

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC94724**

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**CARL GREER  
APPELLANT/CROSS-RESPONDENT,**

**v.**

**SYSCO FOOD SERVICES OF ST. LOUIS, LLC,  
RESPONDENT/CROSS-APPELLANT,**

**And**

**THE TREASURER OF MISSOURI as  
CUSTODIAN OF THE SECOND INJURY FUND,  
Missouri Attorney General,**

**RESPONDENT.**

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**Appeal from the Labor and Industrial Relations Commission**

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**BRIEF OF AMICUS CURIAE  
MISSOURI CHAMBER OF COMMERCE AND INDUSTRY**

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## **JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS**

Amicus Missouri Chamber of Commerce and Industry (“Missouri Chamber”) files this Brief pursuant to Missouri Supreme Court Rule 84.05(f)(2). The Missouri Chamber received consent from both the Appellant/Cross-Respondent and Respondent/Cross-Appellant to file a brief in this matter. Amicus adopts the Respondent/Cross-Appellant’s jurisdictional statement and statement of facts as its jurisdictional statement and statement of facts.

### **INTEREST OF AMICUS CURIAE**

The Missouri Chamber is a Missouri Not For Profit Corporation in good standing. The Missouri Chamber is the largest statewide general business organization in Missouri. The Missouri Chamber represents nearly 3,000 employers and almost 200 local chambers of commerce in advancing the cause of Missouri business.

Amicus Missouri Chamber files this brief in support of the position that the standard for determination of whether a claimant is permanently and totally disabled should remain a factual determination utilizing the Court's precedent for claims filed under Section 287.170, RSMo. Amicus further files this brief in support of the position that the standard for determination of whether a claimant is temporarily totally disabled should exist only up to the date of maximum medical improvement. Missouri Chamber members have a direct interest in the outcome of this case and this Court's decision concerning permanent and temporary total disability claims. The Missouri Chamber supports the decision of the Labor and Industrial Relations Commission ("Commission") on denial of Claimant's claim for permanent total disability and opposes the position of the Commission where it granting additional temporary total disability compensation after Claimant already reached maximum medical improvement.

## ARGUMENT

**I. The decision of the Commission should be affirmed denying Claimant's request for a determination that he is permanently and totally disabled because there was sufficient and competent evidence to support the denial based on the entire record.**

For a worker's compensation claim, this cause has seen the same type of intrigue found in any made-for-television movie. An accident at work, dueling expert witnesses over the extent of the injury, undercover videos of the claimant and enough litigation to give the ol' Perry Mason a run for his money. But this cause is illustrative of an area of law where Missouri has become problematic for employers.

Employers are forced to dispute physician testimony of the level of impairment, even when the testimony should have been excluded as lacking foundation for expertise to provide an opinion. Employers must offer dueling experts and undergo numerous depositions to reach the heart of the facts and opinions. Employers naturally have resorted to surveillance of worker's compensation claimants in life situations that clearly and decisively contradict the arguments of a claimant's alleged disability with visual evidence of higher functioning than alleged. And employers are forced to litigate-even to the Missouri Supreme Court-to protect themselves from paying for claims where no compensation should be owed.

In a time when we have witnessed a man with no legs climb Mt. Everest we have increasing opportunities every day to challenge our concepts of those who were previously thought disabled. With these types of amazing triumphs of human strength many employers fundamentally challenge the notion that workers with disabilities are

unemployable for life. The Second Injury Fund (“SIF”) was created to promote the hiring of injured workers. While there is a legitimate debate to be had about whether the SIF has outlived its time, the Missouri Chamber has gone to great lengths to advocate for keeping the SIF solvent so that injured workers will have better opportunities of being employed in Missouri. Further, a host of state and federal laws protect injured workers from discrimination in the job search so that he may not be discriminated against by virtue of his injury.

Claimant possesses the ability to work in Missouri’s labor market. For years the standard in Missouri for determining whether a worker has a permanent total disability has revolved around the claimant’s ability to compete in the open labor market. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 48 (Mo. App. W.D. 2007); and *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo. App. E.D. 2000). As stated in *ABB Power*, “[t]he critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.” *ABB Power*, 236 S.W.3d at 48.

