SUPREME COURT OF MISSOURI

No.: SC95885

LINDA MANTIA,
Employee/ Respondent,

vs.

MISSOURI DEPARTMENT OF TRANSPORTATION,
Appellant,

Self-Insured Employer,

and

TREASURER OF MISSOURI, AS CUSTODIAN OF
THE SECOND INJURY FUND,
Respondent.

APPELLANT'S SUBSTITUTE BRIEF

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JURISIDICTIONAL STATEMENT

This action involves a workers' compensation claim filed by the Employee/Respondent, Ms. Linda Mantia *["the employee"]*. The claim was tried before an Administrative Law Judge *["the ALJ"]* on March 25, 2014 (A31; LF 8); on July 10, 2014, the ALJ entered her Award denying compensation. (A31-41, LF8-21). The employee timely filed an Application for Review with the Labor and Industrial Relations Commission *["the Commission"]*. (LF 22)

On April 28, 2015, the Commission reversed the ALJ's Award. (A19-43; LF 23-47). The Commission entered its own Final Award, in which the employee was awarded nothing as against the Second Injury Fund, and, as against the Employer/Insurer, the Missouri Department of Transportation *["MoDOT"],* two hundred (200) weeks of permanent partial disability *["PPD"]* benefits and future medical care.

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 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. §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

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.

STATEMENT OF FACTS

The employee's claim alleged an "occupational disease" based on multiple alleged exposures to stressful events while working for MoDOT. (T. 26-27).

During the course of her testimony at trial, she referred to a list of incidents to refresh her memory. (T. 27-28). She explained that her duties as an Urban Metro Maintenance Supervisor involved periodically being present at accident scenes. (T. 28-29). She described fourteen (14) occasions over a period of twenty (20) years – 1987 through 2007 – when she was present at the scene of an accident; however, she stated that this was not a comprehensive list, and she was present at other accident scenes, as well. (T. 29-39).

When present at accident scenes, she frequently saw crumpled vehicles and severely injured or deceased individuals; this occurred on a regular basis for those working in her position. (T. 39). Over time, she believed that these incidents led to her becoming "cold and indifferent". Because she worked with so many men, she felt a need to prove that she was tough; she did not think that exposure to these incidents affected the men. (T. 39-41).

As time passed, she began to "laugh and joke" about these incidents, but also felt that she was becoming callous and short-tempered. Eventually, she decided that "something was wrong" and determined to seek medical care. (T. 39-42).

She began by speaking with her primary care physician, Dr. Devon Golding, who referred her to a local psychiatrist, Dr. Asif Habib. She told Dr. Habib that she did not want to be around people and was becoming reclusive. (T. 42-43). She testified that the

only treatment she received from Dr. Habib was prescription medication. (T. 43-44). At that time, she described feeling depressed and having anxiety, panic attacks and nightmares. (T. 44).

At the time of the hearing before the ALJ, she periodically had panic attacks, but stated that they usually had to be triggered by something; as a result, she tried to avoid stressful situations and the news. (T. 45).

Dr. Habib referred her to Dr. Timothy Jovick, a local psychologist who had previously treated her son. (T. 45). Dr. Jovick provided talk therapy, sometimes in person and sometimes over the telephone. (T. 46). At the hearing, she testified that although she has not seen Dr. Jovick recently, she did still consult with him, usually by telephone. (T. 48). At that time, she was taking prescription medications to treat her alleged condition, including Trazadone, Xanax, Lexapro, and Wellbutrin. (T. 49).

On cross-examination by the employer, she admitted that she never sought medical or psychiatric care in the aftermath of any of the fourteen specific incidents occurred. (T. 67). She did not seek any medical or psychiatric treatment until after February 6, 2008. (T. 70).

When asked whether accident scenes such as the fourteen she described were common in her job, she agreed that her co-workers would also have witnessed numerous such accidents in the course of their employment with MoDOT, and in fact stated that it was “really common”. (T. 70-71). She also said that she had learned about co-workers or state highway troopers or other people being injured or killed; however, she admitted that she had never actually witnessed such an event, but merely heard about them after the

fact. (T. 73-74). According to her own testimony, it was very common for all supervisors to be on the scene of serious road accidents and were witnessed regularly. She estimated that, over the course of her twenty-year career, she may have been present at the scenes of more than one thousand road accidents. (T. 87).

Under cross-examination by the Second Injury Fund, she again stressed that the number of accidents she saw in her job was not at all unusual; motor vehicle accidents are frequent occurrences in urban areas. (T. 78).

Although she was asked numerous detailed questions about her ongoing psychiatric and psychological care, particularly the talk therapy with Dr. Jovick, she provided only very vague responses. According to medical records, she saw Dr. Jovick approximately four times in 2008, once in 2009, eight times in 2010, and twice in 2012; she did not see him at all in 2013, though she thought she might have spoken to him on the telephone. She admitted that she did not have a regular or standing appointment with Dr. Jovick. (T. 82-85).

A. Dr. Devon Golding, Primary Care Physician

On February 11, 2008, Dr. Golding suggested that she was having trouble getting along with people. She stated that she had trouble being around her family, disliked going to work, felt anxious, and claimed insomnia. Dr. Golding prescribed Trazadone, Lexapro, and Xanax. (T. 235-299). One week later, on February 18, she reported insomnia, poor memory, and having "bad thoughts". (T. 270).

On February 22, 2008, she noted that her thoughts were "better", and Dr. Golding noted that her "depression improved". (T. 268). When she returned on March 14, 2008,

she reported insomnia and mood swings. (T. 258). The following week, on March 21, she was having problems "controlling anger", though she did not know why; she also reported insomnia, but thought it was due to the Lexapro. (T. 256).

On April 1, 2008, she was still reporting insomnia, and also felt "spacey". (T. 254). However, when she returned on April 14, she reported sleeping excessively and being quick to anger. (T. 252).

She continued to complain of insomnia on May 9, 2008; however, on June 18, she had no significant complaints with respect to her mood or her ability to sleep, and on June 20, she reported no problems with insomnia, mood swings, or anger. (T. 247, 243, 245). When she returned on July 21, she had no complaints. (T. 241).

