IN THE MISSOURI SUPREME COURT OF MISSOURI

Supreme Court No.: 85456

LARRY HAMPTON

Employee/Respondent,

v.

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

SUBSTITUTE BRIEF OF EMPLOYEE/RESPONDENT

LARRY HAMPTON

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STATEMENT OF FACTS

The claimant testified on his own behalf at the hearing. Claimant testified that he was born on December 10, 1948, and was 52 years of age at the time of the hearing. He testified that he has a Twelfth Grade education. (Tr., Page 17). He testified that he has been employed as an ironworker for 31 years. His last employer was Big Boy Steel Erectors, for whom he worked since 1978, a period of approximately 22 years. (Tr., Page 19). His last date of employment with Big Boy Steel Erectors was February 18, 1999.

The claimant testified that his everyday activities while employed by Big Boy Steel Erectors included climbing, lifting, bending, stooping, and working in odd or awkward positions. (Tr., Pages 20-28, 67). Claimant testified that he regularly carried large heavy objects, weighing anywhere from 100 to 150 pounds. (Tr., Page 67). An ironworker's primary responsibility is the erection of a steel skeletal structure on commercial buildings. The claimant testified that he performed this activity for the employer on a full-time basis for 22 years, and that the last several years prior to the hearing date he worked anywhere from 50 to 60 hours per week. (Tr., Page 67). The employee testified that although he had occasionally felt back pain, he always worked through any back pain and never received an acute injury that he could recall. He was never treated for a back complaint. (Tr., Pages 68-69).

The claimant testified that on January 9, 1998, he was employed on a construction site when he slipped on a beam, fell, and caught himself. (Tr., Pages

30, 33). He immediately felt lower back pain and stopped work immediately. (Tr., Page 34). He returned to his home and felt that a recovery would be spontaneous within a few days. When it was not, he was sent by the employer to Acute Care, where he was seen by Dr. Joseph Prusaczyk. (Tr., Page 35). Records of Acute Care and Dr. Prusaczyk were admitted as Claimant's Exhibit "C". (Tr., Page 176). The medical record of January 12, 1998 contains a history of Claimant complaining of pain localized to his lower back that was increased with lifting, bending and pulling. (Tr., Page 179). It also indicated that pain was increased with prolonged standing and sitting. It further indicated that the claimant managed his pain by lying down or sitting. An examination revealed that the claimant had a positive straight leg raise on the right side. Claimant was prescribed pain medication, muscle relaxers and physical therapy. He was told to rest and stay off of his feet.

On January 20, 1998, the claimant returned to Dr. Prusaczyk with a history of continuing pain in his lower back, primarily while sitting and then getting up to walk. (Tr., Page 180). Following the exam, Dr. Prusaczyk diagnosed a lumbar strain and continued the claimant on his medications. He also scheduled the claimant for a MRI.

The MRI of Claimant's low back identified 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. (Tr., Page

178). 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., Page 178). Following the MRI, the claimant continued to treat with Dr. Prusaczyk. The records of January 26th, February 3rd and February 18th, 1998 all indicate that the claimant was making some improvement, but still suffered reduced range of motion and significant pain. (Tr., Page 181). Pain medications were continually prescribed. On March 18, 1998, the claimant had his final appointment with Dr. Prusaczyk. The records indicate that the claimant complained of persistent lumbar pain with some improvements. The doctor noted that the claimant's complaints of pain would increase by the end of the day while the claimant was working. Additional pain medications, Flexeril and Hydrochlorate, were prescribed. Dr. Prusaczyk returned the claimant to his regular work status. (Tr., Page 180).

The claimant testified that he was unable to work with his injured back. (Tr., Pages 37, 47). Any strenuous activity would increase his back pain, and claimant testified that he experienced pain and numbness down his right leg. (Tr., Page 35). He pressed his employer for additional medical treatment, which sent him to Dr. Peter Mirkin for additional treatment. (Tr., Page 38). Dr. Mirkin first saw the claimant on April 10, 1998. Dr. Mirkin's records were admitted as

Exhibit “F”. (Tr., Page 194). Claimant’s complaints on April 10, 1998 were that of low back pain and right buttock pain. The history further indicated that the claimant was to undergo a treatment of anti-inflammatory medications, analgesic medications and physical therapy if the symptoms did not improve. The claimant denied any history of back pain or problems. The claimant told Dr. Mirkin that although he had previously been a cigarette smoker, he was now a cigar smoker. In that visit, Dr. Mirkin measured the claimant’s range of motion to be 60% of normal. (Tr., Page 200). He had felt tender on palpation in the right gluteal region. A straight leg-raising test was positive on the right. Dr. Mirkin’s review of x-rays indicated moderate degenerative changes in the lumbar spine, while the MRI revealed 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 stated in his report that the claimant was having difficulty doing heavy labor. Dr. Mirkin recommended a trial of epidural steroids, and stated that not much else could be done for the claimant. (T.R., Pages 200-201).

Claimant was seen by Dr. Steven Granberg for epidural injections. Dr. Granberg’s records were admitted as Exhibit “H”. (Tr., Page 212). Dr. Granberg examined the claimant and noted that Claimant’s low back pain radiated into his right hip. Dr. Granberg noted palpable trigger points in the right paraspinal region. (Tr., Page 213). Dr. Granberg felt a trial of epidural steroid injections might be beneficial. In addition to steroid injections, the claimant was given trigger point injections in his right paraspinal region. He also continued the

claimant on pain medications and antiinflammatories. Claimant's regime with Dr. Granberg started April 17, 1998.

On June 15, 1998, the claimant returned to Dr. Mirkin for further evaluation. Dr. Mirkin noted that the epidurals were not helping the claimant's pain complaint. He noticed that the claimant was having some leg pain. The claimant's range of motion was reduced by 30% in all directions. (Tr., Page 202). It was Dr. Mirkin's opinion that the claimant had chronic degenerative spine disease, and he encouraged the claimant to continue with exercises and medication for pain.

Dr. Mirkin again saw the claimant on July 27, 1998. Dr. Mirkin noted that the claimant was limping during the evaluation, and claimant had lost 40% of his range of motion, down 10% from the previous visit. (Tr., Page 203). Straight leg raising produced back pain bilaterally. Dr. Mirkin again noted the x-rays revealed degenerative changes and stenosis at L4-5. It was his impression that the claimant had degenerative spine disease and was at his baseline status. Dr. Mirkin's note of July 27th further stated that the prognosis was poor, and that the claimant could expect pain and at some point would be unable to do any heavy lifting. Dr. Mirkin released the claimant from care.

