IN THE SUPREME COURT OF MISSOURI

Supreme Court No.: 85456

–

LARRY HAMPTON,
Employee/Respondent,

v.

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

APPELLANT'S SUBSTITUTE BRIEF

VALENTINE AND ROUSE
Bradley L. McChesney #50287
10733 Sunset Office Dr., Ste. 410
St. Louis, MO 63127
(314) 965-5440; (314) 965-3649 (fax)
Attorneys for Big Boy Steel and
Liberty Mutual Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Larry Hampton (hereinafter "Respondent") brought a workers' compensation Claim against Big Boy Steel (hereinafter "Appellant" or "employer"), seeking benefits for injuries occurring as a result of a work related accident in 1998. Administrative Law Judge Percy held a hearing on November 13, 2001. On February 11, 2002, Judge Percy issued an award. In his award, Judge Percy granted claimant permanent partial disability against the employer and future medical benefits, but denied permanent total disability benefits.

Thereafter, claimant filed his Application for Review with the Labor and Industrial Relations Commission. On August 2, 2002, the Commission issued its FinalAward, modifying the Award of the Administrative Law Judge to include permanent total disability benefits, rather than permanent partial disability benefits.

Subsequently, employer filed a Notice of Appeal with the Missouri Eastern District Court of Appeals, appealing the Commission's Final Award. On May 6, 2003, the Eastern District affirmed the Commission's Final Award.

On May 21, 2003, employer filed its Motion for Rehearing and Application for Transfer with the Court of Appeals. The Court of Appeals denied employer's Motion for Rehearing and Application for Transfer on July 3, 2003. Employer filed its Application for Transfer with the Supreme Court on July 18, 2003. Thereafter, on August 26, 2003, the Supreme Court sustained the employer's Application.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals pursuant to Article V, section 3 and Article V, section 10 to the Missouri Constitution (1945) (as amended 1982). Therefore, jurisdiction of this Court over the instant appeal is invoked pursuant to Article V, section 3 and Article V, section 10 of the Missouri Constitution (1945) (as amended 1982).

STATEMENT OF FACTS

Larry Hampton (hereinafter "Respondent") filed a claim for Workers' Compensation alleging an accident arising out of his employment with Big Boy Steel. He reported an accident occurring on January 9, 1998. (Tr. 30, 23). On this day, he was working on a beam, moving from "joist" to joist. (Tr. 31,3). As he was moving from the beam to the joist, his foot slipped. (Tr. 31,9). He lost his balance and caught himself before falling to the floor. (Tr. 31,17). He felt immediate pain in his low back. (Tr. 33,23).

Respondent first received treatment at Acute Care Medical Center, on January 12, 1998, with Dr. Prusaczyk. (Tr. 35,20). Acute Care records of January 12, 1998, reflect a diagnosis of acute lumbar strain. (Tr. 179). Treatment consisted of medication and physical therapy. (Tr. 35,25). Respondent was instructed to rest and stay off his feet. (Tr. 179).

Respondent had an initial evaluation at St. Louis Physical Therapy and Industrial Rehabilitation on January 14, 1998. (Tr. 191). The initial evaluation reflected a past medical history of leaky heart valve, high blood pressure, a repaired double hernia, and intermittent back problems throughout the years. (Tr. 191). Respondent's chief complaint was low back pain that radiated off to the right side of the trunk. (Tr. 191). Respondent received instruction on stretching exercises. (Tr. 192). The physical therapist listed goals consisting of improvement in range motion referable to the back. (Tr. 192).

An MRI was taken on January 24, 1998, which revealed degenerative disc disease with multi-level disc bulge. (Tr. 189). There was also relative narrowing of the transverse diameter of the spinal canal at the level of L4-5. (Tr. 189).

More specifically, the bulge at L4-5 was described as a mild posterior bulge of the intervertebral disc with hypertrophic changes in the ligamenta flava that produce relative narrowing of the transverse diameter of the spinal canal at this level. (Tr. 189). The bulge at L3-4 was described as a posterior bulge that did not produce obliteration of the nerve root canal. (Tr. 189). The bulge at L5-S1 was described as an asymmetric bulge, in a left paracentral location. (Tr. 189). There was increase in the signal intensity in the bony structures adjacent to the intervertebral disc L4-5 that could be in relation to degenerative changes. (Tr. 189). The remainder of the intervertebral discs were normal. (Tr. 189).

On January 26, 1998, Dr. Prusaczyk reviewed the MRI. (Tr. 180). He noted that there were no herniated discs, and noted that Respondent was improving. (Tr. 180). He referred Respondent to physical therapy. (Tr. 181). Respondent continued his follow up treatment with Dr. Prusaczyk through March 18, 1998. In his final treatment note, Dr. Prusaczyk wrote that Respondent had a persistent lumbar strain, with some improvements. (Tr. 182).

Respondent next came under the care of Dr. Peter Mirkin, an orthopedic surgeon/spinal specialist. Dr. Mirkin performed a physical exam. (Tr. 200). He noted that Respondent was an obese male who walked with a moderate antalgic gait. (Tr. 200). Respondent's range of motion of the lumbar spine was 60% of normal.

(Tr. 200). He had tenderness to palpation of the right gluteal region. (Tr. 200). Deep tendon reflexes were intact in the knee and achilles. (Tr. 200). Straight leg raising was mildly positive on the right at 80 degrees. (Tr. 200). Motor and sensory exams were intact. (Tr. 200).

Dr. Mirkin reviewed the x-rays. (Tr. 200). He noted moderate degenerative changes of the entire lumbar spine. (Tr. 200). An MRI scan of the lumbar spine revealed severe degenerative disc disease, most severe in the lower lumbar spine. (Tr. 200). Respondent had moderate stenosis at L4/5 and several areas of disc bulging at L3-4, L4-5, and L5-S1. (Tr. 200).

Dr. Mirkin concluded that Respondent had severe degenerative disc disease from chronic tobacco abuse. (Tr. 201). He also felt that Respondent had a lumbar strain and mild stenosis as well. (Tr. 201). He noted that Respondent was having some difficulty doing heavy labor. (Tr. 201). Dr. Mirkin felt it would be safe for Respondent to continue working without restrictions. (Tr. 201).

Dr. Mirkin recommended a trial of epidural steroids, and follow up treatment. (Tr. 201). He did not think surgery would allow Respondent to return to his job in a pain free manner. (Tr. 201).

Respondent saw Dr. Steven Granberg, a pain management specialist, on April 17, 1998. (Tr. 213). Dr. Granberg provided a trial of epidural steroid injections. (Tr. 213). Respondent was to return for a second round of injections, if appropriate. (Tr. 213).

Respondent returned to Dr. Mirkin on June 15, 1998, after having the epidural injections. (Tr. 202). According to Respondent, the epidurals did not help. (Tr. 202). He continued to have complaints of low back pain. (Tr. 202). Dr. Mirkin noted the absence of bowel or bladder dysfunction, and minimal leg pain. (Tr. 202).

