

MISSOURI SUPREME COURT

SUPREME COURT No.:SC95885

**MISSOURI DEPARTMENT OF TRANSPORTATION,
Appellant,
Self-Insured Employer,**

v.

**LINDA MANTIA,
Employee/Respondent,**

and

**SECOND INJURY FUND OF THE STATE OF MISSOURI,
Additional Party**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Respondent agrees that this action involves a workers' compensation claim filed by the Employee/Respondent, Ms. Linda Mantia [“the employee”]. On April 28, 2015, the Labor and Industrial Relations Commission [“the Commission”] (A3-A15) reversed the Final Award of the Administrative Law Judge [“the ALJ”] (A16-A28). It entered its own Final Award in which the employee was awarded:

1) Against the Employer/Insurer:

a) Two Hundred (200) weeks of permanent partial disability [“PPD”] benefits, in the amount of \$77,808.00;

b) Future medical care;

2) Against the Second Injury Fund: Nothing

Respondent agrees that this matter is not one over which the Missouri Supreme Court has exclusive appellate jurisdiction. Mo. Const. Art. V § 3. This is an appeal from a decision by an administrative officer or body existing under the constitution or by law, and is therefore subject to direct review by the courts as provided by law. Mo. Const. Art. V § 18. The appellate courts to direct review by the courts as provided by law. Mo. Const. Art. V § 18. The appellate courts have jurisdiction to review all decisions of the Commission where the Missouri Division of Workers' Compensation [“the Division”] has original jurisdiction over the case. RSMo Workers' Compensation [“the Division”] has original jurisdiction over the case.

RSMo. §287.495. The underlying workers' compensation claim was filed in Missouri, where venue before the Division was proper in Saint Louis County, Missouri. RSMo. §287.640.2. Therefore, jurisdiction for the appeal lay in the Missouri Electronically Filed - SUPREME COURT OF MISSOURI - January 27, 2017 - 04:33 PM 5 Court of Appeals, Eastern District ["the Eastern District"]. RSMo. §287.495; RSMo. §477.070. Appellant MoDOT timely filed a Notice of Appeal with the Eastern District. (LF 48-52). On June 14, 2016, the Eastern District filed its Opinion upholding the Commission's Award. (A3-A18). MoDOT timely filed with the Eastern District a Motion for Rehearing en banc and, in the alternative, an Application for Transfer to the Supreme Court; the Eastern District denied both on August 1, 2016. On August 16, 2016, MoDOT timely filed an Application for Transfer with this Court pursuant to MO. R. CIV. P. 83.04. On December 20, 2016, this Court sustained MoDOT's application and ordered the transfer of this appeal. Accordingly, this Court has appellate jurisdiction over this appeal under Article V, Section 10 of the Missouri Constitution and Supreme Court Rules 83.04 and 83.09. Respondent does not dispute any way the jurisdiction of this court.

STATEMENT OF FACTS

I) RESPONDENT'S WORK DUTIES

Respondent asserts that she has a compensable claim for psychological injuries as a result of her work as a highway supervisor for more than twenty years. She stated that, amongst other duties, it was her job to go to accident scenes and investigate crashes and fatalities. **T-28**

At the hearing, she testified as to a number of extremely traumatic incidents. Amongst the incidents that the Respondent witnessed are the following:

- *In 1987 or 1988, the Respondent noted that a little boy burned to death in a car after being struck by a tractor-trailer. She explained that the young boy was left by his parents on westbound 44 when they went to a truckstop to call someone for help. There was a subsequent collision involving the vehicle which the boy was occupying. Respondent witnessed the boy burning in the car, but was unable to help him. The last thing that she heard was the little boy screaming.* **T-30**
- *In 1990, the Respondent arrived at the scene of an accident and found that a young adult was dead. He was a strange color and she testified that she believed that he had been asphyxiated.* **T30-31**
- *In 1990, Respondent witnessed a one car accident on westbound Highway 44*

and Big Bend Blvd. which resulted in a decapitation. Respondent was walking and inadvertently kicked the decapitated head. The Respondent noted that there were body parts scattered about the scene. T-31

- *In 1991, the Respondent witnessed a woman jump from the Dougherty Ferry Bridge onto Highway 270. She had committed suicide and Respondent saw her body strike the pavement. Respondent then witnessed the disturbing aftermath and diverted traffic. She saw the victim's body actually hit the pavement and indicated that "it kind of bounced ."T-32*
- *In 1992, a tandem dump truck on Highway 30 W. drove across Highway 30 and killed two mothers who were in the vehicle. There were two children who were brought out of the vehicle and they had bandages over their eyes and blood "where their eyes would have been."T-32*
- *In 1993, Respondent's coworker, John Smith, was killed on Westbound Highway 70 by a drunk driver while working on a flashing arrow. He was struck by a truck driver. Respondent was called to investigate the accident and saw the results and after effects of his death.T33-34*
- *In 1996, a worker was killed when a truck backed over him on Westbound Highway 40 and Hanley. Respondent arrived at the scene and saw a co-workers head smashed and saw another co-worker at the scene, who was "unconsolable" following the accident.T-34*