In an undated letter, Dr. Golding stated that he was treating her for "major depressive disorder"; however, the note was primarily focused on her complaints of lower back pain and the treatment she had received for it, though he did mention that she "described feelings of anger and her lack of control over those feelings". (T. 237).

B. Dr. Asif Habib, Psychiatrist

Dr. Habib began treating the employee on May 6, 2008. At the initial visit, she complained of "mood swings", but she did not ascribe this to any particular cause. (T. 370). Notably, Dr. Habib took a psychiatric history, and indicated that she admitted to having previously been diagnosed with bipolar disorder and receiving treatment for it. In fact, after that initial visit, Dr. Habib determined that her problem was attributable to a diagnosis of "bipolar disorder, most recent mixed type". (T. 364-381).

When she returned to Dr. Habib on May 20, 2008, he noted that she was arguing

with her husband and feeling depressed, isolated, and withdrawn. He again noted a diagnosis of bipolar disorder and prescribed medication, and also recommended marriage counseling. (T. 369). When she returned again on June 17, 2008, she stated, "I am still depressed"; Dr. Habib continued to diagnose bipolar disorder. (T. 368).

When she returned on August 12, 2008, she stated, "I am anxious, depressed, isolated, withdrawn, and reclusive". The diagnosis remained bipolar disorder, and she continued on medication. (T. 367). By the time she returned, on November 25, she was showing some improvement – she reported that she was "still withdrawn," but her depression was "stable". Dr. Habib continued to diagnose bipolar disorder. (T. 375).

When she returned nearly five months later, on April 14, 2009, she complained of "feeling irritable" and having a low tolerance for frustration. Dr. Habib continued to attribute her symptoms to bipolar disorder. (T. 374).

She last saw Dr. Habib on September 1, 2009. At that time, she continued to complain of "low frustration tolerance", but reported that her depression had remained "stable". Dr. Habib's diagnosis of bipolar disorder remained unchanged, and she continued on medication. (T. 373).

C. Dr. Timothy Jovick, Clinical Psychologist

The employee also received treatment from Dr. Jovick, who testified as an expert in this matter. (T. 300-363; T. 382-414).

Dr. Jovick testified that the stresses of the employee's job, including difficulties with some of the administrative personnel, had been "accumulative", and added "significantly" to his diagnosis. (T. 310-311). His diagnoses were major depressive

disorder, recurrent without psychotic features, and post-traumatic stress disorder. (T. 308).

At the time of his September 7 and November 28, 2010 reports, Dr. Jovick provided a Global Assessment of Functioning *["GAF"]* score of 35. (T. 312-313). He explained that GAF scores range from a low around ten to a high of one hundred, with one hundred being the most well-adjusted. Most people "hover around 80 or 90" – dealing with some stresses, sometimes serious ones, but still able to function on a daily basis – while someone with a GAF of 35 "is not able to work, has severe social difficulties, has difficulty functioning … in their social family life and in occupational life." (T. 312). In his opinion, the employee was "not psychologically able to work." (T. 314).

On cross-examination, Dr. Jovick admitted that he is neither a medical doctor nor a vocational expert. Further, he is not allowed to prescribe medication. The services he provides to his patients are restricted to psychotherapy services. (T. 315).

When he initially saw the employee, on August 13, 2008, she provided a history of "back injuries and fibromyalgia", but he never saw any records to confirm those diagnoses. He noted that she walked with a limp but, otherwise, he had no objective confirmation of any physical problems. (T. 317). Similarly, he never reviewed any psychiatric records from Dr. Habib; he therefore was completely unaware of: (1) her medical and psychiatric history as she related it to Dr. Habib, (2) Dr. Habib's diagnoses, and (3) her prescription medication history from Dr. Habib. (T. 318-319).

Dr. Jovick testified that he did not know how many accidents she witnessed during

her years working for MoDOT. He did not know when many of her fellow crew members may have been injured or killed, or how those accidents allegedly happened. He did not know how many people – co-workers or otherwise – died in accidents she witnessed. He did not know how many people were allegedly "dismembered", let alone when or where it might have happened, other than on some kind of roadway somewhere in Missouri. He did not know the total number of accidents she may have witnessed. The employee herself was his one and only source of information. (T. 319-322).

Dr. Jovick recommended that she receive vocational rehabilitation; however, she took no steps to obtain such services while he was treating her. (T. 322-323). The majority of the treatment he provided was in 2010; after November 28, 2010, he did not see her again until October 18, 2012, which was the last time he saw her. (T. 323).

When asked about specific accidents the employee may have witnessed, Dr. Jovick could not "recall a whole lot of specific details". Among the details he did not know were how many occurred, and he could provide no more specific time frame than "during the … twenty years that she was" working for MoDOT. (T. 323-324). He did not know the frequency of accidents, or how many times she directly witnessed accidents as opposed to arriving on the scene after an accident had occurred. (T. 324).

Dr. Jovick's conclusions or clinical impressions were his, but they were not based on any objective testing. He agreed that his conclusions were not "a comprehensive assessment" of the employee, but were only the "clinical impressions" of her therapist. (T. 326-327). He was involved in this case only as a treating therapist, using the approach of a treating therapist, which requires him to accept everything a patient says as valid. He

did not take an aggressive forensic approach to this case. His only function in this matter was as a treating therapist. (T. 327). Indeed, he agreed that, if a psychological evaluation were necessary, "I would not be the one to do it because that would blend my roles and I did not want to do that. That would not be helpful to her." (T. 327-328).

He testified that it was his psychological opinion that she was unable to work due to a combination of psychological factors and physical complaints. (T. 328-330).

With regard to Dr. Habib's diagnosis of bipolar disorder, Dr. Jovick stated that "I don't know if she mentioned bipolar or not. She may have mentioned it at one time." (T. 330).