The claimant testified that he attempted to return to work, but working was simply too painful. (Tr., Page 47). Any exertional activities would aggravate his low back condition with radiation of pain into his right lower extremity. (Tr., Page 49). The claimant testified that he had problems sitting, standing, and

performing any lifting, and it was creating problems with his employer. (Tr., Page 48). Claimant testified that he was forced to retire.

The claimant's regular family physician was Dr. Larson with the Fairview Heights Medical Group. Dr. Larson's records were admitted as Claimant's Exhibit "L". (Tr., Page 255). Claimant had been seeing Dr. Larson periodically after Claimant sustained his low back injury. In records dated May 18, 1998 and June 24, 1998, the claimant complained to Dr. Larson of continuing back pain. (Tr., Pages 266, 267). Dr. Larson noted that the low back pain would be stable only if the claimant did not over exert himself. Dr. Larson was also treating the claimant for complaints of shortness of breath and other ailments.

On November 2, 1998, Claimant complained to Dr. Larson of persistent low back pain. (Tr., Page 269). The claimant told Dr. Larson that he was attempting to continue to work despite a continuing increase in back pain. Dr. Larson's records indicate that he continued to prescribe pain medication, and identified the lumbar condition as degenerative disc disease.

On March 15, 1999, the claimant saw Dr. Larson again and was complaining of stabbing pains in his back. The claimant gave Dr. Larson a history of the back injury as it occurred one year prior. Dr. Larson noted lower back pain with extension in the right lower extremity. Dr. Larson diagnosed continuing low back pain and gave Claimant a referral to a neurosurgical specialist.

At Dr. Larson's request, the claimant was seen by Dr. Carl Lauryssen on April 6, 1999. Dr. Lauryssen's records were admitted as Claimant's Exhibit "I".

(Tr., Page 216). Dr. Lauryssen is with the Department of Neurosurgery at the Washington University Medical Center. Dr. Lauryssen took a history from the claimant, which indicated that the claimant had no previous complaints of back pain but that in early January of 1998 claimant sustained a back injury at work. Since then, Dr. Lauryssen noted, the claimant had continuing intractable and incapacitating back pain. The claimant gave a history of having undergone physical therapy, steroid injections, and other multiple evaluations. The claimant's primary components of pain were in his lower back with occasional radiation into the right lower extremity. Symptoms were aggravated by any activity and in particular by bending over. The claimant indicated he could walk 300 feet before needing to sit down and rest. There were complaints of numbness in his right leg, which was also aggravated by any activity. (Tr., Pages 216-217).

Dr. Lauryssen's examination indicated restricted range of motion in the lumbar spine and tenderness over the L4-5 facet joints on the right side. A review of the diagnostic imaging revealed degenerative lumbar disease from L3 through S1. Dr. Lauryssen identified a left disc bulge at L5-S1 and inflammatory changes in the vertebral bodies of L4 and L5 with collapse of the disc space height at L3-4, L4-5 and L5-S1.

Dr. Lauryssen's record indicated that the claimant would benefit only by a surgical fusion. Dr. Lauryssen wanted to perform a provacative discogram to help identify claimant's pain generators; he noted that the results of surgery were clearly correlated with provacative discograms. (Tr., Page 217).

The claimant returned to Dr. Lauryssen on April 29, 1999. The discogram identified areas of pain in the lower lumbar spine. (Tr., Page 218). Dr. Lauryssen identified severe facet disease at L3-4 and L4-5, and identified those areas as pain generators. Dr. Lauryssen had the claimant undergo facet and nerve root blocks at L3-4 and L4-5. Dr. Lauryssen's evaluation and conclusions indicated that he "certainly believe[s] this gentleman does have pain" and that he would need back surgery, in the way of a fusion, to relieve his pain situation. (Tr., Page 218).

Following a series of injections by Dr. Anthony Guarino, Claimant returned to Dr. Lauryssen on June 15, 1999. Dr. Lauryssen's opinion was confirmed by Claimant's treatment from Dr. Guarino. He stated that the claimant was a very dedicated patient and had complied with all of the doctor's requests in his workup, and the doctor anticipated that the claimant would have reasonable results from the surgery. (Tr., Page 219). Dr. Lauryssen concluded his report by stating 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.

The claimant testified that although he requested additional medical treatment from the employer, the employer refused to provide any additional medical treatment. (Tr., Page 42). The claimant has been unable to work since his last visit with Dr. Lauryssen and has received no additional significant treatment.

The claimant testified that he has constant pain in his low back with numbness down his right leg. (Tr., Page 49). He described the pain as "stabbing", which increases if he leaves the home to do any activity. (Tr., Page 69). His

range of motion is limited. (Tr., Page 50). He is on pain pills and anti-inflammatory medication. (Tr., Page 50). He testified that he can sit no longer than one hour and stand for no longer than one-half hour before back pain becomes intractable. (Tr., Page 52). He can perform two hours of activity before needing to lay in bed to recover. He testified that he lays on the recliner at home for most of the day. (Tr., Page 51). He testified that he is extremely limited in any activities that require lifting, bending, stooping or driving. (Tr., Pages 51-52). He will drive at most one time per week. (Tr., Page 52). His back condition causes him sleep disturbances, and he is up every few hours to contend with his back. (Tr., Pages 53-54).

The claimant testified that he would be unable to work in any job or activity. (Tr., Page 53). His typical day requires him to be in a recliner most of the day without any exertional activity. Even if he could alternate between sitting and standing, he could not do deskwork. (Tr., Page 53). He testified that his endurance is much worse.

On the topic of smoking, the claimant testified that he quit smoking in 1979, and that prior to that time he was a one-pack per day smoker. (Tr., Page 54). His wife will not let him smoke in his home, so he may have a cigar perhaps several times per week. (Tr., Page 55).

On cross-examination, the claimant testified that he could sit for no more than one hour and stand for more than one-half hour before intractable back pain set in. (Tr., Page 59). Although he testified that his upper extremities have no

significant problems, his knees give him problems from time-to-time. (Tr., Page 60). He testified that his doctor told him he needed to resign from his job. (Tr., Page 62). He knows of no job that he can handle within his restrictions. He testified that in 1996 he had a double hernia with bleeding complications. (Tr., Page 63). He testified that he is receiving social security disability benefits.

