**SC95885**

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**IN THE SUPREME COURT OF MISSOURI**

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**LINDA MANTIA,**

**Employee/Respondent,**

**vs.**

**MISSOURI DEPARTMENT OF TRANSPORTATION,**

**Self-Insured-Employer/Appellant,**

**TREASURER OF MISSOURI, AS CUSTODIAN OF THE SECOND INJURY FUND,**

**Additional Party/Respondent.**

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# SUBSTITUTE BRIEF OF RESPONDENT TREASURER

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**ATTORNEYS FOR RESPONDENT TREASURER**

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[1] All Statutory references are to RSMo 2005 unless otherwise indicated.

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## ARGUMENT

*Standard of Review*

On appeal, this Court must determine whether the Labor and Industrial Relations Commission's ("Commission") award was authorized by law and supported by competent and substantial evidence. Mo. Const. art. V, § 18. The Commission's award must be affirmed "unless: (1) it acted outside the scope 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." *Tombaugh v. Treasurer*, 347 S.W.3d 670, 674 (Mo. App. W.D. 2011). Questions of law are reviewed de novo. *Treasurer v. Witte*, 414 S.W.3d 455, 460 (Mo. banc 2013).

**I. The Labor and Industrial Relations Commission erred in finding Employee sustained a compensable mental injury arising out of work related stress because she failed to prove she was exposed to anything "extraordinary and unusual" when measured by "objective standards and actual events" in that the competent and substantial evidence establishes that her work related stress was no greater than that to which all employees working in her job were exposed. §287.120.8 R.S.Mo. -- Responding to Appellant's Point I**

Although the Labor and Industrial Relations Commission's (Commission) ultimate conclusion, when it comes to Second Injury Fund (Fund) liability, is correct, the Commissions' compensability analysis is incorrect.

The Fund joins in Appellant's argument regarding its first point relied on, agreeing that Employee did not suffer a compensable mental injury arising out of work related stress. Appellant's substitute brief pgs. 23-37. Appellant provides competent arguments and the Fund sees no reason to reiterate them in their entirety. However, the Fund will augment the arguments as set forth below.

The Commission defines "objective" as, "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." LF 31. It then goes on to note that Dr. Stillings testified that other highway workers that he has treated also suffered from psychiatric injuries as a result of witnessing injuries and death on the highways. LF 32. He testified that witnessing such scenes is "part and parcel of the job." LF 32.

The Commission found these statements by Dr. Stillings constituted objective evidence that the stress experienced by Employee was "extraordinary and unusual" as required by §287.120.8. LF 31-32. However, Dr. Stillings statement actually establishes the exact

opposite. The stress experienced by Employee was not beyond what is usual, ordinary, regular or "part in parcel" for people in her job. LF 32. Her job as an Urban Metro Maintenance Supervisor required her to periodically be present at accident scenes. LF 23-25. She specifically described fourteen such scenes over her twenty year career. *Id.*

The Commission's analysis, of comparing the stress in Employee's job *to any other job in the economy,* easily leads to a finding that her work related stress exposes her, by its very nature, to extraordinary and unusual stress. However, following this analysis does not measure Employee's stress by objective standards and actual events.

When reading Chapter 287 in its entirety, it is evident that the legislature established the standard for proving a mental work related injury due to work related stress to be a high standard. The statute allows for a lower objective standard to be used by one group of employees, and one group of employees alone, in proving a mental injury due to work related stress.

Under §287.067.6, a firefighter, and now paid peace officer, can establish a "psychological stress" claim for workers' compensation benefits "if a direct causal relationship is established." To be entitled to workers' compensation benefits, a firefighter and peace officer have a lower standard of proof, needing only to prove that their stress is directly related to their

work. §287.067.6. They need not prove that their stress was "unusual or extraordinary" as required for all other employees under §287.120.8.

Section 287.120.10 specifically states: "The ability of a firefighter to receive benefits for psychological stress under 287.067[2] shall not be diminished by the provisions of subsections 8 and 9 of this section." The words "shall not be diminished" demonstrates that §287.120.8 requires a heightened standard for mental injury resulting from work related stress for all other employees under The Workers' Compensation Law. Yet, under the Commission's ruling, the standard for mental injury under §287.120.8 for all employees, not just firefighters, has been lowered.

To affirm the Commission's finding would allow employees performing jobs not nearly in the same category as firefighters to obtain benefits for mental injury, at a lower standard that proving that they were exposed to "unusual and extraordinary" stress greater than their co-workers.