D. Dr. Wayne Stillings, M.D., Evaluating Forensic Psychiatrist

Dr. Stillings served as the evaluating expert on behalf of MoDOT. He was a board certified psychiatrist, and practiced general adult psychiatry and forensic psychiatry. (T. 476-556). He explained that a forensic psychiatrist is trained to evaluate multiple sources of information objectively and neutrally, with the goal of assisting courts in making informed decisions. (T. 480-483). Dr. Stillings saw the employee one time, on June 27, 2012, and he approached this evaluation as a forensic psychiatrist. (T. 481-482).

When Dr. Stillings took her history, she stated that some of the events she was describing may not have happened, saying, "I guess in my dreams, I created some." He noted that this was unusual, because when people have nightmares caused by traumatic events that actually did occur, the nightmares are generally of the real events, not of something that did not occur. (T. 483).

In assessing her psychiatric condition, Dr. Stillings administered several tests,

including the MMPI-II, which he described as the "Cadillac of psychometric assessment" – "the most probative, most complex and highly integrated test", very useful in enhancing the accuracy of psychiatric diagnoses as well as describing personality traits, function, dysfunction, and related attributes. He also indicated that it is useful in determining whether someone is under-reporting psychological problems, being forthright, or over-reporting or exaggerating psychological problems. (T. 486-487). He testified that the result of this test was "most probably invalid due to exaggeration … of her subjective complaints." (T. 487).

Dr. Stillings also administered the MCMI-III test which, he explained, is useful as an adjunct to the MMPI-II, and helps the evaluator distinguish between personality disorders versus major psychiatric disorders. It focuses more on personality traits, mental retardation, learning disabilities, and related maladies. (T. 488-489). In this case, the results of the MCMI-III revealed major depression, generalized anxiety disorder, and post-traumatic stress disorder; in addition, on Axis II, it showed schizoid, passive-aggressive, borderline, and sadistic personality traits. (T. 489).

He also administered the Structured Inventory of Malingered Symptomatology *["SIMS"]* test. He explained that this is a "free-standing validity test" that helps determine whether someone is over-reporting or under-reporting. The results of the SIMS test revealed that the employee "over-reported neurologic, depressive, psychotic, memory dysfunction symptoms and low intelligence." He said her general style is to "over-report her subjective complaints." (T. 489-490).

Dr. Stillings also administered the Validity Indicator Profile *["VIP"]*. He noted

that the results indicated the employee did not "make a valid effort". He explained that such a result indicates a need to "be very cautious about interpreting things that people like this might say subjectively." (T. 490-491).

Dr. Stillings agreed that these tests, in combination, make for "a very powerful tool" to diagnose psychiatric disorders and personality disorders, as well as support a forensic approach to evaluation. (T. 491).

Dr. Stillings diagnosed depressive disorder and a personality disorder "with depressive, somatoform, schizoid, passive-aggressive, borderline, sadistic personality traits, some elements of exaggeration pre-existing". (T. 492-493). He also provided a GAF score of 75 at the time he saw her which, he explained, means she was functioning "okay, adequately certainly" and she "could work from a psychiatric standpoint." It was also consistent with mild depression, but it would indicate that it was "not real active". He noted that this was consistent with records he reviewed which showed she had received treatment for a couple of years. (T. 494-496).

He did relate the depressive disorder to her employment at the Missouri Department of Transportation. (T. 496). As a result of this depressive disorder, he assigned 2.5% psychiatric permanent partial disability to the body as a whole, but he did not feel that she required additional or ongoing treatment for that condition. (T. 498). He also felt that she had pre-existing disorders, including the personality disorder that was diagnosed through his testing, and assigned 2.5% permanent partial disability to the body as a whole to the personality disorder. (T. 499-500).

On cross-examination by counsel for the employee, Dr. Stillings testified that he

did not recall "specific incidents" that were described by the employee; however, he noted that "it's typical for MoDOT employees. I have treated many of them and I have evaluated some before." (T. 509). He explained that it was not out of the ordinary for MoDOT employees to witness accidents and injuries on the highway. He noted that he has seen a lot of people who work on the highways – employees of MoDOT, the Illinois Department of Transportation *["IDOT"]*, and private companies, as well – and noted the similar exposures "to some human tragedy" experienced by such workers. (T. 510-511).

On cross-examination by the Second Injury Fund, Dr. Stillings reiterated that he had seen many people who worked for both MoDOT and IDOT who had described seeing dead bodies from highway accidents. When the employee described various road accidents she had seen, it was not the first time he had heard such stories from highway workers. (T. 517).

Dr. Stillings did not believe that the employee had bipolar disorder, but noted that "she has 50% of her mother's genes, so she has genetic loading for mood disorders, and if not bipolar, for depressive disorders, so … genetically, it's a very important finding." (T. 519).

On redirect examination, he was questioned about some inter-personal friction between the employee and supervisors, and "political struggles" she encountered during her years with MoDOT. He replied that he did not find such stories to be unusual, or limited to MoDOT and IDOT, but rather common in large organizations where change tends to be slow. (T. 523).

With regard to his past experience with people – other than the employee in this

case – who reported struggling with seeing injury, death, and destruction on the highway, he stated, "this is not an unusual or extraordinary thing for a highway worker… It is not unusual or extraordinary…, because a lot of them … see that. It's just part and parcel to their job, unfortunately." (T. 524-525).

On further redirect examination, Dr. Stillings was asked about the GAF score of 75 he calculated after evaluating the employee in June 2012, and Dr. Jovick's GAF score of 35 from September 2010. He agreed that most people with a GAF of 35 would not be able to work; however, he noted that a GAF score is not a permanent, unchanging thing. He also pointed out that, in the fall of 2010 when Dr. Jovick calculated the GAF of 35, she was still receiving a lot of treatment; by the summer of 2012, when he evaluated her, she had improved "most of her depression was gone … and I think the treatment was effective, and she improved quite a bit … over that two-year period." (T. 527-528).

Dr. Stillings went on to explain that the rise in the employee's GAF score was consistent with his understanding, evaluation, and assessment of her and her condition. He noted that "one of the more treatable things in psychiatry are mood disorders … the depressive disorders. Bipolar is much harder to treat. … straight depression, major depression, whatever you want to call it, they're more responsive to treatment than most major psychiatric disorders." (T. 528).