The claimant also testified in cross-examination that he worked regular overtime at Big Boy Steel Erectors, working anywhere from 50 to 60 hours per week. He testified that prior to January of 1998 he was aware that he had a degeneration in his low back. (Tr., Page 72). However, he testified that he had no prior back injury, no prior back treatment, and had never seen a chiropractor. (Tr., Pages 68-69). He testified that because of his back injury and condition, he is unable to do any yard work at his home. (Tr., Page 70). He has given up all his prior hobbies of hunting, fishing and playing ball. (Tr., Page 70). He also testified that he has gained 30 pounds from the date of injury due to his inability to do any exercise. (Tr., Page 71).

Upon questioning by the court, the claimant testified he would be unable to any type of sit-down job since he could not tolerate being seated. (Tr., Page 73). He testified that the more he sits, the worse his back becomes. He testified that even sitting at the hearing created back problems and that he anticipated that following the hearing he would lie in bed for several days to recover. (Tr., Page 74). He testified that walking has not helped his back condition and that lying down is the only remedy that can relieve his back pain. (Tr., Page 74). He lies

down three times a day at the very least. He further testified that driving for 30 minutes increased back pain. (Tr., Page 75). If he drives thirty minutes or more, he must lie down to recover. (Tr., Page 76).

CAUSATION

The claimant's evidence of causation included the medical records and the deposition testimony of Dr. Robert Margolis. Dr. Margolis is a neurologist who evaluated the claimant on April 28, 2000. The claimant gave Dr. Margolis a history of the accident, including complaints of intractable and unremitting back pain. The claimant denied any prior back problems. The claimant complained of constant lumbar pain that was graded on three to four out of ten. The claimant stated that if he sat too long, his lumbar area would burn. (Tr., Pages 82-83).

Dr. Margolis performed a physical examination, and reviewed all of the claimant's medical records concerning his low back. Following his examination and the review of the records, Dr. Margolis made conclusions regarding the claimant's condition and the cause of his low back pain. Dr. Margolis testified 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., Page 87). Dr. Margolis testified that the pre-existing back condition was a longstanding one, and that the activities that the claimant performed as an ironworker for 31 years significantly contributed to the development of the low back injury. (Tr., Pages 88-89). Dr. Margolis was familiar with job duties of ironworkers, including heavy lifting, repetitive bending, climbing, stooping, and twisting on a regular basis.

(Tr., Page 89). Dr. Margolis testified that the claimant's career as an ironworker was a substantial factor in developing the degenerative disease of his lower spine. (Tr., Page 90). Dr. Margolis testified that the heavy work of an ironworker, including stooping, lifting, bending, and other associated activity, was extraordinary over what other workers would perform. He testified that it was an accepted fact in medical literature that strenuous activities such as those of an ironworker will cause degenerative disc disease. (Tr., Page 90). Dr. Margolis testified that the degenerative disc disease in the claimant was typical for this type of activity. The claimant had a dehydrated disc, disc space narrowing, instability and restructuring. Restructuring is where the body lays down new bone that creates facet disease and knuckling of the bone and osteophyte formation that results in foraminal encroachment and spinal stenosis, all of which is a process which takes place over time. Dr. Margolis testified that there is "no question that the literature reports that it is accelerated in patients who do heavy labor as opposed to the sedentary population or the white collar population." (Tr., Page 91). Dr. Margolis testified that the claimant had foraminal and central stenosis as a result of his degenerative disc disease. (Tr., Page 92). He further testified that foraminal stenosis may act just like a ruptured disc with nerve root impingement and radicular pain and weakness. (Tr., Page 92).

Dr. Margolis also testified that the claimant's need for surgery was substantially caused by his occupation and/or the event he described on January 9, 1998. (Tr., Page 92). Dr. Margolis testified that if a fusion was performed on the

claimant, it would accelerate the stress and subsequent degeneration and breakdown of the level above and below the level of the fusion. (Tr., Page 93).

On cross-examination, Dr. Margolis reiterated his opinions. He was asked if he was aware of the claimant's normal daily activities outside of work prior to his injury. Dr. Margolis noted that the claimant had not done any regular exercise, and concluded therefore that the claimant's work activities were the substantial contributing factor to his degenerative back condition. Dr. Margolis concluded that the claimant had a 30% disability, all of which is related to his employment. (Tr., Pages 109-110).

The employer offered testimony of Dr. Peter Mirkin on the issue of causation. Dr. Mirkin testified that he felt the claimant had severe degenerative disc disease. He also felt the claimant had mild stenosis and a lumbar strain. (Tr., Page 298). He testified that the degenerative disc disease is a condition that will worsen as the claimant ages. The more severe the degenerative disc disease, the more severe the symptoms are likely to get. As a consequence, he restricted the claimant in his lifting. (Tr., Page 300). It was Dr. Mirkin's opinion that the claimant suffered no permanent partial disability from his work-related event, and that the degenerative disc disease was not related to work. (Tr., Pages 301-302).

On cross-examination, Dr. Mirkin was asked about certain findings made by other health care providers. Dr. Mirkin did not find the muscle spasms identified by the physical therapist, nor did he find the trigger point identified by Dr. Granberg. (Tr., Pages 304-305). Dr. Mirkin also identified limping and a

decreasing range of motion while he was treating the claimant. (Tr., Page 305). When asked whether physical activity is related to degenerative disease, Dr. Mirkin testified that he felt the evidence linking the two conditions was "soft". (Tr., Page 307). Dr. Mirkin believes the condition is more related to smoking than it is to physical activity. (Tr., Pages 307-308). However, Dr. Mirkin failed to note in his report and was unaware of the fact that the claimant was a one pack a day smoker until 1979, when he quit. When Dr. Mirkin saw him approximately 20 years later, the claimant's MRI revealed a severe degenerative disc disease.

At no time did Dr. Mirkin testify that people who had quit smoking for in excess of twenty years would develop degenerative disc disease. Dr. Mirkin did testify that Claimant's prognosis was quite poor, and that he expected the degenerative condition in the claimant's back to continue. (Tr., Page 310). It was his testimony that the claimant would reach a point before long where he would be unable to do any type of lifting. No other party offered any medical testimony concerning causation.

EMPLOYABILITY

Claimant offered the testimony of Dr. Samuel Bernstein, who testified about the employability of the claimant in the open labor market. The employer offered the testimony of Karen Kane.

Dr. Bernstein is a licensed vocational rehabilitation specialist with significant history of dealing with persons in vocational rehabilitation. Dr. Bernstein is also a licensed psychologist.