On physical exam, Dr. Mirkin noted a range of motion of the lumbar spine to 70% of normal, an improvement over the previous appointment. (Tr. 202). He also noted his impression that Respondent had chronic degenerative spine disease. (Tr. 202). He recommended that Respondent continue his exercises and prescribed Relafen and Darvocet. Follow up was scheduled for six weeks. (Tr. 202).

Respondent returned to Dr. Mirkin on July 27, 1998. (Tr. 203). He continued to complain of pain in his back, but wanted to continue working. (Tr. 203). On exam, Dr. Mirkin noted that Respondent walked with a slight antalgic gait. (Tr. 203). Range of motion was 60% of normal. (Tr. 203). Straight leg raising elicited bilateral back pain. (Tr. 203). X-rays revealed degenerative changes and stenosis at L4-5. (Tr. 203).

Dr. Mirkin concluded that Respondent had a degenerative spine disease. (Tr. 203). He felt Respondent was at a baseline status and could work without restrictions. (Tr. 203). Dr. Mirkin felt that Respondent had a poor prognosis for a pain-free future and expected that he would be unable to perform heavy lifting at some point in time. (Tr. 203). Dr. Mirkin placed Respondent at MMI and released him from his care. (Tr. 203).

After being discharged by Dr. Mirkin, Respondent saw his personal physician at Fairview Heights for complaints referable to his back. (Tr. 255).

Respondent next came under the care of Dr. Carl Lauryssen. Dr. Lauryssen saw Respondent on April 6, 1999. (Tr. 216). He noted that Respondent had complaints of pain centered in the lumbar spine, more on the right hand side. (Tr. 216). Ninety-five percent of the pain was in his back and it will occasionally radiate into his right leg. (Tr. 216). Symptoms were aggravated by any activity and, in particular, bending over. (Tr. 216). Respondent can walk 300 feet before needing to sit down and rest. (Tr. 216). He had occasional numbness in his right leg, which had been present for approximately two months. (Tr. 216). Respondent denied any tingling, bowel or bladder difficulties, or weakness in the lower extremities. (Tr. 216).

Dr. Lauryssen examined Respondent, noting the following findings: restricted range of motion due to exacerbation of symptoms, tenderness to palpation over the L4-5 facet joint on the right hand side, normal bulk and tone of the lower extremities, no weakness on motor examination, and sensory examination intact to light touch. (Tr. 217). Moreover, reflexes graded at ¼ and were symmetrically equal at the knees and absent at the ankles. Finally, straight leg raising was negative. (Tr. 217).

Dr. Lauryssen reviewed the MRI taken on January 24, 1998. (Tr. 217). He concluded that Respondent had failed conservative treatment, and indicated his preference to work Respondent up for a surgical fusion. (Tr. 217). First, he

recommended an additional MRI and a discogram, in light of Respondent's multilevel degenerative disease. (Tr. 217). He would see Respondent after the completion of these studies to decide which level would benefit from a fusion procedure. (Tr. 217).

Dr. Anthony Guarino performed the discogram. (Tr. 208). He noted that at L5-S1, the discogram reproduced Respondent's typical low back pain. (Tr. 208). At L4-5, the discogram did not cause Respondent's typical low back pain. (Tr. 208). At L3-4, the discogram was not a reliable test. (Tr. 209).

Dr. Lauryssen wrote in his April 29, 1999, note that "based on [Respondent's] severe facet disease at L3-4 and L4-5, I am still suspicious that despite there being no pain being generated ventrally at L4-5 that dorsally [Respondent's] pain is still potentially coming from this region." (Tr. 218).

Dr. Lauryssen then recommended facet/nerve root blocks at L3-4 and L4-5, which performed Dr. Guarino. (Tr. 219). Dr. Guarino provided selective nerve root injections and facet blocks on May 12, 1999, and on May 25, 1999. (Tr. 210). The selective nerve root injection led to total pain relief for one day. (Tr. 211). The facet injections did not provide any relief as of thirty minutes after the procedure. (Tr. 211). Respondent was instructed to discuss surgical options with Dr. Lauryssen. (Tr. 211).

Respondent returned to Dr. Lauryssen on June 15, 1999. (Tr. 219). Dr. Lauryssen suggested, based on the discogram, nerve root injection, and facet blocks, that Respondent should consider a "3-4, 4-5, and 5-1 decompression and

stabilization." (Tr. 219). Dr. Lauryssen indicated that he was "sure [Respondent] would have reasonable results from surgery." (Tr. 219).

Respondent testified that he still has pain in his low back, which radiates into his right leg during activity. (Tr. 49,8). He said that he is never free of pain. (Tr. 49,12). At best, his pain is a two on a scale of one to ten. (Tr. 49,15). At worst, his pain would be a five or six. (Tr. 49, 18). Recently, he noticed that his endurance is getting worse and that he can't walk as far, or sit as long. (Tr. 48,20). He testified that he can't bend or stoop and tries to avoid kneeling. (Tr. 50,14). He takes anti-inflammatories twice a day and pain medication as needed. (Tr. 50,20). While the option of surgery was discussed during the course of his treatment, he has not yet elected to have surgery. (Tr. 46,12).

A typical day for Respondent consists of sitting in the recliner to read or watch television. (Tr. 51,7). Or, he might lie in bed. Respondent tries to get a little exercise, which consists of walking around the house or going out into the yard. (Tr. 51,10). He does not engage in strenuous lifting or vigorous activity. (Tr. 51,12). Sitting is limited to one hour, whereupon he gets up and walks around. (Tr. 52,1). Standing is limited to one half hour, whereupon he has to sit or lay down. (Tr. 52,6). He is able to drive a car. (Tr. 52,10).

Other than his back, Respondent does not have any significant problems with his neck, his arms, feet, or knees. (Tr. 60,6). He is able to take care of himself, including bathing, getting dressed, and feeding himself. (Tr. 60,23). He doesn't walk with a cane, use crutches, or use a wheelchair. (Tr. 61,5).

He last worked in February, 1999, when he took retirement from Big Boy Steel. (Tr. 62,7). Since then, he has not looked for a job. (Tr. 62,3). No doctor told him that he couldn't, or shouldn't work. (Tr. 62,11). No doctor has placed restrictions on his sitting, standing, or walking. (Tr. 63,7). Respondent testified that he would not be willing to accept a job that fit within his doctors' physical restrictions, due to his discomfort. (Tr. 63,4).

Respondent spent much of his time at Big Boy Steel as a foreman, which is a combination of supervisor and worker. (Tr. 20,3). He would receive instructions from superiors regarding the completion of projects and be responsible for seeing that his team carried out those projects. (Tr. 58,18). In order to achieve that goal, he would have to coordinate those he was supervising. (Tr. 58,21). He would be responsible for ensuring that his team followed proper procedures. (Tr. 59,2). He testified that he never had problems carrying out assigned tasks and that he was able to work with minimal supervision. (Tr. 59,7).