POINTS RELIED ON

I. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ERRED IN AFFIRMING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S CONCLUSION THAT THE EMPLOYEE SUFFERED A COMPENSABLE OCCUPATIONAL MENTAL DISEASE ARISING OUT OF WORK-RELATED STRESS BECAUSE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL, AND OBJECTIVE EVIDENCE TO SUPPORT THAT PORTION OF THE AWARD.

Statutes and Supporting Cases:

§287.020 RSMo. 2005

§287.067 RSMo. 2005

§287.120.8 RSMo. 2005

§287.140.1 RSMo. 2005

§287.800 RSMo. 2005

Williams v. DePaul Health Center, 996 S.W.2d 619 (Mo.App. ED 1999)

Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511 (Mo.App. WD 2011)

StopAquila.org v. City of Peculiar, 208 S.W.3d 895 (Mo. banc 2006)

State v. Salter, 250 S.W.3d 705 (Mo. banc 2008)

II. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ERRED IN AFFIRMING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S CONCLUSION THAT THE EMPLOYEE SUFFERED PERMANENT PARTIAL DISABILTIY OF 50% OF THE BODY AS A WHOLE BECAUSE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL, AND OBJECTIVE EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE AWARD.

Statutes and Supporting Cases:

Rader v. Werner Enterprises, Inc., 360 S.W.3d 285 (Mo.App. ED 2012)

Lewis v. Treasurer, 435 S.W.3d 144 (Mo.App. ED 2014)

Null v. New Haven Care Center, Inc., 425 S.W.3d (Mo.App. ED 2014)

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003)

III. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ERRED IN AFFIRMING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S CONCLUSION THAT THE EMPLOYEE WAS ENTITLED TO FUTURE MEDICAL CARE UNDER §287.140.1 OF THE MISSOURI WORKERS' COMPENSATION ACT BECAUSE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL, AND OBJECTIVE EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE AWARD.

Statutes and Supporting Cases:

Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109 (Mo.App. SD 2013)

ARGUMENT

STANDARD OF REVIEW

A reviewing court must examine the whole record in order to determine whether it contains sufficient "competent and substantial evidence" to support the award. *Johme v. St. John's Mercy Healthcare,* 366 S.W.3d 504, 509 (Mo. banc 2012). A reviewing court is not required to view the evidence in the light most favorable to the award. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

Where the Commission's award is interpreting the law, it is reviewed for correctness without deference to the Commission's judgment. *Pierson v. Treasurer of State*, 125 S.W.3d 386, 387 (Mo. banc 2004). On appeal, questions of law are reviewed de novo. *Treasurer v. Witte*, 414 S.W.3d 455, 460 (Mo. banc 2013).

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." *Null v. New Haven Care Center, Inc.*, 425 S.W.3d 172 (Mo.App. ED 2014), *citing* §287.495.1 *and Hampton* at 222.

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. *Rader v. Werner Enterprises, Inc.*, 360 S.W.3d 285, 298 (Mo.App. ED 2012); *string citations omitted.* However, the claimant still has the burden of proving all of the elements of her claim to a reasonable probability. *Lewis v. Treasurer*, 435 S.Wd.3d 144, 151-152 (Mo.App. ED 2014).

The question for the reviewing court is whether, based on the whole record, the Commission's Award "is supported by competent and substantial evidence"; where the record could support either of two opposing findings, the reviewing court is "bound by the Commission's determination despite supportive evidence for the contrary finding." *Null* at 177 *[internal citations omitted]*. Unless the Commission's Award was clearly contrary to the overwhelming weight of the evidence, a reviewing court must affirm. *Hampton* at 223.

I. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ERRED IN AFFIRMING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S CONCLUSION THAT THE EMPLOYEE SUFFERED A COMPENSABLE OCCUPATIONAL MENTAL DISEASE ARISING OUT OF WORK-RELATED STRESS BECAUSE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL, AND OBJECTIVE EVIDENCE TO SUPPORT THAT PORTION OF THE AWARD.

As a general rule, occupational disease mental stress claims are not compensable in Missouri; §287.120.8 of the Workers' Compensation Act *["the Act"]* provides:

> 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 was work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events. (RSMo §287.120.8).

In its Opinion, the Eastern District mischaracterized MoDOT's first point as "whether the 2005 amendments to the [Act] preclude us from following this court's holding in *Williams v. DePaul Health Center,* 996 S.W.2d 619 (Mo.App. ED 1999)…"; later, the Opinion referred to *Williams* as "the very case on which MoDOT bases its argument…" (A6, A1; ED Opinion pp. 4, 9). MoDOT disputes this characterization. In briefs and oral arguments before the Eastern District, MoDOT analogized from and

applied *Williams* to the matter in question, but did not rely on it as the sole basis of its argument.

In its Award reversing the decision of the ALJ and awarding benefits to the employee, the Commission stated that: "In 2005, our legislature specifically rejected and abrogated all case law interpretations of the meaning or definition of the phrases 'arising out of' and 'in the course of employment'. §287.020.10 RSMo."

Section 287.020.10 provides that:

> 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 …*; *Kasl v. Bristol Care, Inc. …*; and *Drewes v. TWA …,* and all cases citing, interpreting, applying, or following those cases. (RSMo §287.020.10).

However, this does not make it necessary to consign to a legal black hole a case (*Williams*) which does not cite, interpret, apply, or otherwise follow *Bennett, Kasl,* or *Drewes.* The Commission interpreted §287.020.10 as invalidating and eradicating every case which includes definitions of the phrase "arising out of and in the course of the employment" – and, in doing so, overstepped its boundaries. The Eastern District then compounded the error by affirming the Commission and effectively holding that the

purely subjective can be re-cast as objective by simply arranging for someone other than the employee to repeat her subjective impressions.