It was Dr. Bernstein's testimony that the claimant was unemployable in the open labor market. (Tr., Page 129). His reasons for so stating were that the claimant was 52 years of age, which means he is approaching an advanced age under the government standards, and that the claimant had severe impairments. The claimant had mitral valve prolapse, hypertension, obesity, and degenerative joint disease in the lumbar spine, hips and knees. The claimant's main problem was degenerative joint disease which impacted his ability to lift even ten or fifteen pounds, which affected his ability to sit for prolonged periods of time, which affected his ability to walk, stand, repetitive bend, stoop, balance and climb. Furthermore, the claimant testified that with any activity he needed to lie down frequently during the day. Furthermore, the claimant had a semi-skilled work background and had not acquired any transferable skills to other areas of work. The limitations the claimant expressed were consistent with the medical records and the treatment the records identified. Dr. Bernstein testified that when those factors are considered, the claimant was unable to compete in the open labor market. (Tr., Page 130).

The employer offered the testimony of Karen Kane on the issue of unemployability. Karen Kane did not see or evaluate the claimant personally. (Tr., Page 347). She reviewed records which described the limitations expressed by different physicians. (Tr., Page 333). She did not have details of the claimant's limitations he described at the hearing. Based on her limited review, she determined that the claimant could work as a shipper and receiver, checker,

bench work and assembler. (Tr., Pages 340-341). She also made phone calls to various companies and had conversations with them. (Tr., Page 341). Claimant objected to the witnesses' recitation of telephone conversations as being hearsay. (Tr., Page 342).

On cross-examination, Ms. Kane testified that Claimant would not be able to perform the duties of an ironworker. She agreed that the claimant attempted to return to the labor market after his injury, but could not do so. (Tr., Page 347). To return to work, the claimant would have to compete with other, non-disabled, persons for employment. (Tr., Page 351). She recognized that Claimant was prohibited from frequent bending, twisting, squatting and climbing. (Tr., Page 353). She did not consider Claimant's inability to sit for prolonged periods, stand for prolonged periods, and his need to rest after any exertional activity. (Tr., Page 355). In her market survey, she never informed potential employees of claimant's medical restrictions to avoid lifting over 25 pounds and avoid frequent bending, twisting, squatting, and climbing of ladders. Furthermore, Ms. Kane never disclosed to potential employees claimant's constant pain and difficulty sitting, standing, walking, bending, twisting, pushing, pulling, climbing, kneeling or crouching. (Tr., Page 366).

Claimant filed his claim alleging, in the alternative, that his work-related injury on January 9, 1998 aggravated a pre-existing degeneration disc disease, and that his employment as an ironworker with the employer between 1977 and 1998 caused the degenerative disc disease. The claimant claimed to be permanently and

totally disabled. The Administrative Law Judge ruled that the claimant was only partially disabled (25% of body as a whole), which resulted from the January 9, 1998 injury, which aggravated a pre-existing degenerative condition. The Administrative Law Judge also ordered future medical treatment. The Administrative Law Judge found that there was no Second Injury Fund liability.

The Labor and Industrial Relations Commission modified the award of the Administrative Law Judge in this matter to award permanent total disability in accordance with Section 287.200 R.S.Mo. based on claimant's credible testimony regarding his complaints, limitations and pain. The Commission found that the claimant is entitled to weekly payments of $531.52 beginning February 18, 1999, and to continue for life.

The Missouri Court of Appeals, Eastern District, affirmed the award of the Commission. After application for transfer was filed by Appellant, this Court granted transfer.

POINTS RELIED ON

I. THE EASTERN DISTRICT COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DECISION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION BECAUSE ALTHOUGH THE EASTERN DISTRICT CRITICIZED THE TWO-PRONGED STANDARD OF REVIEW, IT NEVERTHELESS CONDUCTED A TWO-PRONGED REVIEW OF THE APPEAL IN THAT THE EASTERN DISTRICT HELD THAT THE AWARD WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Brandt v. E.O. Dorsch Electric Co., 400 S.W.2d 452 (Mo.App.E.D. 1966)

Brown v. Anthony Manufacturing Co., 311 S.W.2d 23 (Mo. banc 1958)

Brown v. Van Noy, 879 S.W.2d 667 (Mo.App.W.D. 1994)

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

Heins Implement Co. v. Missouri Highway & Transportation Commission, 859 S.W.2d 681 (Mo. 1993)

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

Thompson v. Railway Express Agency, 236 S.W.2d 36 (Mo.App.E.D. 1951)

Toole v. Bechtel Corp., 291 S.W.2d 874 (Mo. 1956)

Welborn v. Southern Equipment Co., 395 S.W.2d 119 (Mo. banc 1965)

Wisley v. Syco Foods, 972 S.W.2d 315 (Mo.App.E.D. 1998)

Section 286.010 (R.S.Mo. 1995)

Section 287.495.1 (R.S.Mo.)

Missouri Constitution, Article V, Section 22

II. THE EASTERN DISTRICT DID NOT ERR IN AFFIRMING THE AWARD OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION UNDER EITHER PROPOSED STANDARD OF REVIEW BECAUSE THE COMMISSION'S AWARD WAS SUPPORTED BY SUBSTANTIAL COMPETENCE EVIDENCE AND WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THAT THE CLAIMANT'S TESTIMONY, DR. BERNSTEIN'S TESTIMONY, AND THE ADMISSION OF THE EMPLOYER'S VOCATIONAL EXPERT ALL ESTABLISHED THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

III. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY AWARDED RESPONDENT PERMANENT TOTAL DISABILITY AGAINST THE EMPLOYER AND INSURER BECAUSE THE AWARD WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, IN THAT RESPONDENT'S PHYSICAL LIMITATIONS AND MEDICAL RESTRICTIONS NEGATED HIS ABILITY TO COMPETE IN THE OPEN LABOR MARKET.

Brenneisen v. Leach's Standard Service Station, 806 S.W.2d 443, 445 (Mo.App.E.D. 1991)

Buskuehl v. The Doe Run Co., 68 S.W.3d 535, 539-540 (Mo.App.E.D. 2001)

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

Douglas v. St. Joseph Lead Co., 231 S.W.2d 258, 263 (Mo.App. 1950)

Grgic v. P&G Construction, 904 S.W.2d 464 (Mo.App.E.D. 1995)

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

Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo.App.E.D. 1992)

Section 287.020.7 (R.S.Mo. 1986)

IV. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S AWARD OF PERMANENT TOTAL DISABILITY BENEFITS AGAINST THE EMPLOYER AND INSURER IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AS ALL EVIDENCE IN THE RECORD, INCLUDING EXPERT MEDICAL EVIDENCE ADVANCED BY APPELLANT IN FAVOR OF PERMANENT PARTIAL DISABILITY AND CREDIBILITY DETERMINATIONS BY THE COMMISSION ESTABLISH THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISBLED.