Section 287.120.8 requires that experiences allegedly causing a mental injury are "extraordinary and unusual" as measured by "objective standards and actual events" for others performing the same job or similar jobs. *Williams v. DePaul,* 996 S.W.3d 619, 628 (Mo. App. E.D. 1999). The very nature of some jobs performed by some employees could be considered extraordinary and unusual to a great portion of our population; however that

[2] Section 287.067 defines occupational disease under this chapter.

alone has never been enough and was not intended to be enough to entitle such a worker to workers' compensation benefits for work related stress.

If the Commission's current analysis of §287.120.8 is affirmed, it will result in an irreconcilable difference between two statutory sections; §287.120.8 - the heightened standard in mental injury cases, and §287.120.10 - exempting firefighters from that heightened standard.

These two sections are not ambiguous. "A statute is ambiguous when its plain language does not answer the current dispute as to its meaning." *Derousse v. State Farm Mut. Auto. Ins. Co.,* 298 S.W.3d 891, 895 (Mo. banc 2009); *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 3 (Mo. 2012). Further, construction of a statute should avoid unreasonable or absurd results. *Akins v. Dir. of Revenue,* 303 S.W.3d 563, 565 (Mo. banc 2010); *Aquila Foreign Qualifications Corp. v. Dir. of Revenue,* 362 S.W.3d 1, 4 (Mo. 2012).

The plain language of these sections indicates a heightened standard for all employees except firefighters in proving a mental injury from work related stress. If the Commission's analysis is followed, essentially §287.120.10 is enlarged to include employees other than firefighters, using §287.120.8 as a conduit to do so. This was clearly not the intent of the legislature and would cause an unreasonable and absurd result.

## II. The Labor and Industrial Relations Commission did not err in finding no Second Injury Fund liability – Responding to Appellant's Point II.

Even if this Court determines that Employee suffered a compensable injury, the Fund has no liability in this matter for either permanent partial or permanent total disability.

To recover permanent partial disability against the Fund, Employee must prove that she incurred a compensable injury that resulted in permanent partial disability. §287.220.1. She must also establish the existence of a pre-existing permanent partial disability, whether from a compensable injury or not, that: existed when the last injury was sustained; which was of such severity as to constitute a hindrance or obstacle to employment or re-employment should she become unemployed; and at least one pre-existing disability equals a minimum of 50 weeks of compensation for injuries to the body as whole or fifteen percent for major extremities. In addition, Employee must establish that the present compensable injury, coupled with pre-existing permanent partial disability, causes greater total disability than the sum of the disabilities viewed independently. *See Elrod v. Treasurer*, 138 S.W.3d 714, 717 (Mo. banc 2004); *Treasurer v. Witte*, 414 S.W.3d 455, 467 (Mo. banc 2013).

If Employee is seeking permanent total disability benefits, "[T]he test for permanent total disability is whether the worker is able to compete in the open labor market." *Carkeek v. Treasurer,* 352 S.W.3d 604, 608 (Mo. App. W.D. 2011). The key question is whether any employer in the ordinary course of business would reasonably be expected to hire the worker in her current physical condition. *Id.* Employee has the burden of proving all elements of her claim. *Hoven v. Treasurer,* 414 S.W.3d 676, 678 (Mo.App. E.D. 2013)

The Commission correctly found Employee offered no expert opinion, or any other evidence, identifying or explaining any synergistic effect between Employee's work-related psychiatric injury and any of her pre-existing injuries. LF 27, 33. In fact, at oral argument before the Commission, Employee's attorney conceded this point. LF 27. Therefore, the Fund does not owe Employee permanent partial disability benefits.

The Commission also correctly found that there is no persuasive expert medical or vocational opinion evidence that Employee is incapable of working on the open labor market due to a combination of her psychiatric injuries and her pre-existing injuries. LF 27-28, 33. Consequently, no permanent total disability benefits are due from the Fund.

Given the complete lack of any evidence establishing any liability against the Fund, the Commission's Award denying Employee benefits from the Fund should be affirmed.

## III. Section 287.220 does not provide for Second Injury Fund liability for future medical when the Employer is insured. – Responding to Appellant's Point III

Section 287.220 establishes the liability of the Fund. The only time the Fund is liable for any medical bills is in the event that, prior to January 1, 2014, the employer was subject to the Missouri Workers' Compensation Act but failed to properly insure. *See* §287.220.7 R.S.Mo. Cumm Supp 2015. There is no allegation that Employer, The Missouri Department of Transportation, is uninsured. It is self-insured in this matter, so §287.220.7 is inapplicable, and the Fund has no liability to Employee for future medical treatment.

## CONCLUSION

The Award of the Commission finding Employee to have sustained a compensable injury should be reversed. The Award of the Commission denying Employee benefits from the Fund should be affirmed.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on February 16, 2017, to: Jeffrey W. Wright and Jeffrey Swaney to their emails.

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2,078 words.

/s/ *E. Joye Hudson*
Assistant Attorney General