The Western District has previously dealt with interpreting sections of the Act which were not amended in 2005 in light of the sections that were amended; beginning with a block quotation from a Southern District case, the Western District noted that:

> "[W]here a statute is amended only in part, or as respects only certain isolated and integral sections thereof and the remaining sections or parts of the statute are allowed and left to stand unamended, unchanged, and apparently unaffected by the amendatory act or acts, it is presumed that the Legislature intended the unamended and unchanged section or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act.... Furthermore, '[i]n construing a statute a fundamental precept is that the legislature acted with knowledge of the subject matter and the existing law.'" [*citing Sell v. Ozarks Medical Center,* 333 S.W.3d 498, 508 (Mo.App. SD 2011).]

In adopting the 2005 amendments to The Workers' Compensation Law, the legislature "clearly expressed its intent to negate the effects of various cases and their progeny relevant to some of the sections and terms of the workers' compensation chapter."4 *Id.* [Text of footnote 4: "*See, e.g.* section 287.020.10"] "No such actions were directed toward"

section 287.140.1. *Id.* "Such an omission signals an intentional acceptance of existing case law governing the unchanged portion of" section 287.140.1. *Id.*

Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 519 (Mo.App. WD 2011).

(§287.140.1 was at issue in both *Tillotson and Sell.*)

After noting that "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning", the Western District went on to hold that the Commission had erred in extending the "prevailing factor" test from §287.020.3(1) to the §287.140.1 standard for determining whether an award of future medical was warranted. *Tillotson* at 520.

A similar analysis is appropriate in the case, where the 2005 amendments to the Act did not touch §287.120.8. As in *Tillotson*, the legislature's decision not to amend §287.120.8 must be read as an intentional acceptance of existing case law applying and interpreting it. Furthermore, if the legislature had intended to abrogate case law interpreting §287.120.8, the existence of §287.020.10 amply demonstrates that they could have done so directly.

This Court has previously considered the issue of potentially conflicting laws. In *StopAquila.org*, the plaintiff argued that two constitutional amendments were irreconcilably in conflict. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895 (Mo. banc 2006). (While the conflict in *StopAquila.org* was between two constitutional

amendments, the Court noted that "constitutional provisions are subject to the same rules of construction as other laws." *Id.* at 899. Further, "when construing statutes or constitutional provisions, the primary rule is to consider words in their plain and ordinary meaning." *Id.* at 902.) "Where two provisions are not irreconcilably inconsistent, both must stand even if there is 'some tension between them.'" *Id.* at 905. "[R]epeal by implication is disfavored." *StopAquila.org* at 905, n. 14 *(internal citations omitted).*

This Court has also previously held that the separate provisions of a legislative act are to be read not in isolation, but rather construed together and, if possible, "harmonized with each other." *State v. Salter,* 250 S.W.3d 705, 711 (Mo. banc 2008), *citing Bachtel v. Miller County Nursing Home Dist.,* 110 S.W.3d 799, 801 (Mo. banc 2003).

The 2005 amendments to the Act – and specifically §287.020.10 – were clearly intended to tighten up provisions and requirements that legislators viewed as too lax; hence the abrogation of certain prior cases and their progeny, and the "strict construction" requirement of §287.800. There is no direct conflict between the terms of §287.020.10 and §287.120.8; on the contrary, §287.120.8 is plainly intended to heighten the baseline requirements of work-relatedness ("arising out of and in the course of", §287.020.3(2)), and causation (the "prevailing factor" test, §287.020.3(1)). Furthermore, §287.120.10 carves out a special exception to §287.120.8 for firefighters – "The ability of a firefighter to receive benefits for psychological stress under section 287.067[*] shall not be diminished by the provisions of subsections 8 and 9 of this section." If §287.020.10 had

[*] Section 287.067 defines "occupational disease".

been intended to abrogate §287.120.8, there would have been no need for the legislature to carve out the exception for firefighters.

Far from tightening statutory requirements, adopting the Commission's and Eastern District's interpretations would loosen them so much that alleged mental stress injuries would effectively be subject to no standards at all. The Commission and Eastern District embarked on a flawed analysis of the "plain, ordinary meaning" of §287.120.8 and, in doing so, distorted the meaning of §287.120.8, including the meaning of the word "objective," and misstated the arguments made by the parties before it.

Neither §287.120 in general, nor §287.120.8 specifically, fall under the "abrogation" section of §287.020.10. Section 287.120.8 exists to create an exception to the ordinary compensability analysis set forth in the Act. Section 287.120 is the "Employer Liability" section of the Act, which is focused on delineating certain situations and types of injuries which may give rise to increased, decreased, or no compensation; it therefore necessarily contains numerous exceptions to what would otherwise be considered compensable injuries – including one contained in the very first words of subsection 8: "Mental injury resulting from work-related stress does not arise out of and in the course of the employment". Section 287.120.8, however, then goes on to provide an exception to that exception, and set limits on it: "…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." (RSMo. §287.120.8)

There is no argument that the employee enjoyed an utterly stress-free twenty years working for MoDOT. She testified to work-related events which may be deemed

"stressful," and Dr. Stillings, the evaluating expert for the defense, also concluded that she had some measure of work-related stress. However, the Commission then held that Dr. Stillings' conclusion that the employee endured some work-related stress somehow satisfies all of the other requirements of §287.120.8; in fact, it does not. Section 287.120.8 demands much more than that the stress be work related; in order to be compensable, it must also be "extraordinary and unusual" in nature, and that must be proven "by objective standards and actual events." (RSMo. §287.120.8)

It is this inquiry into the nature of the stress, and the clear requirement of objective proof, that truly demonstrates the legislative intent behind §287.120.8. It was clearly intended to limit the number of compensable mental stress claims, because such claims are inherently subjective in nature, unlike the many physical injury claims, which have a strong objective element – a fractured bone can be proven with an X-ray, but depression or anxiety are not conditions that lend themselves to easy, objective proof. By requiring that, in order to be compensable, mental stress must be "extraordinary and unusual," the legislature was guarding against mental stress claims which could arise out of normal, ordinary, and frequent stressors which may occur to all employees on any job. The legislature also sought to broaden the focus beyond the affected individual and look to other, less obviously subjective sources.