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

Landers v. Chrysler Corp., 963 S.W.2d 275, 282 (Mo.App.E.D. 1998)

I. THE EASTERN DISTRICT COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DECISION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION BECAUSE ALTHOUGH THE EASTERN DISTRICT CRITICIZED THE TWO-PRONGED STANDARD OF REVIEW, IT NEVERTHELESS CONDUCTED A TWO-PRONGED REVIEW OF THE APPEAL IN THAT THE EASTERN DISTRICT HELD THAT THE AWARD WAS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The Appellant argues that the Eastern District, in affirming the findings of the Commission, rejected the standard of review articulated in ***Davis v. Research Medical Center***, 903 S.W.2d 557 (Mo.App.W.D. 1995), and applied a one-step analysis in reviewing the appropriateness of the Commission's award. What Appellant fails to recognize is that although the Eastern District criticized the ***Davis*** standard of review, it nevertheless applied it in affirming the Commission's award. Thus, regardless of whether this Court modifies the standard of review, the opinion of the Eastern District should be affirmed.

An analysis of the appropriate standard of review is best viewed with an accurate history of the evolution of the standard for administrative hearings. Little improvement could be made to the historical perspective outlined in ***Davis***. Starting with the 1946 Constitutional amendment to Section V, Article 22 of the

Missouri Constitution, the ***Davis*** court set forth the statutory and precedential basis for concluding that the standard of review is a two-step process. That process includes: (1) evaluating whether substantial competent evidence supports the award, and (2) whether the award is against the overwhelming weight of the evidence. This second prong, first announced in ***Wood v. Wagner Electric Corp.***, 197 S.W.2d 647 (Mo. 1946), proved troublesome for the Eastern District, and which forms the basis for this appeal.

Reconciling the dizzying array of cases would be a daunting challenge. Cases from this Court, as well as each District Appellate Court, at times apply a one-pronged approach, and at other times a two-pronged approach. Undoubtedly, it was this very phenomenon that prompted the Western District to engage in the involved analysis of ***Davis***. However, the conclusion in ***Davis*** inevitably leads to some inconsistent applications.

When amended, the Missouri Constitution imposed a requirement that an award of an administrative agency must be supported by substantial competent evidence upon the whole record. (Missouri Constitution, Article V, Section 22). There is no mention that the award must also survive a test that it not be against the overwhelming weight of the evidence. Nor does the statutory framework create such a requirement. An award is to be set aside only if:

(1) The Commission acted in excess of its power;

(2) The award was procured by fraud;

(3) The facts found by the Commission do not support the award; or

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

Section 287.495.1 (R.S.Mo. 1994).

While the fourth requirement mirrors the constitutional requirement, there is no requirement that an award be set aside if it is against the greater weight of the evidence. That requirement is a creature of case law.

Many cases have interpreted the standard which requires that the award be supported by competent and substantial evidence. The principles of that review are well entrenched. The Commission is the sole judge of the weight of evidence and credibility of witnesses. ***Welborn v. Southern Equipment Co.***, 395 S.W.2d 119 (Mo. banc 1965). On review, the court cannot substitute its judgment for that of the Commission upon disputed fact questions. ***Brandt v. E.O. Dorsch Electric Co.***, 400 S.W.2d 452 (Mo.App.E.D. 1966). In reviewing the evidence, the court must review it in the light most favorable to the findings of the Commission. ***Wisely v. Syco Foods***, 972 S.W.2d 315 (Mo.App.E.D. 1998). With these well-established and unchallenged principles in mind, it is a small wonder why the Eastern District criticized the ***Davis*** two-prong approach.

The ***Davis*** approach requires the additional requirement that the Commission's award not be against the overwhelming weight of the evidence. This analysis, according to ***Davis***, is applied after the reviewing court concludes that the award is supported by competent and substantial evidence. However, if an award is supported by competent and substantial evidence, and if the Commission

is the ultimate arbitrator of the facts, of credibility of witnesses, and of weight to be given to witnesses, how can the Appellate Court thereafter "determine whether the award is against the overwhelming weight of the evidence." ***Davis*** at 570. It is precisely this contradiction which led the Eastern District to conclude that "such an exercise would cause us to invade the province of the Commission and 'weigh' the evidence." (Slip opinion at page 10, A37).

Equally troubling is the fact that no decision has articulated what quantum or quality of evidence will "overwhelm" the Commission's findings and award. And while some cases have ventured into this unknown territory, few have actually reversed the Commission's findings under this standard of review. Of the decisions which have, no objective standards can be found. Thus, in ***Seabaugh's Dependence v. Garver Lumber Mfg. Co.***, 200 S.W.2d 55 (Mo. banc 1947), this Court reversed a Commission finding on the basis that it was against the overwhelming weight of the evidence. But upon close examination, it simply appears that the claimant failed to make a submissible case. The claimant's expert testified that the claimant died from one of two causes, one of which was not work related. A finding of compensability by the Commission, which was later reversed by this Court, could simply be construed as a holding that the claimant failed to admit competent evidence on the issue of causation. It wasn't that opposing evidence was overwhelming, it was that the claimant never clearly established his case.

In ***Toole v. Bechtel Corp.***, 291 S.W.2d 874 (Mo. 1956), this Court reversed the Commission's finding that the claimant's death "arose out of" his employment, as contrary to the overwhelming weight of the evidence. The decedent worked in a tool shed on a construction project. He was found shot by workers who came to the shed following lunch. Although the decedent lived for some time after his death, he only vaguely identified the shooter and never indicated that the shooting was work related. This Court reversed the award as against the overwhelming weight of the evidence, but the holding could be construed as indicating that the claimant never produced substantial competent evidence that it was a work-related shooting. Other cases where the court reversed a Commission finding for compensation as against the overwhelming weight of the evidence, but which could have been ruled as a failure to support the award through substantial competent evidence include ***Brown v. Anthony Manufacturing Co.***, 311 S.W.2d 23 (Mo. banc 1958), and ***Thompson v. Railway Express Agency***, 236 S.W.2d 36 (Mo.App.E.D. 1951).

The standard of review set forth in Article V, Section 22, and Section 287.495.1 (R.S.Mo.), are closely analogous to the standard of reviewing a jury verdict. The jury is the ultimate fact finder. That verdict will be upheld as long as there is substantial competent evidence to support it (absent evidentiary error). If so, the Appellate Court does not weigh the evidence to determine if a different result could be reached, only if the result reached was supported by the evidence. ***Heins Implement Co. v. Missouri Highway & Transportation Commission***, 859

S.W.2d 681 (Mo. 1993); and ***Brown v. Van Noy***, 879 S.W.2d 667 (Mo.App.W.D. 1994). Furthermore, in ***Heins***, this Court stated that the opinion of a single qualified witness constituted substantial evidence supporting a jury verdict. It could be argued that the same standard should apply in reviewing awards of the Commission, which is also the ultimate fact finder in a workers' compensation claim.