- *In 1997, there was a fatality on the ramp from Highway 55 Southbound to Highway 270. A van lost control and ended up in a fielded area. Respondent was surveying the accident scene when she tripped over the dead body.***T-35**
- *In 1999, a woman hit a guardrail on Highway 270 and the guard rail had impaled her. She was still in the vehicle with her hands on the steering wheel. The Respondent testified that her eyes were still opened.***T-35**
- *In 2000, a vehicle left a church on Highway 30 and went across the highway and struck and killed a young girl in a car. Respondent was the first person on the scene. The mother of the girl started screaming for Respondent to help the daughter, but she was "obviously dead".***T35-36**
- *In 2001, a dump truck lost control and hit a bridge and the driver was ejected and killed. Respondent was at the scene and witnessed a partial decapitation of his head.***T-36**
- *In 2003, a woman was traveling on Eastbound Highway 70 and struck a "backup truck". Respondent looked inside of the pickup truck and the woman had only half of her head. The case was later declared to be a suicide.***T35-37**
- *In 2006, a truck hit a car and went across Highway 270 and slammed into a Jersey wall and caught fire. When Respondent arrived at the scene of the fatality, there was a strong odor of burnt flesh. The Respondent witnessed the police pull the burnt body from the car. The body was burned so badly, that it*

*was unrecognizable and no one could even determine whether it was a male or female.***T-38**

- *In 2007, the Respondent was called to the scene of a tragedy on Highway 70. A delivery truck came up on the ramp from Highway 270 to Westbound Hwy.70 and hit a tractor-trailer. This caused the delivery truck to flip and the driver was ejected from the truck and was also run over by the truck in the process. While the Respondent was working the accident scene, she inadvertently stepped on something and then realized that it was the dead driver's teeth.***T38-39**

Besides these incidents, Respondent testified that there were numerous others.**T-39** Her job required that she constantly investigate fatalities and she stated that her designated area was one of the busiest areas for fatalities because it was a highly congested urban area. **T-39**

The Respondent testified that she attempted to hide her feelings regarding these incidents. She explained that she was the only woman working in this capacity and did not want her male coworkers to think that she wasn't tough.**T40** She stated that she learned to hide her feelings and often resorted to dark humor in order to project an air of bravado. **T40-42**

II) RESPONDENT'S TREATMENT

The Respondent was seen by her family physician, Dr. Devon Golding. **T42-43** Respondent spoke with Dr. Golding, who advised her that he thought that she was suffering from depression. On 2/25/08, Dr. Golding noted in his records that the Respondent had "anxiety with depression". Respondent said that she never realized that she had a problem until she saw Dr. Golding. He placed her on medication and referred her to Dr. Habib. **T-43** Respondent said that she would become sick to her stomach and would have nightmares and couldn't sleep. **T-42** The Respondent began treating with a psychiatrist, Dr. Asif Habib, on 5/6/08. Dr. Habib diagnosed the Respondent as having depression and anxiety and treated her with medication. **T-43**

Respondent subsequently came under the care of Dr. Timothy Jovick on 8/13/08 **T-359** Dr. Jovick noted that the Respondent had been placed on medication by Dr. Habib. Dr. Jovick stated that the Respondent had been a supervisor for the Department of Transportation and had been on leave since February 2008. **T-359** He noted that she had worked at the Missouri Department of Transportation for over 20 years.

Over the last three years, Respondent told Dr. Jovick that her motivation and self-image as a supervisor had declined. **T-359** She had witnessed numerous

accidents which included many deaths and incidents involving dismemberment.**T-359** She also described an incident where a crew member had been struck and killed and the Respondent described herself as having a great deal of anger towards various motorists who were speeding through construction zones.**T359-360**

In addition, Dr. Jovick noted that the Respondent became discouraged and disillusioned in 1997 when two coworkers died because of departmental negligence. **T-360** Prior to taking leave, she indicated that she had become withdrawn and had "stopped doing things". **T-360** The changes which had taken place had caused problems in her marriage and she was noted to be depressed and lethargic.**T-360** Dr. Jovick stated that she was not, in his professional opinion, able to discharge the duties of the supervisor due to poor concentration, disorganization, chronic trauma, uncertainty, depression, and lethargy.**T-360**

The Respondent also described having nightmares on a more or less continuous basis. **T-361** She indicated that certain sessions had opened up emotional wounds which resulted in increasing nightmares.**T-361** Contacting some of her former colleagues caused her to also experience additional trauma.**T-361** While on leave, she described various traffic incidents as bringing her back to her work experiences.