With respect to his educational background, Respondent graduated from high school and went through a three-year apprenticeship to become an ironworker. (Tr. 56,6). He is able to read and write. (Tr. 56,22). He is right hand dominant and has no problems with his right hand. (Tr. 57,2). He is able to do basic math and considers himself of average intelligence. (Tr. 57,9).

Doctor Robert Margolis and Doctor Dr. Peter Mirkin testified via deposition. Dr. Margolis testified that Respondent had thirty percent permanent partial disability, referable to the body as a whole. He attributed twenty-five percent to the

accident of January 9, 1998. He attributed five percent to a pre-existing degenerative condition. (Tr. 88,3). Dr. Margolis did not place any physical restrictions on Respondent.

Dr. Mirkin testified that Respondent was not likely to have a pain free future. (Tr. 298,20). He acknowledged that it was unlikely he would be able to continue working as an ironworker. (Tr. 311,4). He did not testify that he was permanently and totally disabled. With respect to physical restrictions, Dr. Mirkin told Respondent to limit his lifting to fifty pounds or less. (Tr. 300,11).

Karen Kane-Thaler, a vocational consultant, testified via deposition on behalf of employer and insurer. Ms. Kane-Thaler is a Certified Rehabilitation Counselor and received certification through the Missouri Division of Workers' Compensation for Vocational Services. (Tr. 323,13). She based her opinions on information taken from Respondent's deposition transcript and treatment records, the depositions of the testifying doctor's, and the report of Dr. Samuel Bernstein, Respondent's vocational expert. (Tr. 345,12).

Ms. Kane-Thaler used the dictionary of occupational titles to conduct a transferable skills analysis and an employability analysis. (Tr. 338,17). As part of this process, she contacted employers to obtain information about the labor market. (Tr. 341,18). She identified a number of jobs, existing in significant numbers, which Respondent could perform in spite of his back condition. Ms. Kane-Thaler concluded that he could be employable in shipping and receiving, outside delivery, ticket taker, security guard, bench assembler and bench worker. (Tr. 381).

Dr. Samuel Bernstein, a vocational consultant, testified via deposition on behalf of Respondent. Dr. Bernstein opined that Respondent is unemployable in the open labor market, due to a combination of impairments. (Tr. 129,20). Dr. Bernstein cited the following factors as the basis of his opinion: Respondent's age, severe physical impairments, including mitral valve prolapse, hypertension, obesity, degenerative joint disease in the lumbar spine, hips and knees, and a lack of transferable job skills. (Tr. 130 1-25).

Dr. Bernstein testified that Respondent has no cognitive problems that would prevent him from competing in the open labor market. (Tr. 136,24). While he did not have transferable skills, there were some things about his iron working experience that might be of interest to a prospective employer, such as his experience as a foreman and experience working with tools. (Tr. 139,10).

Respondent filed a claim for compensation alleging permanent total disability. (L.F.1-2). At trial, the Administrative Law Judge found that he was permanently partially disabled, rather than permanently totally disabled. (L.F.30). Respondent appealed to the Labor and Industrial Relations Commission on the issue of permanent total disability. (L.F.33-34). On August 2, 2002, the Commission modified the Administrative Law Judge's award, finding Respondent permanently and totally disabled. (L.F.38-64). The Commission found, contrary to the Administrative Law Judge, that Respondent's complaints, limitations, and pain to be so limiting as to constitute permanent total disability. (L.F.39). Employer, Big Boy

Steel, and its' Insurer, Liberty Mutual, appealed the Commission's decision to the Eastern District Court of Appeals. (L.F.65-94).

On May 6, 2003, the Missouri Court of Appeals, Eastern District, issued its Opinion. The opinion affirmed the Commission's award. The Opinion held that the Commission did not err in awarding permanent total disability benefits against the employer. Specifically, the Opinion held that Respondent's testimony and the doctor's testimony constituted substantial and competent evidence that supported the Commission's finding that Respondent was unable to return to any job in the open labor market, such that Respondent was permanently and totally disabled. The Opinion also held that the Commission's award of permanent total disability benefits was not against the overwhelming weight of the evidence. In the process, the Eastern District disagreed with the Western District's articulation of the standard of review in ***Davis v. Research Medical Center,*** 903 S.W.2d 557 (Mo.App.W.D.1995).

On May 21, 2003, employer filed a Motion for Rehearing and Application for transfer with the Court of Appeals. The Court of Appeals denied employer's Motion for Rehearing and Application for Transfer on July 3, 2003. Employer filed its Application for Transfer with the Supreme Court on July 18, 2003. Thereafter, on August 26, 2003, the Supreme Court sustained the employer's Application.

STANDARD OF REVIEW

In reviewing an award of the Industrial Relations Commission in a workers' compensation proceeding, the Court is limited to a determination of whether the findings are authorized by law and supported by competent and substantial evidence. RSMo. Section 287.495; ***Akers v. Warson Gardens Apts.,*** 961 S.W.2d 50, 53 (Mo.banc.1998). The Court may modify, reverse, remand for hearing, or set aside the Award only on the grounds specified by statute, namely: (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; or (4) that there was not sufficient competent evidence in the record to warrant the making of the Award. RSMo Section 287.495.1; ***Akers,*** 961 S.W.2d at 52-53.

Questions of law are reviewed independently. ***Blades v. Commercial Transport, Inc.,*** 30 S.W.3d 827, 828-829 (Mo.banc 2000). Decisions of the Commission that are clearly an interpretation or application of the law are not binding upon the reviewing Court and fall within the Court's province of review and correction. ***West v. Posten Constr. Co.,*** 804 S.W.2d 273, 278 (Mo.banc 1979); ***Ikerman v. Koch,*** 580 S.W.2d at 273, 278 (Mo.banc 1979).

Where the Commission's decision is based upon a determination of facts, the Court reviews the whole record in a light most favorable to the decision. ***Akers,*** 961 S.W.2d at 53. The Court's review is limited to a determination of whether the findings of fact are supported by competent and substantial evidence on the whole

record. ***Id.*** Facts found by the Commission may be set aside where those factual findings are not supported by substantial evidence or are contrary to the overwhelming weight of the evidence before the Commission. ***Reese v. Coleman,*** 990 S.W.2d 195, 199 (Mo.App.S.D.1999).

POINTS RELIED ON

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

Wood v. Wagner Electric Corporation, 197 S.W.2d 647 (Mo.banc 1946).

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

Hampton v. Big Boy Steel, 2003 WL 21003499 (Mo.App.E.D.).

State ex rel. Rice v. Public Service Commission, 220 S.W.2d 61 (Mo.banc 1949).