In the course of reaching their ultimate conclusions, the Commission did not provide explanation of its understanding of "extraordinary and unusual", while the Eastern District did; the Commission and the Eastern District provided (different) definitions of "objective".

The Eastern District stated that the "dictionary defines 'extraordinary' as '(1) not according to the usual custom or regular plan; (2) going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable.' Webster's Third New World College Dictionary 505 (5th ed. 2014). 'Unusual' means 'not usual or common; rare; exceptional.' *Id.* at 1587."

If the terms of §287.120.8 are applied to the facts in this matter, the conclusion that this is a compensable mental stress claim must be reversed. The employee failed to provide any objective evidence that her work-related stress was extraordinary and unusual. Indeed, she testified – and Dr. Stillings' testimony supported her – that her work-related stress cannot be termed "extraordinary and unusual."

The employee described fourteen specific incidents that occurred over her two-decade-long career with MoDOT. She testified that she regularly witnessed the aftermath of serious accidents on the roadways – accidents which led to serious injury, death, and even dismemberment of various individuals. She indicated that she saw such scenes frequently in her job as a supervisor, as did the other supervisors throughout the state. She estimated that she saw more than one thousand accidents during her twenty plus year career; an average of one accident per week would equate to 1,040 over twenty years. Based on her own testimony, these events were common to the job for an Urban Metro Maintenance Supervisor. She testified that she knew of co-workers who had witnessed numerous accidents, that it was "really common" to do so, and that responding and assisting the Highway Patrol with accident scenes was part of the job. (T. 70-71; LF 73-74).

Similarly, Dr. Stillings testified that incidents such as those described by the employee were common to not only other highway department employees in Missouri and Illinois, as well as people who work for private highway service companies. In fact, he directly stated that such incidents were not "extraordinary and unusual" for highway workers.

It is true that §287.120.8 does not specifically state that comparing what the employee experienced to what other similarly-situated employees experienced, but comparing like with like is the simplest and most common method by which human beings separate the ordinary and usual from the extraordinary and unusual. What seems "extraordinary and unusual" to appellate judges who might possibly come upon one or two serious motor vehicle accidents in their entire lives is almost certainly going to be very different from what seems "extraordinary and unusual" to people who work on the scene of major road accidents an average of once a week for two decades.

In fact, the employee even testified that – outside of work, in her private life – she encountered approximately four different stress-causing incidents or accidents; some occurred after she was no longer working for MoDOT.

She also testified that she knew other employees had witnessed similar events and did not show any outward signs of work related stress. She did not respond to any accident scenes alone, yet none of her co-employees were affected as she claims she was. Also, in twenty plus years of employment and witnessing accident scenes, she did not seek any psychiatric treatment until 2008, and even then, she was unaware of any type of

psychiatric problem, which tends to indicate that the nature of these events was less than "extraordinary and unusual" and their impact was minimal.

With regard to "objective", the Commission's definition was: "'the use of facts without distortion by personal feelings or prejudices,' 'perceptible to persons other than an affected individual,' and 'of such nature that rational minds agree in holding it real or true or valid.' Webster's Third New International Dictionary 1556 (2002)." (A52; LF 31).

Notably, the Eastern District provided a different definition of "objective": "'[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions.' Black's Law Dictionary 1178 (9th ed. 2009)." (A14; ED Opinion p. 10). The court went on to state, in a footnote, that "objective" also appears in other places in the Act – as, for example, in §287.190.6(2), which provides that "objective medical findings shall prevail" – and that courts have applied the term "objective" "straightforwardly – and consistently with the definition of 'objective' given by Black's Law Dictionary – to mean the sort proved not solely by the testimony of the party seeking compensation, but also by external verification such as a doctor's diagnosis." *Id.*

The problem is that both the Commission and the Eastern District then relied upon the testimony of Dr. Jovick as "objective" evidence, with the Eastern District saying that it "proved her work-related mental injury under an 'objective' standard". *Id.* However, in characterizing Dr. Jovick's testimony in this way, both the Commission and the Eastern District failed to consider that Dr. Jovick himself testified that:

(1) He never reviewed any medical or psychiatric records which could substantiate any of the history the employee provided (T. 317);

(2) He was completely unaware of the history she related to Dr . Habib, his diagnoses, and the medications he prescribed (T. 318-319);

(3) He had no idea how many accidents she had witnessed, or how many accident scenes she had to work, or how many injured, dead, or dying people she encountered (T. 319-322);

(4) His "diagnoses" were not based on any kind of objective testing, and were merely therapeutic clinical impressions (T. 326);

(5) He approached this case solely as a treating therapist, which meant that he worked on the assumption that everything she told him was true, and therefore had no idea if any of the incidents she described ever even occurred (T. 327); and

(6) The employee herself was his one and only source of information. (T. 319-322).

To categorize all of that as "objective evidence" would stretch the meaning of "objective" so far as to render it effectively meaningless. Finding a third party to repeat your entirely subjective reports under oath does not somehow render them "objective" – and this is true whether one uses the Commission's or the Eastern District's definition.

The Commission noted that its chosen definition of "objective" included "the use of facts without distortion by personal feelings or prejudices," and "perceptible to persons other than an affected individual," as well as "of such nature that rational minds agree in

holding it real or true or valid." (A52; LF 31). Despite the Commission's conclusion to the contrary, the evidence on the record does not satisfy any of these definitions of "objective". Most importantly, the employee is the "affected individual" and thus her perception cannot be objective. The Commission's definition also refers to being "perceptible to persons other than the affected individual" – but the employee offered no proof at all from other people who could verify the stories she told or recall her reactions to them, although she testified that she knew such people and even supervised many of them. The employee herself is the only person who testified that she witnessed any of these accidents, or worked any of these accident scenes – in fact, her testimony is the only "proof" that any of the accidents and incidents she described ever occurred – so her claim still fails under that definition. The Commission deemed the testimony and records of Dr. Jovick "objective" evidence in support of the employee's claims, when it was anything but "objective"; the one and only source for everything Dr. Jovick said was the employee herself, and she is not "objective".