The Respondent told Dr. Jovick that she was trying to "hang in there" and

wasn't really paying attention to what was happening to her.**T-361** Dr. Jovick noted that her experiences were quite dramatic and cumulative.**T-361** During one session, she admitted that she had worked for too long at her job and had allowed her emotional responses to accumulate because of her perceived dedication to her job. **T-361** In addition, she continued to feel a great deal of guilt about not being able to perform her job. Dr. Jovick stated that the Respondent's work was the prevailing factor concerning her diagnosis of depression and post-traumatic stress disorder.**T310-311.**

Dr. Jovick diagnosed the Respondent as having an axis I major depressive disorder and a post-traumatic stress disorder.**T-362** He indicated that there was an inability to work and she was experiencing family problems due to withdrawal, irritability and fearfulness. Dr. Jovick gave the Respondent a 35 with respect to her Global Assessment of Functioning. **T-362** Dr. Jovick testified that a Global Assessment of Functioning is a score that goes somewhere from a low of 10 to a high of 100. Most of us hover around 80 to 90 as we're dealing with the stresses of life. A person with a Global Assessment of Functioning of 35 is not able to work, has severe social difficulties and has difficulty functioning in their family and social life. Because of her difficulty in concentrating for more than a few minutes on any certain task and her anger and depression, "she was not psychologically able to work." **T-313**

Dr. Jovick testified that post-traumatic stress disorder is a diagnosis that's based on witnessing, or being part of, events that are extreme in their psychological impact upon the person. **T-311** They result in individuals spontaneously reliving the events and having violent nightmares. **T-311** It significantly affects a person's ability to function. During the course of his treatment, Dr. Jovick stated that the Respondent had loved being with her crew and thought of herself as being a socially active person which added to her depression. **T-312** He also testified that there are not a set number of traumatic events that need to be witnessed. He noted that watching someone being killed in an auto accident would be traumatic for anybody. **T344-345** Dr. Jovick testified that the Respondent was not psychologically capable of working. **T-314** From the standpoint of a permanent partial disability rating, Dr. Jovick indicated that the Respondent would be 90 to 95% disabled. **T-363**

III) Dr. Wayne Stillings

Employer and Insurer introduced the deposition of Dr. Wayne Stillings into evidence. Dr. Stillings evaluated the Respondent on one occasion at the request of the Appellant.

Dr. Stillings diagnosed Respondent as suffering from a depressive disorder and a personality disorder. **T497-498** He indicated that Respondent suffered from

the essential features of a depressed mood and had experienced symptoms like insomnia and loss of interest. In regards to the personality disorder, he indicated that the Respondent had passive-aggressive tendencies which involved irritable shifts in her mood.**T493-494** He also indicated that she had a Global Assessment of Functioning of 75 and stated that she was capable of working.**T-495** He further stated that the Respondent had sustained 2.5% permanent partial disability of the body as a whole.**T498-500** He also opined that the Respondent's work was the **prevailing factor** with regard to her depression and permanent partial disability. In addition, he stated that the Respondent had 2 1/2% permanent partial disability which pre-existed her work injury.**T498-500**

On cross-examination, he testified that he charged somewhere between \$2,000 and \$2,200 for his evaluation. **T-501** He also testified that he charged \$1,100 for his one-hour deposition. **T-501** Dr. Stillings further testified that deaths and dismemberments are not that unusual for MODOT employees. He indicated that he had treated a number of them in his practice.**T-509** In addition, he treated many private highway and IDOT employees and stated that many highway employees are generally exposed to tragedy.**T-511**

Dr. Stillings conceded that, if Dr. Jovick gave the Respondent a Global Assessment of Functioning of 35 on September 7, 2010, then this would interfere with her ability to work. He stated that a Global Assessment of Functioning score

below 40 makes it very unlikely that a person can work. With regard to a 35, he noted that the vast majority of persons would not be able to work with that score. **T521-522**

POINTS RELIED ON

STANDARD OF REVIEW

Statutes and Supporting Cases:

Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 509 (Mo. banc 2012).

Greer v SYSCO Food Service, 475 S.W.3rd 655,664 Mo.banc (2015).

Kersey v. Autry Morlan, Inc., 388 S.W.3d 644, 647-648 (Mo.App. SD 2013)

at 647-648

Lacy v. Federal Mogul, 278 S.W.3d 691, 699 (Mo.App.SD 2009)

R.S.Mo.Section §287.495.1

R.S.Mo.Section §287.120.8

POINTS RELIED ON

I. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DID NOT ERR IN AFFIRMING THE DECISION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION WHICH CONCLUDED THAT THE EMPLOYEE SUFFERED A COMPENSABLE OCCUPATIONAL MENTAL DISEASE ARISING OUT OF WORK-RELATED STRESS AS THERE WAS SUFFICIENT COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE AWARD.

Statutes and Supporting Cases:

Mo. Revised Statutes Section 287.120 .8

Mo. Revised Statutes Section 287.020.10

Mo. Revised Statutes Section 287.800(2000)

Mo. Revised Statutes Section 287.800.1

Robinson v Hooker, 323S. W. 3-D 418, 423 – 24 (Mo.App.W.D. 2010)

Norman v Phelps County Regional Medical Center , 256S. W. 3-D 202, 205 (Mo.App. S.D. 2008)

Hanwell v Hannibal Regional Hospital, 390 S. W. 3d 919, 923 (MO. APP. E. D. 2013)

Templemire v W and M Welding, Inc. 433. S.W. 3d 371, 381(Mo..banc 2014).

II. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DID NOT ERR IN AFFIRMING THE DECISION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION WHICH CONCLUDED THAT THE EMPLOYEE SUFFERED PERMANENT PARTIAL DISABILITY OF 50% OF THE BODY AS A WHOLE AS THERE IS SUFFICIENT COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE AWARD.

Statutes and Supporting Cases:

Wiedower v AFC Industries, Inc., 657 S.w. 2d 71,73 (Mo.App E.D.1983)

Hammett v Nooter Corp., 264 S.W. 2d 915,919 (Mo.App. 1954)

Malcolm v La-Z-Boy Midwest Chair Company, 618S. W. 2d. 725, 728 (Mo. App.1981)

Blair v Associated Wholesale Grocers, Inc., 593 S.W.2d 650, 655(Mo.App.1980)

III. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DID NOT ERR IN AFFIRMING THE DECISION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION WHICH CONCLUDED THAT THE EMPLOYEE WAS ENTITLED TO FUTURE MEDICAL CARE UNDER §287.140.1 OF THE REVISED STATUTES OF MISSOURI.

Statutes and Supporting Cases:

Mo. Revised Statutes Section.287.120(8)

Lacy v. Federal Mogul, 278 S.W.3d 691, 699 (Mo.App. SD 2009),

Kersey v. Autry Morlan, Inc., 388 S.W.3d 644, 647-648 (Mo.App. SD 2013)

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 629 (Mo. banc 2012)

ARGUMENT

STANDARD OF REVIEW

In reviewing the Commission's decision, the Court must determine whether it is "supported by competent and substantial evidence upon the whole record." MO CONST.art.V,section18. An appellate court must affirm the Commission's award unless (1) The Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) the record lacks sufficient competent evidence to support the award. **Hampton v. Big Boy Steel Erection**, 121 S.W.3d 220, 220-223 (Mo. banc 2003); **Johme v. St. John's Mercy Healthcare**, 366 S.W.3d 504, 509 (Mo. banc 2012). In the absence of fraud, the Commission's findings of fact shall be conclusive and binding. **Greer v SYSCO Food Service**, 475 S.W.3d 655,664 Mo.banc (2015). Appellate courts defer to the Commission's determinations with regard to witness credibility and the weight accorded to conflicting evidence. **Johme v. St. John's Mercy Healthcare**, 366 S.W.3d 504, 509 (Mo. banc 2012). The issue for the reviewing court is whether the Commission could have reasonably made its findings and reached its result after considering all the evidence before it. **Kersey v. Autry Morlan, Inc.**, 388 S.W.3d 644, 647-648 (Mo.App. SD 2013). at 647-648; citing **Hornbeck v. Spectra Painting, Inc.**, 370 S.W.3d 624, 629 (Mo. banc 2012).

In the instant case, the relevant facts decided by the Commission are not in dispute. On appeal, only questions of law are reviewed de novo. **Ellis v. Treasurer**, 302 S.W.3d 217, 219 (Mo.App. SD 2009). The Court “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.” **Lacy v Federal Mogul**, 278 S.W.3d 691, 699 (Mo.App. SD 2009), citing §287.495.1.

I. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, DID NOT ERR IN AFFIRMING THE DECISION OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION WHICH CONCLUDED THAT THE EMPLOYEE SUFFERED A COMPENSABLE OCCUPATIONAL MENTAL DISEASE ARISING OUT OF WORK-RELATED STRESS AS THERE WAS SUFFICIENT COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE AWARD.

A) RELEVANT STATUTORY LAW

The standard of proof which is required in mental disability cases is that work-related stress must be "extraordinary and unusual".

The statute reads as follows:

[287.120(8). Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.]

B) THE COMMISSION'S APPROACH

The Commission, by unanimous decision, determined that the actual events

described herein met the objective standards requirement under the Act.

The Commission noted that the definition of “objective”, as cited in Webster’s Third New International Dictionary, 1556 (2002) involves “the use of facts without distortion by personal feelings or prejudices.” Objective was also noted to involve something which is “perceptible to persons other than an affected individual.” Additionally, it defined objective to mean something “of such nature that rational minds agree in holding it real or true or valid.” Webster’s Third New International Dictionary, 1556 (2002).

C) APPLICATION OF FACTS AND THE COMMISSION'S APPROACH

Respondent describes the following:

- *In 1987 or 1988, the Respondent noted that a little boy burned to death in a car after being struck by a tractor-trailer. She explained that the young boy was left by his parents on westbound 44 when they went to a truckstop to call someone for help. There was a subsequent collision by another vehicle with the vehicle which the boy was occupying. Respondent witnessed the boy burning in the car, but was unable to help him. The last thing that she heard was the little boy screaming. T-30*

Utilizing the Commission's approach would it be reasonable for the Commission to find that the Respondent witnessed an event that was

“extraordinarily stressful”? In addition, would it be reasonable for the Commission to find that the event was unusual ? In utilizing the plain meaning approach in analyzing the statute, would it be reasonable for the Commission to determine that having the Respondent witness a young boy screaming and being burnt alive in a car would not be deemed to be merely "ordinary and usual."