The Court should review the Commission's determination based on whether it is "supported by competent and substantial evidence upon the whole record." *Id.* quoting Mo. CONST. Art. V, Sec. 18. As set forth in statute, on appeal the Court shall:

review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

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

- (2) That the award was procured by fraud;
- (3) That the facts found by the commission do not support the award;
- (4) That there was not sufficient competent evidence in the record to warrant the making of the award.

§ 287.495.1, RSMo.

The Commission's findings of fact are conclusive and binding on appeal absent fraud. *ABB Power*, 236 S.W.3d at 48. A reviewing Court will “review the award objectively, *without* viewing the evidence and its inferences in the light most favorable to the award.” *Id.*, citing, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-3 (Mo. banc 2003) (emphasis in original). A determination of whether there is sufficient competent and substantial evidence to support the award requires examining the “evidence in the context of the whole record.” *Hampton*, 121 S.W.3d at 223. Logically, “an award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.” *Id.* at 223. A reviewing Court will defer to the Commission on the credibility of witnesses and weight given to the conflicting evidence. *Pennewell v. Hannibal Reg’l Hosp.*, 390 S.W.3d 919, 923 (Mo. App. E.D. 2013).

The issue presented in this appeal regarding permanent total disability is one based on evidence in the record. Given the above rules on appeal in worker’s compensation claims the hearing phase before the Administrative Law Judge and the reliance therein of



expert testimony and other extrinsic evidence to establish the extent of the impairment is critical to the outcome of the case even on appeal.

Despite dueling experts, the Commission chose to give greater weight to Mr. Cordray, a vocational rehabilitation expert. Mr. Cordray testified Claimant was capable of performing sedentary jobs in the open labor market in St. Louis, Missouri. (Tr. 2814-2815). Mr. Cordray's testimony is dispositive of the factual determination of whether a permanent total disability exists because he opined, and the Commission adopted the opinion, that Claimant was able to perform sedentary work, full time in the labor market for which jobs were readily available. (Tr. 2815). Further, video footage showed Claimant's ability to walk, climb stairs, lean on an injured foot, stand for extended periods of time and also drive a vehicle. (L.F. 78). The video evidence clearly contradicted Claimant's subjective testimony of impairment. The Commission correctly weighed the video evidence against Claimant's assertions of impairment and found no support for permanent total disability existed.

Viewing the record as a whole, there is sufficient competent evidence to support the factual conclusion that no permanent total disability existed in this case. The Commission's award should be affirmed denying permanent total disability compensation to Claimant.

**II. The decision of the Commission should be reversed as to granting additional payments to Claimant for a temporary total disability occurring between June 22, 2010 and February 4, 2011 which occurred after reaching maximum medical improvement as of April 23, 2007 because the Commission relied upon an erroneous interpretation of the law surrounding temporary total disability payments.**

Like the discussion above on permanent total disability, the one surrounding a temporary total disability turns on the review of the evidence presented before the administrative law judge to determine when the claimant has achieved maximum medical improvement. However, in this instance, the record indicated that maximum medical improvement occurred no later than April 23, 2007. What the Commission did subsequently was accept a second period of temporary total disability. Creating a second period of temporary total disability was an error.

Statute defines total disability as the “inability to return to any employment in which the employee was engaged at the time of the accident.” § 287.120.6, RSMo. A total disability can be one that is temporary or permanent in nature. §§ 287.170 & 287.200, RSMo. The difference between a temporary total disability and one that is permanent may seem intuitive but statute defines a temporary total disability as one that occurs, “. . . during the continuance of such disability . . .” § 287.170.1, RSMo. Compensation for a temporary total disability is capped at four hundred weeks further reinforcing the temporal nature of the disability. *Id.* Whereas a permanent total disability is one that is defined by statute using the same language above which states, “. . . during the continuance of such disability . . .” but goes on in statute to allow compensation of the

disability “. . . for the lifetime of the employee . . . .” § 287.200.1, RSMo. Disabilities can also be determined to be temporary partial or permanent partial disabilities. §§ 287.180 & 287.190, RSMo.

For decades, reviewing courts consistently interpreted the phrase ‘continuance of such disability’ to mean that a total disability exists, “. . . from the date of the injury through the date the condition has reached the point where further progress is not expected.” *Cardwell v. Treas. of State of Missouri*, 249 S.W.3d 902, 910 (Mo. App. E.D. 2008). This reading of the statute makes sense in the grand scheme of the worker’s compensation system in that a total disability can be temporary in nature during the period of recovery. And at some point along the continuum of medical recovery the injured worker will reach an apex where maximum medical improvement is obtained. If full recovery is not possible, and the injury has achieved the point where no further medical improvement can be reached, then a total disability is no longer temporary in nature. It is not until such time as maximum medical improvement is reached that an assessment can be made as to the extent of the injured worker’s impairment to be one that is permanent partial or permanent total in nature.

Perhaps it would be best if statute defined “maximum medical improvement” in an era of strict construction. However, even a quick reading of the plain meaning of the law and reading how the statutes work together defining temporary partial, permanent partial, temporary total and permanent total disability one can hear the harmony of the song in the statutes by concluding that there must be a practical point in the continuum of medical care where no further medical improvement can be reached. Without that point

in time there can be no determination of when a temporary disability becomes a permanent disability. Courts have repeatedly referred to that point as “maximum medical improvement.” *Lewis v. Treas. of State of Missouri*, 435 S.W.3d 144, (Mo. App. E.D. 2014); *Claspill v. Fed Ex Freight East, Inc., and Treas. of State of Missouri*, 360 S.W.3d 894, 899 (Mo. App. S.D. 2012); *Thorsen v. Sachs Electric Co.*, 52 S.W.3d 611 (Mo. App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo. App. W.D. 2000); *Sutton*, 37 S.W.3d 803 (Mo. App. ED 2000).

This point at which an injured worker no longer can expect to medically improve could be called any other descriptive term but the effect would remain the same. Courts have chosen to refer to that point as ‘maximum medical improvement.’ The term not being defined in statute does not undermine the statutory scheme and the fact that there must be a point in space and time when a disability becomes one that is temporary or permanent in nature. In this case, that point in space and time occurred for Claimant on April 23, 2007.

The Commission adopted April 23, 2007 as the date of maximum medical improvement. However, the Commission erred in their interpretation of the law as to when temporary total disability began and ended then began an ended again which all stems from the factual determination of when Claimant reached maximum medical improvement. Beyond April 23, 2007, there was no further temporary total disability to provide Claimant. A scenario where an injured worker can reach the apex of their medical improvement, receive compensation for a temporary total disability under statute, then years later, seek to obtain further temporary total disability compensation

without altering the injured worker's maximum medical improvement would go too far. The Commission erred in this regard as a matter of law and should be reversed.

Employers should be able to rely upon the effect of legal thresholds for when a temporary total disability is no longer temporary in nature so as to calculate any permanent disability and compensate the injured worker so both parties can move forward with life. By its very definition the intent of the compensation for temporary total disability is to compensate the injured worker for the time during recovery when the injured worker cannot work at all. Allowing a claimant to create new periods of temporary total disability without the hope of medical improvement would go too far and diminish the conclusive effect of a worker's compensation award.

## **CONCLUSION**

Based on the foregoing, amicus Missouri Chamber urges this Court to affirm the decision of the Commission denying permanent total disability for Claimant and reverse the Commission on its finding of additional temporary total disability benefits for a second period of recovery years after Claimant reached maximum medical improvement.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that pursuant to Rule 84.06 (c), this brief: (1) complies with 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 2576 words, exclusive of the section exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2013.

/s/ Richard M. AuBuchon

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was filed electronically via Missouri CaseNet and served, this 30th day of March, 2015 to:

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