It is impossible to ignore dozens of cases, from every appellate court, that reference the second prong of the ***Davis*** review. However, it is equally impossible to ignore the incredibly rare application of that standard to reverse an award of the Commission. In cases where it has been applied to reverse the Commission, an alternative legal theory was viable to justify reversal. Applying and enforcing only the standard of review in Article V, Section 22, and that found in Section 287.495.1, would both simplify and standardize appellate review. It would also reverse the obvious conflict of first deferring to the Commission's weighing of evidence, and then re-weighing it in the second prong of the review.

Neither party advocated a modification of the standard of review to the Eastern District. Even before the ***Davis*** case, it was assumed among most practitioners that there was a two-pronged review. Many take solace in the two-step review, believing it to be a check over a system that is ultimately political. While a jury verdict may occasionally defy a reasonable result, and then be affirmed if there is competent substantial evidence to support it, an award by the Commission that is unreasonable is more unsettling. Jurors hear one case, while

the politically appointed Commission hears cases constantly. Only one of the Commissioners need be an attorney. Section 286.010 (R.S.Mo. 1995). Perhaps the only way to prevent a steady tide of unreasonable awards is to ensure that the award is not contrary to the overwhelming weight of evidence.

The two-prong standard of review was developed shortly after the Constitutional amendment, although applied inconsistently at times. This writer has not seen a decision or analysis which provides a compelling argument for altering the ***Davis*** standard of review. And although it appears at first blush to be inherently contradictory (to defer on the weight of evidence, and then to weigh the evidence), the net result is that the two-pronged approach advances more consistent results and reasonable awards. The standard should not be disturbed.

For purposes of the case at bar, resolving the appropriate standard of review should not change the result. The Commission's decision and the ruling of the Eastern District should be affirmed. The Eastern District, while rejecting the concept of a two-prong review, nevertheless considered the Appellant's claim that the award was against the overwhelming weight of the evidence. (Slip opinion at page 12, A39). The court considered contrary medical evidence and the finding of Appellant's vocational expert, and concluded Appellant's argument did not provide "any basis for us to overturn the award as against the overwhelming weight of the evidence." (Slip opinion at page 14, A41). As such, the opinion of the Eastern District should be affirmed.

II. THE EASTERN DISTRICT DID NOT ERR IN AFFIRMING THE AWARD OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION UNDER EITHER PROPOSED STANDARD OF REVIEW BECAUSE THE COMMISSION'S AWARD WAS SUPPORTED BY SUBSTANTIAL COMPETENCE EVIDENCE AND WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THAT THE CLAIMANT'S TESTIMONY, DR. BERNSTEIN'S TESTIMONY, AND THE ADMISSION OF THE EMPLOYER'S VOCATIONAL EXPERT ALL ESTABLISHED THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

Once the issue of standard of review is resolved, the only question to be answered on appeal is whether the evidence supported the Commission's award. If a one-pronged approach is used, the only question is whether the award is supported by substantial competent evidence. The Appellant addresses that question in both Points II and III of its brief. To avoid duplication, Respondent will address that question in Point III.

If a two-pronged approach is used, the additional question arises as to whether the award is against the overwhelming weight of the evidence. Appellant addresses that question in both Points II and IV. To avoid duplication, Respondent will address that point in Point IV of his brief.

III. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY AWARDED RESPONDENT PERMANENT TOTAL DISABILITY AGAINST THE EMPLOYER AND INSURER BECAUSE THE AWARD WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, IN THAT RESPONDENT'S PHYSICAL LIMITATIONS AND MEDICAL RESTRICTIONS NEGATED HIS ABILITY TO COMPETE IN THE OPEN LABOR MARKET.

On appeal from a decision in a workers' compensation case, the Appellate Court shall review only questions of law and may modify, reverse, remand for hearing, or set aside the award upon any of the following grounds and no other:

(1) That the Commission acted without or in excess of it powers;

(2) That the award was procured by fraud;

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

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

Where the Commission has reversed the Administrative Law Judge, the review is conducted in two steps. In the first step, the whole record is examined, viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award, to determine if the record contains sufficient competent and substantial evidence to support the award. If not, the

Commission's award must be reversed. ***Davis v. Research Medical Center***, 903 S.W.2d 557, 571 (Mo.App.W.D. 1995); see also, ***Buskuehl v. The Doe Run Co.***, 68 S.W.3d 535, 539-540 (Mo.App.E.D. 2001). In this first step, the court may disregard any evidence which might support any finding different from those made by the Commission. ***Davis***, 903 S.W.2d at 566.

If there is competent and substantial evidence to support the award, the Appellate Court then moves to the second step and determines whether the award is against the overwhelming weight of the evidence. ***Davis***, 903 S.W.2d at 571. It is true that it is the Commission's findings and award, not those of the Administrative Law Judge, which are reviewed by the Appellate Court. ***Davis*** at 569. It is also true that when it reviews the award entered by the Administrative Law Judge, the Commission is not bound to yield to his or her findings, including those relating to credibility, and is authorized to reach its own conclusions. Id.

To establish that the claimant is permanently and totally disabled, evidence must be adduced which indicates that the claimant was unable to return to any employment and not merely the inability to return to employment in which he was engaged at the time of the accident. Section 287.020.7 (1986). 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 is hired. ***Reiner v. Treasurer of the State of Missouri***, 837 S.W.2d 363, 367 (Mo.App.E.D. 1992). Working very

limited hours at a rudimentary task is not considered reasonable or normal employment. ***Grgic v. P&G Construction***, 904 S.W.2d 464 (Mo.App.E.D. 1995). The term "any employment" has been defined to mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert, in order to meet the statutory definition." ***Kowalski v. M-G Metals & Sales, Inc.***, 631 S.W.2d 919 (Mo.App.S.D. 1982). Even if it is established that the claimant can work very limited hours at a rudimentary task, it does not disqualify him from being considered permanently and totally disabled. The test is whether he is able to compete in the open labor market and ultimately what his prospects are for obtaining employment. ***Grgic***, 904 S.W.2d at 466. In the instant action, the claimant clearly meets the definition of being permanently and totally disabled.