The Eastern District's definition of "objective" focused on 'externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions'. In other words, the employee herself cannot be the sole source of all the evidence, because she can never be free of her own perceptions, feelings, or intentions. Her testimony in deposition and before the ALJ, and the histories she provided Dr. Golding, Dr. Habib, Dr. Jovick, and Dr. Stillings are, by definition, subjective, not objective.

The only person, other than the employee, who testified regarding traumatic highway events was Dr. Stillings, and he testified to the aforementioned "commonality"

of these experiences to all people who work on the highways, whether working for MoDOT, IDOT, or a private company. His conclusion, which has not been refuted by any other testimony, is that such common events are not "extraordinary and unusual."

The Commission took great pains to attempt to show that the facts which allegedly satisfy §287.067 regarding an occupational disease claim arising out of and in the course of the employment, but which do not satisfy §287.120.8, are somehow beyond the context of the entire statutory scheme of workers' compensation and are contradictory. What the Commission failed to perceive is that the requirements of §287.120.8 are separate from the requirements of §287.067 and are, necessarily, an exception to the standard analytical framework of the Act. Thus, it is not a contradiction for the facts to seem to support the requirements of §287.067 but then fail to satisfy the burden of proof in §287.120.8. That, in fact, was the intent of the legislature in establishing a higher burden of proof for occupational disease mental stress claims under §287.120.8. Any other conclusion would render §287.120.8 meaningless within the statutory framework of the Act.

Section 287.120.8 was enacted by the Missouri legislature in order to provide compensation for mental stress claims based on objectively measurable facts, rather than the subjective perceptions of claimants; upholding the Commission and the Eastern District would achieve the very opposite end, and open the floodgates to spurious mental-stress claims supported by nothing more than a claimant's say-so.

The plain language of §287.120.8 demands that we look beyond the employee herself for evidence of the nature and extent of the stress allegedly felt by the employee –

and that remains true even if the Eastern District was correct in holding that *Williams v. DePaul Health Center* was abrogated by §287.020.10. In that case, the Eastern District would have been correct that "there was no language in the statute that provided that 'extraordinary and unusual' meant 'extraordinary and unusual as compared to similarly-situated employees.'" (A13; ED Opinion p. 9). As the Eastern District noted, it was precisely because §287.120.8 says nothing about "what sort of objective standards should be used" that the *Williams* court looked to statutes in other states, and ultimately was persuaded to adopt a standard which required comparing a claimant's stresses to those of similarly situated employees, regardless of employer, rather than one which required comparing a claimant's stresses to those of the average employee. *Williams* at 625-629 (A14; ED Opinion p. 10)

Regardless of the standard used, the §287.120.8 requirement for objective evidence remains unchanged – and certainly, nothing in the statute prohibits the use of testimony from similarly situated employees. The employee in this case worked for MoDOT for twenty years. She was a supervisor, and worked with a road crew. She testified that many other people saw the sorts of things she saw, and experienced the sorts of things she experienced. Clearly, she could have offered objective evidence – evidence from a source other than herself – in support of her claims. Unfortunately, ultimately, she was the only source of all the evidence she offered; Dr. Habib and Dr. Jovick did no objective testing, did not look into the things she told them, and accepted everything she said as true. Routing subjective evidence through a third party and having him repeat it under oath does not transform its basic nature and render it objective.

The only objective evidence in the record came from Dr. Stillings; he was the only person who relied on something other than what the employee remembered or reported. Unlike Dr. Habib and Dr. Jovick, he performed objective tests and evaluations; unlike Dr. Habib and Dr. Jovick, he reviewed records from other providers; unlike Dr. Habib and Dr. Jovick, he had independent knowledge of the conditions and stressors faced by people other than the employee work under similar conditions. And Dr. Stillings testified that the incidents described by the employee were common to all highway workers, and therefore not "extraordinary and unusual."

The employee has failed to meet her burden of proof establishing that she had compensable mental stress under the Act. Thus, her claim for mental stress benefits must fail under §287.120.8 and the Eastern District's Opinion and the Commission's Award must be reversed.

II. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ERRED IN AFFIRMING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S CONCLUSION THAT THE EMPLOYEE SUFFERED PERMANENT PARTIAL DISABILTIY OF 50% OF THE BODY AS A WHOLE BECAUSE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL, AND OBJECTIVE EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE AWARD.

On appeal, a reviewing 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. *Rader v. Werner Enterprises, Inc.*, 360 S.W.3d 285, 298 (Mo.App. ED 2012); *string citations omitted.* However, the claimant still has the burden of proving all of the elements of her claim to a reasonable probability. *Lewis v. Treasurer*, 435 S.Wd.3d 144, 151-152 (Mo.App. ED 2014).

The question for the reviewing court is whether, based on the whole record, the Commission's Award "is supported by competent and substantial evidence"; where the record could support either of two opposing findings, the reviewing court is "bound by the Commission's determination despite supportive evidence for the contrary finding." *Null* at 177 *[internal citations omitted]*. Unless the Commission's Award was clearly

contrary to the overwhelming weight of the evidence, a reviewing court must affirm. *Hampton* at 223.

In this case, despite the lack of factual support in the record, the Commission concluded that the employee suffered 50% PPD to the body as a whole as a result of work-related mental stress. Notwithstanding the arguments, set forth above, negating the finding of compensability, and argued in the alternative, MoDOT maintains that there is insufficient evidence to support this conclusion.