The Commission cited the dictionary definition of “objective” referring to “the use of facts without distortion by personal feelings or prejudices,” and “perceptible to persons other than an affected individual.” Respondent would argue that this is a reasonable definition of "objective" as it is a determination which can be made without respect to one's personality, psychological history, or one's cultural preferences. There is no need to make further inquiry as to why such an event would be considered to be a extraordinary and unusual.

Respondent would argue that the Commission's approach is reasonable and well within discretion in interpreting the relevant statute. Respondent would note that there are number of horrific incidences in which she witnessed the aftermath of serious accidents involving catastrophic injury, dismemberment and death. Over the course of her career, she worked at approximately 1000 accident scenes. One such incident involved the following

- *In 1990, Respondent witnessed a one car accident on westbound Highway 44*

and Big Bend Blvd. which resulted in a decapitation. Respondent was walking and inadvertently kicked a decapitated head. The Respondent noted that there were body parts scattered about the scene. T-31

In utilizing the Commission's plain-meaning approach, it is indisputable that this incident involved "extraordinary stress" and would be considered "unusual." The incident is "perceptible to persons other than an affected individual." Additionally, the Commission, in finding this to be objectively "extraordinary and unusual" is determining that the categorization of this event is "of such nature that rational minds agree in holding it real or true or valid." Webster's Third New International Dictionary, 1556 (2002).

D) THE 2005 AMENDMENTS AND THE ABROGATION CLAUSE

The Appellant urges that, pursuant to section 287.120 .8, the standards in the **Williams v. DePaul Health Ctr.**, 996 S.W.2d 619 (Mo.App.1999) still applies and the Commission must find that the work stress of the Respondent must be measured in comparison to "similarly-situated" employees in order to make a determination as to whether it is "extraordinary and unusual." Although Respondent would contend that there is evidence on record that would suggest that she would have prevailed, even under **Williams**, it is clear that **Williams** is no longer good law as it involves an "arising out of and in the course of" case and is, therefore, specifically

abrogated by statute.

In 2005, the Missouri legislature amended the Worker's Compensation Act as follows:

Section 287.020.10 Definitions--intent to abrogate earlier case law.

[In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.]

Section **287.020 .10** abrogated all prior case law with respect to the meaning of **arising out of and in the course of employment**. Consequently, **Williams v. DePaul Health Ctr.**, 996 S.W.2d 619 (Mo.App.1999) was abrogated, along with every other such case.

The Missouri Court of Appeals for the Eastern District correctly point out that a number of cases have been directly affected by the abrogation clause of the 2005 amendments. Prior to the statutory amendments, the statute was to be "construed liberally" with a view to "public welfare." R.S. Mo.Section 287.800(2000). In **State ex rel. Badami v Gaertner**, 630 S.W. 2d 175,179(1982), it was noted that the statute's grant of

employer's immunity had been extended to co-employees. However, this case was superseded by statute in accordance with the ruling in **Robinson v Hooker**, 323S.W. 3d 418, 423 – 24 (Mo.App.W.D. 2010) Also in **Woodburn v May Distributing Company** 815 S.W.2d 477,480 (Mo.App. S.D.1991), the court used "liberal construction" to find that it had jurisdiction to consider an appeal of a temporary ward, even though the statute provided only for appeals from a final award. This case was also overruled by **Norman v Phelps County Regional Medical Center** , 256S. W. 3-D 202, 205(Mo.App. S.D. 2008) based on the abrogation clause and the switch from "liberal construction" to "strict construction."

E) THE ABROGATION CLAUSE AND STRICT CONSTRUCTION

The issue arises as to whether the language of the abrogation clause is to be construed "strictly" only in selected cases in which an employee is denied compensation, or can it also operate to remove obstacles from compensability . The Court of Appeals for the Eastern District of Missouri correctly points out that, prior to the 2005 amendments, Section 287.800 required the statute to be construed" liberally" with a view to the "public welfare." The Court notes that the **Williams** case arose from the era of liberal construction of the statute. In order to create more specific standards, the **Williams** court looked to case law from others states in order to determine what sort of "objective" standards could be used in order to interpret the "extraordinary and unusual requirements" for mental stress claims. They looked at a number of approaches in other states and subsequently developed the "similarly-situated approach."

However, following the 2005 amendments, statutory law required interpreting the Worker's Compensation Act "strictly." The Legislature provided that, under **287.800.1**,

[Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the Division of Workers' Compensation, and any reviewing courts shall construe the provisions of this chapter strictly] This requires the "clear, plain, obvious or natural import of the language should be used". Strict construction means that a statute can be given no broader an application that is warranted by its plain and unambiguous terms. **Hanwell v Hannibal Regional Hospital**, 390 S. W. 3d 919, 923 (MO. APP. E. D. 2013) . The strict construction of a statute presumes nothing that is not expressed. **Templemire v W and M Welding, Inc.** 433. S.W. 3d 371, 381(Mo..banc 2014).

Appellant, contrary to the explicit provisions of the statute, urges the Court to ignore the abrogation clause as well as the strict construction clause and instead look to **Williams**, a 1999 case, in order to determine legislative intent at the time that it amended the Act in 2005. Following Appellant 's argument, the abrogation and strict construction clauses should only apply when they serve to restrict the compensability of claims. However, if the legislature had wanted to preserve the findings of the **Williams** case, they could have simply chosen to amend 287.120(8).

F) PRACTICAL IMPLICATIONS OF THE WILLIAMS APPROACH VERSUS THE COMMISSION APPROACH WHICH WAS AFFIRMED BY THE MISSOURI COURT OF APPEALS FOR THE EASTERN DISTRICT

The "similarly-situated" approach was developed by looking at the law from mental stress cases in other states. It is a by-product of the "liberal construction" era. There is no indication that the legislature intended for courts to adopt the "similarly-situated" approach in order to analyze various cases. Even without the abrogation clause, the Williams case was subject to being overruled at the appellate court level. However, the abrogation clause leaves no doubt that the Missouri Court of Appeals for the Eastern District was not bound by Williams and decided the instant case correctly.

The court in the Williams case sought to define the terms "extraordinary and unusual" and create a standard for what constitutes "objective." However, the ruling in the Williams case did little to define the statute. Instead, the Williams case created a confusing standard of proof and made the statute even more difficult to interpret.

For example, in the pre-2005 amendment case of Carnal v. Pride Cleaners Missouri Court of Appeals, Western District. July 13, 2004 138 S.W.3d 155 (2004), there was a finding that "claimant was subjected to job-related stress that was extraordinary and unusual compared to "similarly-situated employees." The Court found that the employee's claim " was supported by sufficient competent evidence, even though all of employer's facilities experienced similar increases in workload after employer reorganized, and thus claimant was entitled to workers' compensation benefits for mental injury caused by such stress." The decision went on to say that "[T]he facility that claimant managed had a higher personnel

turnover rate and was in poorer condition compared with employer's other facilities, and claimant's supervisor was her ex-husband, who placed more demands and used harsher language on her than he did on other employees."

In the Carnal case, the Court applied Williams and looked at a particular employment situation and then decided that the "extraordinary and unusual" standard was satisfied by the fact that the employee's ex-husband made "more demands and used harsher language on her than he did on other employees." It is ironic that the Williams approach would allow one employee to be compensated due to "harsh language and more work demands", but would conceivably be used to deny compensation to other classes of workers who may be forced to deal with such disturbing things as death, mutilation and dismemberment.

Respondent would urge that the Williams approach does not define "extraordinary and unusual", nor does it clarify the word "objective" in the statute. Instead, it opens the door to a whole new set of considerations. What is a "similarly situated employee?" Is a police officer who works in a small crime-free town "similarly-situated" in comparison to a police officer working in a high crime district in an urban area? Is a desk sergeant in a high crime area, the same as an undercover drug officer?

In comparing "similarly situated" employees, does it even matter if those

"similarly situated" employees are also diagnosed with post-traumatic stress disorder? In the instant case, if Linda Mantia's co-employees were all diagnosed with post-traumatic stress disorder, would it make any difference? According to the Williams approach, the only thing that matters is whether the hypothetical employees suffering with post-traumatic stress disorder are "similarly situated." Dr. Stillings testified that he often treats highway workers for post-traumatic stress disorder. Are we to believe that the legislature intended for the mental stress statute to be interpreted in such a way as to deny treatment and benefits to employees in circumstances where it is well accepted that post-traumatic stress disorder is a not an uncommon occurrence?

In addition, the Williams approach takes the Commission away from fact-finding and places it in a situation of having to analyze extraneous evidence which has nothing to do with the underlying merits of a case. For example, the Commission factually determined that the Respondent had inadvertently kicked a decapitated head at an accident scene and that various body parts were scattered throughout the area. Under the obvious plain-meaning of the statute, Respondent would urge that from any "objective" point of view, this event would be described as "extraordinary and unusual."

However, an employer such as the Missouri Department of Transportation, rather than accepting this underlying proposition, can attempt to search for other

employees across the state of Missouri who may have stories of a similar nature. If other employees are called to testify, even if they are also suffering from post-traumatic stress disorder, an employee's case can be conceivably denied. In other words, if the Missouri Department of Transportation can find enough employees with horrific stories, they can deny virtually any claim. Dr. Stillings even testified that he is treated many highway workers in both Missouri and Illinois for posttraumatic stress syndrome. Did the legislature mean for employees who suffer from work-related stress and experience extraordinary and unusual events to be denied compensation just because their fate is shared with others?

Dr. Stillings testified that he is treated many highway workers in both Missouri and Illinois for post-traumatic stress syndrome. It would be seemingly ironic to think that the mental stress statute was written in order to limit claims to those who had experienced the worst "actual events." By contrast, in **Carnal**, "harsh language" was deemed to be "extraordinary and unusual." So if one adopts Appellants approach, for individuals like police officers, paramedics and emergency responders, it would seem that it would always be possible to make plausible denial of any case. Across the State of Missouri, there will always be other police officers, or paramedics, or first responders who will have their own stories to tell.

Respondent would argue that in utilizing the **Williams** approach, it is not a

matter of whether the legislature wanted to set higher or lower bar. **Williams** just creates a completely uneven, unpredictable and inconsistent bar. It takes those individuals who legitimately are the most susceptible to post-traumatic stress disorder and creates a sphere of plausible deniability. This is unfortunate because those who were on the front lines doing the most difficult jobs are often then denied desperately needed treatment. For example, a police officer after being shot and wounded in the line of duty could be denied treatment for post-traumatic stress disorder because perhaps it is not that "extraordinary or unusual" for police officers to be shot. Respondent would urge that people like Linda Mantia deserve to have access to treatment benefits should not be turned away.

On the other hand, the Commission's approach, which was affirmed by the Missouri Court of Appeals for the Eastern District, sets forth an analysis which is more clear and predictable. In looking at the "extraordinary and unusual" standard, Commission adopts the plain meaning of the word "objective" when it comes to looking at "actual events." The Commission noted that the definition of "objective", as cited in Webster's Third New International Dictionary, 1556 (2002) involves "the use of facts without distortion by personal feelings or prejudices." It was also noted to involve something which is "perceptible to persons other than an affected individual." Additionally, it defined objective to mean something "of such nature that rational minds agree in holding it real or true or valid." Webster's Third

New International Dictionary, 1556 (2002).

In the instant case, inadvertently kicking a decapitated head and observing body parts strewn throughout an area qualify as "extraordinary and unusual." If we look at this from an "objective" point of view as defined by the Commission, you would analyze whether this would only affect particular individual, or would it be an event that would be perceived by the vast majority of people as "extraordinary and unusual?" This would be in comparison to a "subjective" point of view in which an individual would be affected in a unique manner due to their own psychological or cultural makeup. Respondent would submit that in virtually any culture, or regardless of one psychological profile, observing a child screaming to death while they are burning to death in a car, or kicking a decapitated head, or observing an individual who has been impaled with a guard rail, would be disturbing and likely to lead to post-traumatic stress disorder. In addition, observing a co-employee that one has worked with for years, having their head crushed would affect virtually anyone. Respondent would submit that Commission's approach provides a superior framework of analysis and the Court of Appeals for Eastern District of Missouri was correct in determining that the Williams case was abrogated by the 2005 amendments to the statute.

II. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DID NOT ERR IN CONCLUDING THAT THE EMPLOYEE SUFFERED PERMANENT PARTIAL DISABILITY OF 50% OF THE BODY AS A WHOLE BECAUSE THERE WAS SUFFICIENT COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE AWARD.

A) STANDARD OF REVIEW

Respondent argued to the Commission that she was permanently and totally disabled as a result of the psychological injuries that she sustained in the course of her employment with the Missouri Department of Transportation. Dr. Jovick testified that the Respondent was 90 to 95% disabled. The Missouri Industrial Commission determined that the Respondent was not permanently totally disabled, but found that she had sustained 50% permanent partial disability as a result of her post-traumatic stress disorder and depression. We submit that the Commission did not err in finding that the Respondent had sustained 50% permanent partial disability.

There is a long line of cases which establish that it is the special province of the commission to determine, from all of the evidence before it, the percentage of disability attributable to an accident sustained by a claimant. **Wiedower v AFC**

Industries, Inc.,657 S.w. 2d 71,73 (Mo.App E.D.1983) **Hammett v Nooter Corp.**,264 S.W. 2d 915,919 (Mo.App. 1954)

In addition, the Commission is not bound by the percentage estimates of medical experts and may consider all of the evidence, including the employees trial testimony in arriving at a disability rating. **Malcolm v . La-Z-Boy Midwest Chair Company**, 618S. W. 2d. 725, 728 (Mo. App.1981). **Blair v Associated Wholesale Grocers, Inc.**, 593 S.W.2d 650, 655(Mo.App.1980)

B) CONFLICTING EVIDENCE AS TO PERMANENT PARTIAL DISABILITY

Dr. Jovick is the Respondent's treating doctor and his testimony was given great weight by the Industrial Commission. Dr. Jovick indicated that the Respondent had a Global Assessment of Functioning of 35. Even Dr. Stillings conceded that, if this GAF is correct, the Respondent would not be capable of performing any kind of work.

In the instant case, there were two widely divergent opinions as to the degree of permanent partial disability and/or permanent total disability. Appellant argues that there is not sufficient "objective evidence" to support the Commission's award. They also assert that Dr. Stillings is a more qualified expert and conducted gold standard objective testing. However, even Dr. Stillings concedes that the

Respondent sustained a degree of permanent partial disability. He also indicates that the Respondent's work-related stress is the prevailing factor. Consequently, the only analysis is to what degree the Respondent sustained permanent partial disability.