When examining the entire record and viewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commission's award, to determine if the record contains sufficient competent and substantial evidence to support the award, it is important to remember the deference accorded to credibility determinations of the Commission vis-à-vis those of the Administrative Law Judge.

Contrary to the Administrative Law Judge, the Commission deemed claimant to be credible in finding his complaints, limitations and pain to be so limiting as to constitute permanent and total disability. All doctors, including

Dr. Mirkin, reported significant limitations of motion in claimant's back. Accordingly, numerous doctors restricted lifting over 25 pounds, bending, twisting, squatting, and climbing of ladders. Furthermore, the Commission found claimant's complaints to be consistent with the nature of his injury. Claimant testified that he experiences constant pain and has difficulty sitting, standing, walking, bending, twisting, pushing, pulling, climbing, kneeling or working, which causes him to be "laid up" for some time afterwards. (Tr., Pages 70-74). In addition to the subjective complaints and objective findings, the Commission felt the nature of the suggested surgery, to include decompression and stabilization at L3-4, L4-5 and L5-S1, confirmed the severity of claimant's back problems.

The Administrative Law Judge and Commission agreed that the surgery is reasonable treatment, and the need for the surgery is due to the January 9, 1998 work accident. The Commission further believed it was "completely reasonable" for the employee to put off what can fairly be described as "massive surgery" as long as possible.

Additionally, the Commission agreed with claimant's vocational expert, Dr. Samuel Bernstein, that claimant was unable to compete in the open labor market. As will be explained in greater detail in the next Point Relied On, it is easy to see why the Commission sided with Dr. Bernstein, as opposed to the employer's vocational expert, Carol Kane.

Dr. Bernstein, a licensed vocational rehabilitation specialist and licensed psychologist, opined that claimant is unemployable in the open labor market due

to claimant's advanced age, semi-skilled work background, and physical limitations. Claimant's persistent pain limits claimant's ability to lift ten to fifteen pounds or attempt prolonged sitting, standing, walking, repetitive bending, stooping, balancing and climbing. Basically, any exertion requires claimant to lie down to relieve his pain and discomfort. (Tr., Pages 70-74). Accordingly, claimant cannot function on a sustained basis in a work setting and is therefore unemployable in the open labor market.

Carol Kane, a career-long vocational consultant for Crawford & Company, offered different opinions regarding claimant's employability, which upon close examination raise questions as to their reliability. Ms. Kane never personally met with and examined claimant, but rather merely reviewed claimant's medical records. (Tr., Page 347). She noted claimant's numerous complaints to his treating doctors and the many medical restrictions prescribed by those same doctors. Based on this information, Ms. Kane contacted ten or eleven potential employers in order to determine that claimant is employable. However, Ms. Kane failed to inform these employers of claimant's medical restrictions of avoiding lifting, frequent bending, twisting, squatting and climbing of ladders. Furthermore, Ms. Kane did not notify these same employers that claimant had constant pain, difficulty sitting, standing, walking, bending, twisting, pushing, pulling, climbing, kneeling or crouching. (Tr., Pages 365-366). In fact, several of the jobs Ms. Kane did identify, for which she claimed claimant could compete, violated several of his medical restrictions. (Tr., Page 367). Given the flaws in

Ms. Kane's assessment, claimant's medical restrictions, physical limitations, and constant pain, he will not be able to compete in the open labor market, especially against non-disabled, full-time workers.

Considering the deference accorded the Commission's findings regarding credibility, the testimony of the claimant and the experts, there is ample competent and substantial evidence which establishes that claimant is permanently and totally disabled due to claimant's injury, physical limitations, and current complaints. This Court should therefore affirm the Commission's award.

IV. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S AWARD OF PERMANENT TOTAL DISABILITY BENEFITS AGAINST THE EMPLOYER AND INSURER IS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AS ALL EVIDENCE IN THE RECORD, INCLUDING EXPERT MEDICAL EVIDENCE ADVANCED BY APPELLANT IN FAVOR OF PERMANENT PARTIAL DISABILITY AND CREDIBILITY DETERMINATIONS BY THE COMMISSION ESTABLISH THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISBLED.

Appellant, in this point, attempts to attack the Commission's credibility findings presented regarding the expert medical testimony. It is important to note that none of the medical experts in this claim presented live testimony, but rather voiced opinions in depositions, reports and records. When this Court takes the second step of review to determine whether the Commission's award is against the overwhelming weight of the evidence, this Court is to defer solely to the Commission as to the credibility of witnesses who did not testify live. ***Davis***, 903 S.W.2d at 573. Where the right to compensation depends on which of conflicting medical opinions should be accepted, the issue is peculiarly for the Commission's determination. ***Landers v. Chrysler Corp.***, 963 S.W.2d 275, 282 (Mo.App.E.D. 1998).

Appellant wishes to argue that some expert medical opinions are more credible than others, however, the Commission had the opportunity to consider all

of the same expert medical testimony as the Administrative Law Judge and reached different conclusions. Scrutiny of the Commission's credibility determinations regarding the expert medical testimony is hardly appropriate at this time, according to the case law above. However, examination of all the expert medical evidence does demonstrate that the Commission's determinations are correct and not against the overwhelming weight of the evidence.

Dr. Margolis testified that the claimant's entire disability related to his back is referable to his employment. (Tr., Page 110). Dr. Margolis testified that he is very familiar with the type of work that ironworkers perform, and he considers it extraordinary over what other workers would do. (Tr., Page 90). He testified that it is an accepted medical fact that activities such as those of an ironworker will cause degenerative disc disease. (Tr., Page 90). Finally, Dr. Margolis testified that the described work of an ironworker and the type of work that the claimant would perform was a substantial factor in causing his degenerative disc disease. (Tr., Pages 89-90).

The employer's chosen physician, Dr. Mirkin, identified problems in the claimant's low back. From June through July 1998, Dr. Mirkin noted that the claimant's range of motion of 30% in June reduced to 40% reduction in range of motion in July. Straight leg raising tests produced back pain bilaterally. Dr. Mirkin noted the severe degenerative joint disease in the MRI. Dr. Mirkin's note of July 27th stated that the claimant's prognosis was poor and that he could

expect pain and at some point would be unable to do any heavy lifting. It was at that time that Dr. Mirkin released the claimant from care.