The Commission correctly noted that Dr. Jovick's opinion regarding the amount of disability was based on his therapeutic impressions rather than comprehensive data derived from objective assessments; as a result, the Commission found the record did not contain sufficient evidence to support a finding of permanent and total disability. (A26-A27; LF 30-31). The Commission contrasted Dr. Jovick's opinions with the comprehensive and objective opinions of Dr. Stillings, and found Dr. Stillings' opinions more persuasive. (A26; LF 30). Dr. Stillings assigned a rating of 2.5% PPD to the body as a whole, related to work-related stress, and 2.5% of the body as a whole related to a pre-existing personality disorder. He noted that her work-related depression had improved markedly in the time between first seeking care and coming to him for evaluation; by the time of his evaluation, she was functioning well and receiving no care. Although the Commission did recognize that Dr. Stillings' opinions were based upon comprehensive and objective assessment, the Award failed to take into account the results of those objective tests performed by Dr. Stillings in the course of his evaluation of the employee. Those evaluations included:

(1) The MMPI-II, which he described as "the Cadillac of psychometric assessment" – "the most probative, most complex, most highly integrated" test he could administer. The employee's result was invalid, probably due to "exaggeration of her subjective complaints." (T. 487).

(2) The SIMS, which helps determine whether a person is over- or under-reporting symptoms. The results of the employee's SIMS test revealed that she "over-reported neurologic, depressive, psychotic, memory dysfunction symptoms and low intelligence." (T. 489-490).

(a) He noted that the results of the MMPI-II and the SIMS were consistent, indicating that "her general style is to over report her subjective complaints." (T. 490).

(3) The Validity Indicator Profile, the results of which indicated that the employee did not "make a valid effort"; this result indicated the necessity of being "very cautious about interpreting things that people like this might say subjectively." (T. 490-491).

The Commission apparently based its award of 50% PPD of the body as a whole on the employee's statement that her "psychiatric injuries were partially responsible for motivating her to leave her job of more than twenty years." (A26; LF 30). Aside from the fact that there is no mention of the physical complaints she said also influenced her decision, the Commission also failed to take into account the fact that multiple objective tests performed by that persuasive board-certified psychiatrist found that the employee tends to exaggerate and over-report her subjective complaints. Furthermore, when Dr.

Stillings' evaluation of the employee showed that, while she had previously had major depression, her condition had improved such that she only had mild depression at the time he saw her. He went on to say that her mild depression was "not real active right now. Based on looking at the medical records, I think it was more active or she was more depressed in the past, but then she got treatment, you know a couple of years of treatment." He noted that treatment "helped her." Her mood at the time of evaluation was normal, indicating that she was not then depressed; she had a perfectly adequate GAF score of 75, and he felt she could work. (T. 496). The last time she sought any psychiatric or psychological treatment was one visit in 2012. (T. 82-85).

The Commission found Dr. Stillings' opinions persuasive because, unlike those of Dr. Jovick, they were based on forensic examination and objective evidence; the Commission therefore discounted the disability rating provided by Dr. Jovick. (A26; LF 30). However, the Commission then proceeded to disregard the objective evidence they had just found so persuasive in order to award the employee 50% PPD of the body as a whole.

Based on the evidence in the record as a whole, the Commission's award of 50% PPD of the body as a whole is clearly contrary to the overwhelming weight of the competent, substantial, and objective evidence in the record. Therefore, the Commission's award of 50% PPD of the body as a whole should be overturned, and an award of 2.5% PPD of the body as a whole should be entered.

III. THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT, ERRED IN AFFIRMING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S CONCLUSION THAT THE EMPLOYEE WAS ENTITLED TO FUTURE MEDICAL CARE UNDER §287.140.1 OF THE MISSOURI WORKERS' COMPENSATION ACT BECAUSE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL, AND OBJECTIVE EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE AWARD.

"To receive an award of future medical benefits, a claimant must show a reasonable probability that he or she requires further medical treatment because of an injury suffered at work. … An employer will be responsible for future medical benefits only if the evidence establishes to a reasonable degree of medical certainty that 'the need for future medical care flows from the accident.'" *Sickmiller v. Timberland Forest Products, Inc.*, 407 S.W.3d 109, 122 (Mo.App. SD 2013) *(internal citations omitted).*

In its Award, the Commission concluded that if the employee's psychiatric injury is compensable, then the employer is "obligated to provide the future medical treatment that may reasonably be required to cure and relieve the effects of her psychiatric injury." (A29; LF 33). Notwithstanding the arguments, set forth above, negating the finding of compensability, and argued in the alternative, MoDOT maintains that there is insufficient evidence to support this conclusion.

Although it is not clear from the Commission's Award, it appears that the basis for the award is found in a single line of Dr. Jovick's September 7, 2010 report, which states: "I plan to continue to see Ms. Mantia for regular psychotherapy for the foreseeable future." (T. 362.).

However, the Commission failed to account for Dr. Jovick's later report, dated November 28, 2010, in which he outlined his further treatment since the September 7, 2010 report and did not provide an opinion indicating that the employee would require any future psychotherapy. (T. 363). Based on the testimony of Dr. Jovick, after the visits listed in the November 28, 2010 report, there was essentially no further regular treatment after that date, other than a single visit with him on October 18, 2012. (T. 323). Dr. Jovick stated, "I hadn't seen her any time in the interim between that second summary and this time" – in other words, treatment had essentially ended back in 2010. Thus, the testimony of Dr. Jovick and his statement that he would provide psychotherapy "for the foreseeable future" appears to encompass a period of time between September 7, 2010, and November 28, 2010. After that, he saw her on one occasion, and then treatment by him effectively ceased.

Dr. Stillings opined on the need for additional psychiatric care: when asked if the employee required additional treatment for her mild depression, he replied, "No. No. I don't think she does." (T. 498). The Commission, in rendering its Award of future medical care, dismissed Dr. Stillings' opinion on the basis that he made no statement regarding whether she needed medical treatment that "flowed" from the injury – but Dr. Jovick did not do so, either.

Thus, there is insufficient evidence to support an award of future medical care in this matter, and the award of the Commission of future medical care should be reversed.

CONCLUSION

WHEREFORE, the Employer and Insurer pray that an Award consistent with this Brief be entered, reversing the April 28, 2015, Final Award of the Labor and Industrial Relations Commission and the June 14, 2016, Opinion of the Missouri Court of Appeals, Eastern District.

Respectfully submitted,

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CERTFICATE 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 10,155 words.

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