Collins v. Division of Welfare, 270 S.W.2d 817 (Mo.banc 1954).

Akers v. Warson Gardens Apts., 961 S.W.2d 50 (Mo.banc.1998).

West v. Posten Constr. Co., 804 S.W.2d 273 (Mo.banc 1979).

Hundley v. Wenzel, 59 S.W.3d 1 (Mo.App.W.D.2001).

II

UNDER EITHER ARTICULATION OF THE STANDARD OF REVIEW, THE EASTERN DISTRICT COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S AWARD OF PERMANENT TOTAL DISABILITY AGAINST THE EMPLOYER, BECAUSE THERE WAS NO COMPETENT AND SUBSTANTIAL EVIDENCE OF TOTAL DISABILITY, IN THAT THE RESPONDENT'S COMPLAINTS OF PAIN, LIMITATIONS IN RANGE OF MOTION, AND THE NATURE OF HIS INJURY, IN AND OF THEMSELVES, DO NOT ESTABLISH THE UNAVAILABILITY OF JOBS IN THE OPEN LABOR MARKET, IN THAT BOTH DOCTOR MARGOLIS AND DOCTOR MIRKIN TESTIFIED THAT RESPONDENT WAS PARTIALLY DISABLED, IN THAT KAREN KANE-THALER, VOCATIONAL EXPERT, TESTIFIED THAT RESPONDENT WAS EMPLOYABLE, AND IN THAT RESPONDENT'S VOCATIONAL EXPERT, DOCTOR BERNSTEIN DID NOT TESTIFY THAT RESPONDENT WAS TOTALLY DISABLED DUE TO THE EMPLOYER'S INJURY, STANDING ALONE

Reeves v. Midwestern Mortgage, 929 S.W.2d 293, 296 (Mo.App.E.D.1996).

Messex v. Sachs Electric, 989 S.W.2d 206 (Mo.App.E.D.1999)

Chatmon v. St. Charles County Ambulance Dist., 55 S.W.3d 451 (Mo.App.E.D.2001).

Johnson v. Terre Du Lac, 788 S.W.2d 782 (Mo.App.E.D.1990).

Mathia v. Contract Freighters*, *Inc., 929 S.W.2d 271 (Mo.App.1996)……

III

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN AWARDING PERMANENT TOTAL DISABILITY BENEFITS AGAINST THE EMPLOYER AND INSURER, AS OPPOSED TO PERMANENT PARTIAL DISABILITY BENEFITS, BECAUSE THE AWARD WAS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, IN THAT RESPONDENT'S COMPLAINTS OF PAIN, LIMITATIONS IN RANGE OF MOTION, AND THE NATURE OF HIS INJURY, IN AND OF THEMSELVES, DO NOT ESTABLISH THE UNAVAILABILITY OF JOBS IN THE OPEN LABOR MARKET

Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo.App.1982)

Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo.App.1974)

Garcia v. St. Louis County, 916 S.W. 263 (Mo.App.E.D.1995)

Reiner v. Treasurer of State of Mo., 837 S.W.2d 363 (Mo.App.1992)

IV

THE COMMISSION ERRED IN AWARDING PERMANENT TOTAL DISABILITY BENEFITS AGAINST EMPLOYER AND INSURER, AS OPPOSED TO PERMANENT PARTIAL DISABILITY, BECAUSE THE AWARD IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, IN THAT BOTH DOCTOR MARGOLIS AND DOCTOR MIRKIN TESTIFIED THAT RESPONDENT WAS PARTIALLY DISABLED, IN THAT KAREN KANE-THALER, VOCATIONAL EXPERT, TESTIFIED THAT RESPONDENT WAS EMPLOYABLE, IN THAT RESPONDENT'S VOCATIONAL EXPERT, DR. BERNSTEIN, TESTIFIED THAT RESPONDENT WAS TOTALLY DISABLED DUE TO A COMBINATION OF IMPAIRMENTS, AND THE COMMISSION DID NOT DISTURB THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT DR. BERNSTEIN WAS UNPERSUASIVE

Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App.1996).

ARGUMENT

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

This case presents an issue regarding the appropriate standard of review. As noted in the Missouri administrative law practice guide:

> The scope of judicial review over an administrative proceeding is of considerable importance. If overly broad and independent, the risk is that the agency proceeding will be reduced to inconvenient redundancy, with no significant utility beyond that of a gathering of the facts. If overly narrow and limited, the risk lies in the opposite direction, and the agency may proceed without meaningful judicial

oversight.

20A Alfred S. Neely, *ADMINISTRATIVE PRACTICE AND PROCEDURE*, section 12.40 at 65-66 (2001).

Judicial review of administrative decisions is set forth in the Missouri Constitution. Article V, Section 18 provides, in relevant part:

> All final decisions, findings, rules and orders on 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.

The Missouri Supreme Court addressed this constitutional provision in the 1946 case, ***Wood v. Wagner Electric Corporation***, 197 S.W.2d 647 (Mo.banc 1946). The Court held that the phrase "shall be subject to direct review by the courts as provided by law" referred to the method of review to be provided, such as certiorari or appeal, and not to the scope of review. ***Wood*** 197 S.W.2d at 649. The phrase "supported by competent and substantial evidence upon the whole record" referred to the scope of review. ***Id.*** The Court held that this standard is a mandatory, minimum standard, that requires no legislation to put it into effect. ***Id.***

This does not mean that the reviewing court may substitute its own judgment on the evidence for that of the administrative tribunal. ***Id.*** But it does authorize it to decide whether such tribunal could have reasonably made its findings, and reached its result, upon consideration of all of the evidence before it; and to set aside decisions clearly contrary to the overwhelming weight of the evidence. ***Id.*** The Court held that the reviewing court should adhere to the rule of deference to findings, involving the credibility of witnesses, made by those before whom the witnesses gave oral testimony. ***Id.***

"Substantial evidence" means evidence which, if true, would have a probative force upon the issues. ***State ex rel. Rice v. Public Service Commission,*** 220 S.W.2d 61, 64 (Mo.banc 1949). The term "substantial evidence" implies and comprehends competent, not incompetent evidence. ***Rice*** 220 S.W.2d at 64. The Supreme Court clarified the term further in ***Collins v. Division of Welfare,*** 270 S.W.2d 817 (Mo.banc 1954). The Court held that substantial evidence is evidence which, if true, has probative force upon the issues, *i.e.*, evidence favoring facts which are such that reasonable men may differ as to whether it establishes them; it is evidence from which the triers of fact reasonably could find the issues in harmony therewith; it is evidence of a character sufficiently substantial to warrant the triers of facts in finding from it the facts, to establish which the evidence was introduced. ***Collins,*** 270 S.W.2d at 820.

The Western District Court of Appeals set forth a two-part test for review of administrative decisions in a Workers' Compensation case, ***Davis v. Research Medical Center,*** 903 S.W.2d 557 (Mo.app.W.D.1995). In ***Davis***, appellant, Research Medical Center, argued that the reviewing court had the duty to examine the entire record in its determination as to whether the Labor and Industrial Relations Commission's award was supported by competent and substantial evidence. ***Davis,*** 903 S.W.2d at 560. Moreover, appellant argued that the reviewing court should consider the dissenting opinion and contrary findings by the administrative law judge as probative of the issues as to whether or not the Final Award was supported by competent and substantial evidence, and whether the Final Award was clearly contrary to the overwhelming weight of the evidence. ***Id***.

The ***Davis*** court first addressed the proper standard of review, tracing the background, early development, and modern development of the standard, citing ***Wood v. Wagner*** as a seminal case.

The Court noted that cases decided subsequent to the adoption of Article V, section 18, led by the Supreme Court, adopted and applied a two-step review process designed to determine whether the Commission could have reasonably made its findings and award upon consideration of *all* the evidence before it. (original emphasis). ***Davis*** 903 S.W.2d at 565. First, the reviewing court examines the record, together with all reasonable inferences to be drawn from the evidence therein, in the light most favorable to the findings and the award of the Commission

to determine whether they are supported by competent and substantial evidence. ***Id.*** If so, the reviewing court must then determine whether the Commission's findings and award, even if supported by some competent substantial evidence, were nevertheless clearly contrary to the overwhelming weight of the evidence contained in the whole record before the Commission. ***Id.***

The ***Davis*** Court reiterated the proposition that a reviewing court may not substitute its own judgment on the evidence for that of the reviewing tribunal. ***Id.*** The Court noted that an increasing number of cases held that the appellate court must disregard any evidence which might support any finding different from those made by the Commission. ***Id.*** However, this principle may be applied only during the first step of the analysis, in determining whether the Commission's award is supported by competent and substantial evidence. ***Id*** at 566. While the reviewing court does not substitute its judgment for that of the Commission, the court must examine the entire record to see whether the evidence against the Commission's findings so clearly overwhelms that which supports them, such that the Commission could not have reasonably made its findings and reached its result. ***Id.***

Thus, reasoned the ***Davis*** case, the cases clearly teach that while evidence is viewed in the light most favorable to the award, the opposing, unfavorable evidence must be considered and cannot be discarded or disregarded when the appellate court performs the second step of the analysis, because Article V, section 18 demands that the review be "upon the whole record." ***Id.***

Statements to the effect that the court reviews the evidence in a light most favorable to the findings and decisions of the Commission and must disregard all opposing and unfavorable evidence are overly broad unless taken in context. ***Id.*** They can be taken literally only at the sacrifice of the prevailing principle of whole record review, which requires the reviewing court to make its' determination in light of the evidentiary base which detracts from the agency's findings, as well as that which supports them. ***Id.***

Where the Commission has reversed the findings and award entered by the Administrative Law Judge, the appellate court must consider the ALJ's findings and credibility determinations in step two of the test, as the review is on the whole record. ***Id*** at 570. Because the ALJ's findings and credibility determinations are part of the record as a whole, when the Commission's determinations as to the credibility of witnesses who gave live testimony before the ALJ are different from those made by the ALJ, the ALJ's contrary findings must be given due consideration, bearing in mind that evidence supporting a conclusion may be less substantial when an impartial, experienced ALJ who has observed the witness and lived with the case has drawn conclusions different from the Commission's. ***Id*** at 571. In such cases, it is therefore a great aid to the reviewing court of the Commission articulates the reasons why it differed in its credibility determinations. ***Id.*** Otherwise, the court is left to search the record and speculate as to the Commission's rationale. ***Id.***

The Court in ***Davis*** summarized the standard of review of an award of the Commission. ***Id.*** As previously illustrated, the reviewing court may not substitute its judgment on the evidence for that of the Commission. ***Id.*** Weight of the evidence and credibility of witnesses are ultimately for the Commission. ***Id.*** The reviewing court engages in a two-step analysis, taking into account the evidence which opposes the award in the second step. ***Id.*** In the second step of analysis, the reviewing court takes account of the *overall effect* of all of the evidence and determines whether the award is against the overwhelming weigh of the evidence. ***Id.*** (emphasis added).

In the case at bar, the Eastern District explicitly disagreed with the Western District's holding in ***Davis***. The Eastern District stated specifically disagreed that the reviewing court's power to reverse an award as against the overwhelming weight of the evidence requires the reviewing court to examine the evidence contrary to the Commission's award to see if it "so clearly overwhelms" the evidence favoring the Commission's award, because such an exercise would cause the reviewing court to invade the province of the Commission and "weigh" the evidence. ***Hampton v. Big Boy Steel***, 2003 WL 21003499, 5 (Mo.App.E.D.). Rather, the Eastern District held that Article V, section 18 and the Supreme Court cases decided under it and its predecessor only require the reviewing court to find whether the Commission could have reasonably made its findings and reached its result upon its consideration of all of the evidence before it. ***Hampton*** at 5. The reviewing court examines the whole

record to determine the issue of reasonableness, not to examine the amount of unfavorable evidence. ***Id.***

The Eastern District cited several cases for the proposition that the reviewing court considers the evidence in the light most favorable to the Commission's findings. ***Hampton*** at 4, *citing* ***Akers v. Warson Garden Apartments,*** 961 S.W.2d 50, 53 (Mo.banc 1998.); ***West v. Posten Construction Co.,*** 804 S.W.2d 743, 744 (Mo.banc.1991). Contrary to ***Davis***, the Eastern District does not consider the evidence that is unfavorable to the award.

The Eastern District's standard of review, as articulated in the case at bar, is narrower than the Western District's, as articulated in ***Davis***. The two districts seem to agree on several points. They agree that the Article V, section 18 and the cases decided pursuant to it and its predecessor require the reviewing court to overturn an award only if it is not supported by substantial evidence or where it is clearly contrary to the overwhelming weight of the evidence. They agree that the constitutional mandate does not allow the reviewing court to substitute their judgment on the evidence for that of the administrative tribunal. They agree that the Supreme Court has authorized the reviewing court to decide whether the Commission could have reasonably made its findings.

The disagreement between the districts centers on the method of reviewing the whole record, in determining whether the Commission's decision is against the overwhelming weight of the evidence. The effect of the Eastern District's holding is

to preclude consideration of evidence that detracts from the award. ***Davis*** specifically allows consideration of evidence that detracts from the award, in light of the constitutional mandate to consider the whole record.

It is notable that the Western District italicized the word "all" in their observation that the appellate courts and Supreme Court adopted the two-step review process designed to determine whether the Commission could have reasonably made its findings and award upon consideration of all the evidence before it. ***Davis*** at 565. Emphasis on the word "all" is consistent with the constitutional mandate that the whole record must be considered.

The Eastern District takes a different approach. Their holding uses the word "its" three times in their holding, in reference to the Commission. Specifically, the Court states that Article V, Section 18 and the Supreme Court cases only require them to find whether the Commission could have reasonably made its findings and reached its result upon its consideration of all of the evidence before it. ***Hampton*** at 5. Prior to the holding, the Court stated that their power to set aside an award that is clearly contrary to the overwhelming weight of the evidence is a process whereby the reviewing court determines as a matter of law whether the Commission could have reasonably made *its* findings and reached *its* result upon consideration of all of the evidence before *it*. ***Id*** at 5. (emphasis added).

The Eastern District's holding suggests that the responsibility to consider the whole record is the Commission's. If the reviewing court defers to the Commission

to determine credibility and weigh evidence, the reviewing court's only responsibility is to ensure that the Commission looked at the whole record.

The Eastern District does not specifically define the phrase "reasonable" finding in their opinion. An administrative agency acts unreasonably and arbitrarily if its findings are not based on substantial evidence. ***Hundley v. Wenzel,*** 59 S.W.3d 1, (Mo.App.W.D.2001). As previously illustrated, substantial evidence is probative in nature. ***State ex rel. Rice v. Public Service Commission,*** 220 S.W.2d 61, 64 (Mo.banc 1949).

The Eastern District defers to the Commission to make findings regarding weight of the evidence. Arguably, the Court relies on the Commission to determine whether the findings were reasonable.

Despite holding that it could not do so, the Eastern District engaged in the process of weighing evidence and determining credibility, with respect to the vocational opinion of Dr. Samuel Bernstein. The Administrative Law Judge explicitly found Dr. Bernstein unpersuasive. (L.F.29). Specifically, he found that Dr. Bernstein's opinion that Respondent was unemployable was speculative, based on four factors. (L.F.29). First, Dr. Bernstein relied heavily on the self-serving and subjective complaints of the claimant. (L.F.29). The Administrative Law Judge found the claimant's credibility regarding subjective complaints as questionable. (L.F.29). Second, the Administrative Law Judge found that Dr. Bernstein included in his evaluation symptoms which are not attributable to the employer, Big Boy Steel. (L.F.29). Third, Dr. Bernstein stated that Respondent was totally disabled, despite

not performing a labor market survey or making even one specific inquiry to a prospective employer. (L.F.29). Fourth, Dr. Bernstein's reliance on Respondent's age was incorrect. (L.F.29). Although the Administrative Law Judge did not enumerate this as a fifth reason, he did note that even if Dr. Bernstein is believed, that Respondent is permanently and totally disabled, there is no evidence that the employer and insurer's injury, standing alone, resulted in permanent total disability. (L.F.29).

On appeal the Commission never made a specific finding regarding Dr. Bernstein. Instead, they simply overruled the Administrative Law Judge's finding that Respondent's credibility regarding subjective complaints was questionable. Specifically, the Commission found that the nature of Respondent's problems in his back were evidenced by, among other things, the nature of the proposed surgery; and that his subjective complaints, limitations, and description of problems were in line with the objective findings. (L.F.39).

The Eastern District wrote in their opinion that the Commission explicitly disagreed with the ALJ's basis for finding Dr. Bernstein to be unpersuasive, because it found claimant credible. ***Hampton*** at 7. However, this was only one of four explicit reasons why the Administrative Law Judge made his finding that Dr. Bernstein's opinion was not competent and substantial evidence regarding permanent total disability. The Commission was silent in regard to the other three. Arguably, the Court's conclusion that Dr. Bernstein testimony constituted competent and substantial evidence was based *their* determination on credibility, not the

Commission's. Characterizing a witness as credible because the Commission removed one of four findings made by the Administrative Law Judge would appear to be a function of weighing evidence or making a decision regarding credibility.

Appellants respectfully suggest that the Eastern District's articulation of the standard of review in the case at bar is incorrect, as it does not meet the minimum standard of whole record review under Article V, section 18. Affirming this narrow standard of review would mean that an administrative agency may proceed without meaningful judicial oversight. In light of the foregoing, Appellants respectfully suggest that the standard of review articulated by the Western District in ***Davis*** should be followed, as its application is consistent with Article V, section 18.

Therefore, Appellants respectfully request that this Court reverse the Eastern District's decision regarding the standard of review and follow the standard articulated in ***Davis v. Research Medical Center.***

II

UNDER EITHER ARTICULATION OF THE STANDARD OF REVIEW, THE EASTERN DISTRICT COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION'S AWARD OF PERMANENT TOTAL DISABILITY AGAINST THE EMPLOYER, BECAUSE THERE WAS NO COMPETENT AND SUBSTANTIAL EVIDENCE OF TOTAL DISABILITY, IN THAT THE RESPONDENT'S COMPLAINTS OF PAIN, LIMITATIONS IN RANGE OF MOTION, AND THE NATURE OF HIS INJURY, IN AND OF THEMSELVES, DO NOT ESTABLISH THE UNAVAILABILITY OF JOBS IN THE OPEN LABOR MARKET, IN THAT BOTH DOCTOR MARGOLIS AND DOCTOR MIRKIN TESTIFIED THAT RESPONDENT WAS PARTIALLY DISABLED, IN THAT KAREN KANE-THALER, VOCATIONAL EXPERT, TESTIFIED THAT RESPONDENT WAS EMPLOYABLE, AND IN THAT RESPONDENT'S VOCATION EXPERT, DOCTOR BERNSTEIN DID NOT TESTIFY THAT RESPONDENT WAS TOTALLY DISABLED DUE TO THE EMPLOYER'S INJURY, STANDING ALONE

Appellants respectfully suggest that under either standard of review, there is no competent and substantial evidence that Respondent is permanently and totally disabled, from the employer's injury standing alone. The burden of establishing permanent total disability lies with the claimant. ***Schuster v. Division of Employ. Sec,*** 972 S.W.2d 377, 381 (Mo.App.E.D.1998)**.** "Total disability" is 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. RSMo 287.020.7; ***Reeves v. Midwestern Mortgage,*** 929 S.W.2d 293, 296 (Mo.App.E.D.1996). Within this definition, the term "any employment" means any reasonable or normal employment or occupation. ***Reeves***, 929 S.W.2d at 296. Thus, total disability is not defined in terms of claimant's former employment. ***Johnson v. Terre Du Lac***, 788 S.W.2d 782, 783 (Mo.App.E.D.1990).

The general test for permanent total disability is whether the employee would be able to compete on the open labor market. ***Chatmon v. St. Charles County Ambulance Dist.,*** 55 S.W.3d 451, 458 (Mo.App.E.D.2001). In determining whether an employee is permanently and totally disabled, the pivotal question is whether an employer, in the usual course of business, would reasonably be expected to hire claimant in her present physical condition, expecting her to perform the work for which she is hired. ***Messex v. Sachs Electric,*** 989 S.W.2d 206, 210 (Mo.App.E.D.1999).

In the case at bar, the Commission found that Respondent's complaints, limitations and pain to be so limiting as to constitute permanent total disability. Specifically, the Commission referenced Respondent's testimony that any activity results in pain and would cause him to be "laid up" for sometime afterwards. (L.F.39). In addition, all of the doctors reported significant limitations of motion in Respondent's back. (L.F.39). The Commission found that the nature of his problems in his back are evident from the nature of the proposed surgery and that his

subjective complaints, limitations, and description of problems are in line with the objective findings as to the condition of his back. (L.F.39).

Both Eastern District and Western District agree that the evidence must first be viewed in the light most favorable to the award, granting deference to the Commission's credibility findings. Here, the Commission found Respondent's testimony credible, regarding his subjective complaints. (L.F.39). Assuming this evidence is true, it still does not amount to probative evidence that there are no jobs available to Respondent in the open labor market. It may support a finding that Respondent is unable to perform his last job. However, the standard for total disability is that he must be unable to perform any job, not just the job he had when the injury occurred.

The Commission did not explicitly consider the vocational evidence or make a specific credibility decision regarding Dr. Bernstein. As previously illustrated, the Court of Appeals arguably weighed Dr. Bernstein's credibility, stating that it was implicit the Commission found Dr. Bernstein credible by eliminating one out of four of the reasons why the Administrative Law Judge found Dr. Bernstein unpersuasive.

Even if Dr. Bernstein's opinion is viewed in a light most favorable to the award, i.e., the evidence is true, there is no competent substantial evidence that Respondent is totally disabled due to the employer's injury, standing alone. Dr. Bernstein testified that Respondent was totally disabled due to a combination of severe impairments. (Tr.129,20). An employer is liable for permanent total

disability compensation under Section 287.200, Mo.Rev.Stat (1994) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. ***Mathia v. Contract Freighters, Inc.,*** 929 S.W.2d 271, 276 (Mo.App.1996). As a result, there is no probative vocational evidence that Respondent is totally disabled due to the employer's injury.

In light of the foregoing, Appellants respectfully suggest that under either standard of review, the Commission's decision is not supported by competent substantial evidence. If so, it is unnecessary to examine the whole record to determine whether the award was against the overwhelming weight of the evidence.

Assuming, arguendo, that whole record review is necessary, a review of the whole record suggests that the Commission's award is against the overwhelming weight of the evidence. ***Davis*** stands for the proposition that it is necessary to look at the opposing, unfavorable evidence in this second step of analysis. Moreover, ***Davis*** suggests that it is appropriate to review Administrative Law Judge Percy's findings as well, as they are part of the whole record. The Eastern District suggests that the opposing, unfavorable evidence is irrelevant. In light of that, the following discussion utilizes the ***Davis*** standard of review to address the overwhelming weight of the evidence.

In the case at bar, neither Dr. Margolis nor Dr. Mirkin believe that Respondent is permanently and totally disabled. Dr. Margolis testified that Respondent was *partially* disabled. (emphasis added). (Tr. 88,3) Specifically, he

testified that Respondent had thirty percent permanent partial disability referable to the body as a whole. (Tr.88,3) He attributed twenty-five percent to the accident of January 9, 1998. (Tr. 88,3) He attributed five percent to a pre-existing degenerative condition. (Tr.88,3). Dr. Margolis did not place any physical restrictions on Respondent. (cite)

Dr. Mirkin testified that Respondent was not likely to have a pain free future. (Tr.298,20). He acknowledged that it was unlikely he would be able to continue working as an ironworker. (Tr.311,4). However, he did not testify that he was permanently and totally disabled. With respect to physical restrictions, Dr. Mirkin told Respondent to limit his lifting to fifty pounds or less. (Tr.300,11).

Karen Kane-Thaler testified that there were jobs available to Respondent in the open labor market. Ms. Kane-Thaler used the dictionary of occupational titles to conduct a transferable skills analysis and an employability analysis. (Tr.338,17). As part of this process, she contacted employers to obtain information about the labor market. (Tr.341,18). She identified a number of jobs that Respondent could perform, in spite of his back condition. Ms. Kane-Thaler concluded that he could be employable in shipping and receiving, outside delivery, ticket taker, security guard, bench assembler and as a bench worker. (Tr.381).

As previously illustrated, there is no evidence that the Appellants' injury, standing alone, renders Respondent permanently and totally disabled, even if Dr. Bernstein's opinion is believed. In the case at bar, Dr. Bernstein testified that Respondent is permanently and totally disabled due to a combination of

impairments. (Tr. 129,20). Appellants respectfully submit that there is insufficient evidence in the record that the primary accident, standing alone, caused Respondent to be permanently and totally disabled.

Finally, the Administrative Law Judge questioned Respondent's credibility regarding his subjective complaints. (L.F.29) According to ***Davis***, this finding must be given due consideration, bearing in mind that evidence supporting a conclusion may be less substantial when an impartial, experienced ALJ who has also observed the witness and lived with the case has drawn conclusions different from the Commission's. ***Davis***, 903 S.W.2d 570. In this case, the Commission relied on their finding that Respondent was credible, in arriving at their conclusion. When not looking at the evidence in the light most favorable to the award, it is clear that the Administrative Law Judge and Commission disagreed on the issue of Respondent's credibility regarding his subjective complaints.

In light of the Administrative Law Judge's findings, the Respondent's testimony, the vocational testimony, the medical testimony, and the medical records, Appellants respectfully suggest that the Commission's findings were against the overwhelming weight of the evidence. Moreover, the Eastern District Court of Appeals erred in affirming the Commission's decision. Therefore, Appellants respectfully suggest that this Court reverse the Court of Appeals' decision, against the employer, that Respondent is permanently and totally disabled.

III

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN AWARDING PERMANENT TOTAL DISABILITY BENEFITS AGAINST THE EMPLOYER AND INSURER, AS OPPOSED TO PERMANENT PARTIAL DISABILITY BENEFITS, BECAUSE THE AWARD WAS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, IN THAT RESPONDENT'S COMPLAINTS OF PAIN, LIMITATIONS IN RANGE OF MOTION, AND THE NATURE OF HIS INJURY, IN AND OF THEMSELVES,

DO NOT ESTABLISH THE UNAVAILABILITY OF JOBS IN THE OPEN LABOR MARKET

Section 287.495.1 RSMo (2000) governs the standard of appellate review of Commission decisions, and states in relevant part:

> 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 power;
>
> (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.
>
> Section 287.495.1 RSMo (2000).

The appellate court uses a two-step procedure to resolve the issue of reasonableness of findings and award in a workers' compensation case, in which the first step is to examine the record, together with all inferences to be drawn from evidence therein, in light most favorable to findings and award of the Commission to determine whether they are supported by competent and substantial evidence, and in which the second step is to determine whether the Commission's findings and award, even if supported by some competent, substantial evidence, were nevertheless clearly contrary to the overwhelming weight of the evidence contained in the whole

record before the Commission. ***Garcia v. St. Louis County***, 916 S.W. 263, 266 (Mo.App.E.D.1995).

Section 287.020.7 Mo.Rev.Stat. (1998) defines total disability 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." The words "inability to return to any employment" mean that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. ***Kowalski v. M-G Metals and Sales, Inc.***, 631 S.W.2d 919, 922 (Mo.App.1982).

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.1992). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market. ***Reiner*** at 367.

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. ***Griggs v. A.B. Chance Company***, 503 S.W.2d 697 (Mo.App.1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. ***Griggs*** at 703.

In the case at bar, the Commission found that Respondent's complaints, limitations and pain to be so limiting as to constitute permanent total disability. (L.F. 39). Specifically, the Commission referenced Respondent's testimony that any activity results in pain and would cause him to be "laid up" for sometime afterwards. (L.F.39). In addition, all of the doctors reported significant limitations of motion in Respondent's back. (L.F.39). The Commission found that the nature of his problems in his back are evident from the nature of the proposed surgery and that his subjective complaints, limitations, and description of problems are in line with the objective findings as to the condition of his back. (L.F.39).

Respondent's complaints, limitations and pain would constitute competent and substantial evidence that he is unable to return to his job as an ironworker. However, the test for permanent total disability is not whether he is able to return to his job as an ironworker. Rather, the test is whether he can return to any employment. The nature of his injury and his testimony do not address the issue of whether there are jobs available in the open labor market.

The Commission did not explicitly consider the vocational evidence or disturb the Administrative Law Judge's findings regarding the vocational experts. Appellants respectfully submit that the Commission's finding that Respondent is permanently and totally disabled due to his complaints, limitations, and pain is speculative, with respect to the availability of jobs in the open labor market.

IV

THE COMMISSION ERRED IN AWARDING PERMANENT TOTAL DISABILITY BENEFITS AGAINST EMPLOYER AND INSURER, AS OPPOSED TO PERMANENT PARTIAL DISABILITY, BECAUSE THE AWARD IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, IN THAT BOTH DOCTOR MARGOLIS AND DOCTOR MIRKIN TESTIFIED THAT RESPONDENT WAS PARTIALLY DISABLED, IN THAT KAREN KANE-THALER, VOCATIONAL EXPERT, TESTIFIED THAT RESPONDENT WAS EMPLOYABLE, IN THAT RESPONDENT'S VOCATIONAL EXPERT, DR. BERNSTEIN, TESTIFIED THAT RESPONDENT

WAS TOTALLY DISABLED DUE TO A COMBINATION OF IMPAIRMENTS, AND THE COMMISSION DID NOT DISTURB THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT DR. BERNSTEIN WAS UNPERSUASIVE

Neither Dr. Margolis nor Dr. Mirkin believes that Respondent is permanently and totally disabled. Dr. Margolis testified that Respondent was *partially* disabled. (emphasis added). Specifically, he testified that Respondent had thirty percent permanent partial disability referable to the body as a whole. He attributed twenty-five percent to the accident of January 9, 1998. He attributed five percent to a pre-existing degenerative condition. (T88,3). Dr. Margolis did not place any physical restrictions on Respondent.

Dr. Mirkin testified that Respondent was not likely to have a pain free future. (Tr. 298,20). He acknowledged that it was unlikely he would be able to continue working as an ironworker. (Tr. 311,4). However, he did not testify that he was permanently and totally disabled. With respect to physical restrictions, Dr. Mirkin told Respondent to limit his lifting to fifty pounds or less. (Tr. 300,11).

Karen Kane-Thaler testified that there were jobs available to Respondent in the open labor market. Ms. Kane-Thaler used the dictionary of occupational titles to conduct a transferable skills analysis and an employability analysis. (Tr. 338,17). As part of this process, she contacted employers to obtain information about the labor market. (Tr. 341,18). She identified a number of jobs that Respondent could perform, in spite of his back condition. Ms. Kane-Thaler concluded that he could be

employable in shipping and receiving, outside delivery, ticket taker, security guard, bench assembler and as a bench worker. (Tr. 381).

Dr. Bernstein is the only expert to testify that Respondent is totally disabled. The Commission adopted the Administrative Law Judge's award, to the extent it did not conflict with the Commission's modification. The Commission modified the award based on the nature of Respondent's injury and his testimony. Noteworthy is that the Commission did not explicitly disturb the Administrative Law Judge's finding that Dr. Bernstein was unpersuasive. Because the Commission did not make a finding that Dr. Bernstein's opinion was persuasive, the Administrative Law Judge's finding regarding Dr. Bernstein is not inconsistent with the Commission's award. In light of the foregoing, Appellants respectfully submit that the Commission adopted the Administrative Law Judge's finding that Dr. Bernstein is unpersuasive.

Even if Dr. Bernstein's opinion is believed, there is no evidence that the Appellants' injury, standing alone, renders Respondent permanently and totally disabled. An employer is liable for permanent total disability compensation under Section 287.200, Mo.Rev.Stat (1994) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. ***Mathia v. Contract Freighters, Inc.,*** 929 S.W.2d 271, 276 (Mo.App.1996).

In the case at bar, Dr. Bernstein testified that Respondent is permanently and totally disabled due to a combination of impairments. Appellants respectfully submit that there is insufficient evidence in the record that the primary accident, standing alone, caused Respondent to be permanently and totally disabled.

CONCLUSION

The Eastern District Court of Appeals erred in articulating the standard of review. Appellants respectfully ask this Court to reverse the Eastern District and rule that the broader standard of review, articulated in ***Davis v. Research Medical Center***, is the appropriate standard of review.

The Eastern District Court of Appeals erred affirming the Commission's award of permanent total disability benefits against the employer, under either standard of review. Appellants respectfully ask this Court to reverse the Eastern District's decision affirming the Commission's finding that Respondent is permanently and totally disabled.

Respectfully Submitted,
VALENTINE AND ROUSE

By: _____

Brad L. McChesney #50287
10733 Sunset Office Dr., Ste. 410
St. Louis, MO 63101

(314) 965-5440
(314) 965-3649 FAX
Attorneys for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 12th day of September, 2003 to: Mr. Matthew Padberg, Attorney at Law, 1010 Market Street, Ste. 650, St. Louis, MO 63101; and Mr. Michael Finneran, Assistant Attorney General, 720 Olive Street, Ste. 2000, St. Louis, MO 63101.

_____
Brad L. McChesney

CERTIFICATE OF COMPLIANCE

This Brief complies with Special Rule 1 and contains 9,840 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus-free.

_____
Brad L. McChesney