Dr. Jovick stated that individuals with post-traumatic stress disorder spontaneously relive events and have violent nightmares.**T-311** He stated that it significantly affects a person's ability to function. During the course of his treatment, Dr. Jovick stated that the Respondent had loved being with her crew and thought of herself as being a socially active person which added to her depression. Dr. Jovick testified that the Respondent was not psychologically capable of working.**T-314** From the standpoint of a rating, Dr. Jovick indicated that the Respondent would be 90 to 95% disabled.**T-363**

On the other hand, Dr. Stillings diagnosed the Respondent as suffering from a depressive disorder and a personality disorder.**T497-498** He indicated that the Respondent suffered from the essential features of a depressed mood and had experienced symptoms like insomnia and loss of interest. In regards to his diagnosis of a pre-existing personality disorder, he indicated that the Respondent had passive-aggressive tendencies which involved irritable shifts in her mood.**T493-494** He also indicated that she had a Global Assessment of Functioning of 75 and stated that she was capable of working.**T-495**

He further stated that the Respondent had sustained 2.5% permanent partial disability of the body as a whole. **T498-500** He also opined that the Respondent's work was the prevailing factor with regard to her depression and permanent partial disability. In addition, he stated that the Respondent had 2 1/2% permanent partial disability which pre-existed her work injury. **T498-500**

Appellant submits that Dr. Jovick's testimony was given great weight by the Commission. Although Dr. Stillings agreed that the Respondent had sustained 2 1/2% permanent partial disability as a direct result of her work-related mental condition and he attributed an additional 2 1/2% permanent partial disability to an underlying "pre-existing" condition, even though the record establishes that Respondent was a long time employee of the Missouri Department of Transportation who was in a long-term marriage and had raised children. Given the Commission's broad discretion, it was certainly within their special province to determine that the degree of permanent partial disability was somewhere in the range of the disability ratings that were provided by the two experts.

C) THE COMMISSION'S DISCRETION

The Missouri Labor and Industrial Relations Commission was well within its authority to make a factual determination as to the extent of the Respondent's permanent partial disability. On appeal, the Court defers to the Commission's

determinations with regard to witness credibility and the weight accorded their testimony; the Court likewise defers to the Commission with regard to decisions between conflicting medical theories and the weight accorded to expert testimony on issues of causation, as those determinations are within the sole discretion of the Commission. **Lacy** at 699; string citations omitted. Where the Commission has adopted the ALJ's award, the court reviews the ALJ's findings as adopted by the Commission. **Kersey v. Autry Morlan, Inc.**, 388 S.W.3d 644, 647-648 (Mo.App. SD 2013). The issue for the reviewing Court is whether the Commission could have reasonably made its findings and reached its result after considering all the evidence before it. **Kersey** at 647-648; citing **Hornbeck v. Spectra Painting, Inc.**, 370 S.W.3d 624, 629 (Mo. banc 2012)

III. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DID NOT ERR IN CONCLUDING THAT THE EMPLOYEE WAS ENTITLED TO FUTURE MEDICAL CARE UNDER §287.140.1 OF THE REVISED STATUTES OF MISSOURI.

Dr. Jovick indicated that he would need to treat the Respondent with psychotherapy for the foreseeable future. **T-362** It is clear that , based on his testimony, Respondent's post-traumatic stress disorder is a lifelong condition which will continue to affect the Respondent and is likely to resurface over time.

Once again, the Missouri Industrial Relations Commission was well within its authority to make a factual determination as to the extent of the Respondent's permanent partial disability.

On appeal, the Court defers to the Commission's determinations with regard to witness credibility and the weight accorded their testimony; the Court likewise defers to the Commission with regard to decisions between conflicting medical theories and the weight accorded to expert testimony on issues of causation, as those determinations are within the sole discretion of the Commission. **Lacy** at 699; string citations omitted. Where the Commission has adopted the ALJ's award, the Court reviews the ALJ's findings as adopted by the Commission. **Kersey v. Autry Morlan, Inc.**, 388 S.W.3d 644, 647-648 (Mo.App. SD 2013). The issue for

the reviewing Court is whether the Commission could have reasonably made its findings and reached its result after considering all the evidence before it. **Kersey** at 647-648; citing **Hornbeck v. Spectra Painting, Inc.**, 370 S.W.3d 624, 629 (Mo. banc 2012). Respondent would submit that there is ample evidence to support commission's award of future medical treatment.

CONCLUSION

WHEREFORE, the Respondent submits that the April 28, 2015, Final Award of the Labor and Industrial Relations Commission, is based upon substantial and competent evidence, and the Missouri Court of Appeals for the Eastern District was correct, in unanimously affirming the award. We would, therefore, request that the award be upheld by this Court.

In the alternative, Respondent would submit that, even if **Williams** is upheld, a remand to the Commission would be the appropriate remedy as there is ample factual evidence to support the award of compensation to the Respondent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 84.06(b) and (c), and Rule 55.03. This brief contains 7,909 words.

/s/Jeffrey R. Swaney

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing brief were delivered on this 14th day of February, 2017, via the electronic filing system, and mailed first class, postage prepared, to the following:

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