Dr. Samuel Bernstein testified on behalf of the claimant. He is a licensed vocational rehabilitation specialist with significant history of dealing with persons in vocational rehabilitation. He is also a licensed psychologist. Dr. Bernstein was of the opinion that the claimant was unemployable in the open labor market. He testified that the primary reasons were that the claimant was 52 years of age, which is considered advanced for employment purposes. (Tr., Page 130). He also had severe impairments related to mitral valve prolapse, hypertension, obesity, and degenerative joint disease in the lumbar spine, hips and knees. Dr. Bernstein testified that the main problem was the degenerative joint disease, which impacts the claimant's ability to even lift ten to fifteen pounds, prolonged sitting, standing, walking, repetitive bending, stooping, balancing, climbing, and the fact that with activity he must lie down frequently during the day. (Tr., Page 130).

In addition, Dr. Bernstein testified that the claimant had a semi-skilled work background and had not acquired any transferable skills to other areas of work. (Tr., Page 130). The limitations that Claimant expressed were consistent with the medical records which describe the medications and the treatment that he has undergone. When those factors are considered, and in particular when they are considered in conjunction with the fact that the claimant cannot function on a sustained basis in a work situation, he becomes unemployable in the open competitive labor market. (Tr., Page 131).

The employer presented testimony of Carol Kane, whose findings must be questioned due to limitations in her evaluation. Ms. Kane testified that her entire work history was working for Crawford and Company as a vocational consultant. Crawford and Company is involved in representing the employer in workers' compensation claims. She testified that she never met with the claimant. (Tr., Page 347). While she agreed that the claimant was unable to return to his work as an ironworker, she felt that there was some employment available to him in the open labor market. (Tr., Page 347). She agreed that the claimant attempted to go back to work as a supervisor in the ironworking field but was unable to successfully work on a regular basis. (Tr., Page 348-349).

Ms. Kane admitted that to compete in the open labor market one would have to compete with other individuals who would be seeking work eight hours a day, 40 hours a week. (Tr., Page 350). Mr. Hampton would have to compete with individuals who are able-bodied or healthy and without any disabilities. (Tr., Page 351). Ms. Kane was of the opinion that the claimant's difficulties with walking, sitting, standing, twisting, squatting, climbing ladders, and his inability to lift in excess of 25 pounds would reduce the number of positions accessible to him within the open labor market. (Tr., Page 355). She was unable to state how long the claimant would have to sit, stand or walk in any of the job titles that she felt he was qualified to fill. (Tr., Page 356-357). She agreed that the Social Security Administration had determined that the claimant was unemployable in the open labor market. (Tr., Page 358).

Ms. Kane claims to have contacted ten or eleven employers to see if Mr. Hampton's restrictions would fit within prospective employment. However, she never informed any prospective employers about Mr. Hampton's specific physical limitations. (Tr., Page 365). Ms. Kane did not inform any potential employer that the claimant had medical restrictions of avoiding lifting, frequent bending, twisting, squatting, and climbing of ladders. (Tr., Page 366). She did not inform any prospective employers that the claimant had constant pain, difficulty sitting, standing, walking, bending, twisting, pushing, pulling, climbing, kneeling or crouching. (Tr., Page 366). Of the jobs identified by Ms. Kane that the claimant was available for, those job requirements often violated the restriction the claimant was under. Thus, the job with Orkin required crawling, for which the claimant was disqualified. (Tr., Page 367). The job at Home Depot required bending, squatting and lifting in excess of 30 to 40 pounds. (Tr., Page 367).

Ms. Kane's evaluation is seriously flawed by her failure to consider and to provide to employers the specific restrictions under which the claimant was suffering. The fact that her market survey was biased is underscored by her failure to inform any prospective employer about the claimant's limitations. (Tr., Page 365).

The Commission had the same opportunity to review all expert medical evidence as the Administrative Law Judge. Appellant's arguments to refute the Commission's determinations regarding credibility of conflicting expert medical

evidence is, as previously stated, improper, and this Court is to defer solely to the Commission on such matters.

Concerning evidence presented via live testimony before the Administrative Law Judge, examination of different findings and the basis thereof between the Administrative Law Judge and Commission is only appropriate where the evidence is balanced such that the Commission struggles to reach a decision. ***Davis v. Research Medical*** Center, 903 S.W.2d 557, 568 (Mo.App.W.D. 1995). In this case, there is ample substantial, competent evidence to support the Commission's findings and award, which obviate the need to scrutinize the Administrative Law Judge's and Commission's findings and basis thereof regarding Claimant's credibility. Although there may be some evidence to support the Administrative Law Judge's original determination, the Commission is not bound or obligated to yield to the Administrative Law Judge's determination of the credibility of witnesses or its other factual findings. This Court reviews the Commission's award and not the findings of the Administrative Law Judge. Even if it is necessary to review the different findings and credibility determinations of the Administrative Law Judge and Commission, it is obvious that the Commission considered all of the evidence, including that relied upon by the Administrative Law Judge to reach different conclusions, in reaching contrary results. When reviewing the entire record in the light most favorable to the award, including the Commission's reasons for differing with the Administrative Law Judge, the

Commission's award is supported by competent and substantial evidence and is not against the overwhelming weight of the evidence.

CONCLUSION

Claimant submits that the Commission's award of permanent total disability is supported by competent and substantial evidence, given the Commission's determination that claimant's credible testimony and Dr. Bernstein's vocational opinion concerning his injury, physical limitations and pain establish his inability to compete in the open labor market.

Furthermore, the Commission's award is not against the overwhelming weight of the evidence the overwhelming weight of the evidence considering the Commission's review of all expert medical evidence presented and its credibility assessments therefrom, which according to case law, are immune to comparison with those of the Administrative Law Judge.

Accordingly, claimant requests this Court to uphold the Commission's award of permanent total disability benefits.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

LARRY HAMPTON, Employee/Respondent, vs. BIG BOY STEEL ERECTORS, Employer/Appellant, and TREASURER, STATE OF MISSOURI, as Custodian of THE SECOND INJURY FUND, Additional Party/Respondent.	)	No.: ED81712

CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Employee/Respondent, and for his certificate of compliance, state as follows:

1. The undersigned do hereby certify that Employee/Respondent's response brief filed herein complies with the page limits of Rule 84.06(b) and contains 9,973 words of proportional type.

2. Microsoft Word was used to prepare Employee/Respondent's response brief.

3. The undersigned do hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of Employee/Respondent's Brief and one copy of the accompanying disk were mailed this 3rd day of October, 2003, to: Brad L. McChesney, Attorney for Appellant, 10733 Sunset Office Drive, Suite 410, St. Louis, MO 63127; and Michael T. Finneran, Assistant Attorney General, 720 Olive Street, Suite 2000, St. Louis, MO 63101.

_____

Subscribed and sworn to before me this 3rd day of October, 2003.

_____
Notary Public

My Commission Expires: