The employer's vocational expert, Ms. Karen Kane, found that although the claimant could not work as an ironworker, he could perform other jobs. (Tr.347-349, 340-341). However, her opinion is diminished by the fact that she did not consider all of the claimant's limitations when rendering her opinion. Specifically, she did not consider the claimant's inability to sit for prolonged periods, stand for

prolonged periods, and his need to reset after any exertional activity in her analysis of his ability to compete in the open labor market. (Tr. 353-355).

The Commission was faced with competing expert testimony, and, when that occurs, the Commission is empowered to determine which expert it finds more credible. *Bruflat v. Mister Guy, Inc.,* 933 S.W.2d 829, 835-836 (Mo.App. W.D. 1996). Once that determination is made, it is binding on the Court. *Johnson v. Denton Construction*, 911 S.W.2d 286, 288 (Mo. banc 1995). The Commission specifically found that the testimony of Dr. Bernstein was more credible than that of Dr. Mirkin or Karen Kane. (A. 25-26). That decision is within the province of the Commission, and, once that decision was made, it could not be disturbed by the court.

CONCLUSION

For the reasons stated above, the Court should reverse the holding of the Court of Appeals as to the appropriate standard of review from administrative decisions. However, the decision of the Commission should be affirmed as to the responsibility for claimant's alleged permanent and total disability.

Respectfully Submitted,

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

The undersigned hereby certifies that on this 16th day of October, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Mr. Bradley L. McChesney
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The undersigned certifies that the foregoing brief complies with the limitations contained in Special Rule 1, and that the brief contains 6034 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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APPENDIX

Section 287.220.1 RSMo. (2000)

§ 287.220. Compensation and payment of compensation for disability--second injury fund created, services covered, actuarial studies required--failure of employer to insure, penalty--records open to public, when --concurrent employers, effect

1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge 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 administrative law judge 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. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and 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" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall

be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

Section 287.495 RSMo. (2000)

§287.495. Final award conclusive unless an appeal is taken--grounds for setting aside--disputes governed by this section, claims arising on or after August 13, 1980

1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

(1) That the commission acted without or in excess of its powers;

(2) That the award was procured by fraud;

(3) That the facts found by the commission do not support the award;

(4) That there was not sufficient competent evidence in the record to warrant the making of the award.

2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

8 CSR 20-1.010 The Labor and Industrial Relations Commission

PURPOSE: This rule describes the organization of the commission.

The Labor and Industrial Relations Commission (commission) is in charge of the department (Missouri Constitution, Article IV, Section 49) and is composed of three (3) members appointed by the governor with the consent of the senate. One (1) member of the commission who, by reason of his/her previous activities and interests and who is licensed to practice law in Missouri, shall represent the public. Another member on account of his/her previous vocation, employment, affiliation or interests shall be classified as a representative of the employer. The remaining member on account of his/her previous vocation, employment, affiliation or interests shall be classified as a representative of the employee. A member of the commission is designated by the governor as chairman.

AUTHORITY: section 286.010, RSMo 1986. [FNa1] Original rule filed Dec. 18, 1975, effective Dec. 28, 1975.