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 REPLY BRIEF

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TABLE OF CONTENTS

SUBJECT HEADING	PAGE(S)
TABLE OF AUTHORITIES	2
ARGUMENT	3-8
CONCLUSION	9
CERTIFICATIONS	9

TABLE OF AUTHORITIES

AUTHORITY	CITED ON
Revised Statutes of Missouri (2005), §287.067	6
Revised Statutes of Missouri (2005), §287.120	8
Revised Statutes of Missouri (2005), §287.190	7
Williams v. DePaul Health Center, 996 S.W.3d 619 (Mo.App. ED 1999)	3, 5

ARGUMENT

MoDOT joins in the arguments presented by the Second Injury Fund *["SIF"]* regarding the first point relied on. (SIF Substitute Brief, pp. 1-5). Those arguments, as set forth, require no addition from MoDOT, and MoDOT will not repeat them here.

In her Substitute Brief, the employee misrepresented MoDOT's arguments at multiple points and, in at least one instance, stated the facts in such a way as to be grossly misleading.

MoDOT did not urge this Court to ignore either the abrogation or the strict-construction clauses of the Workers' Compensation Act *["the Act"]*. (Employee's Subs. Br., p. 29). On the contrary, MoDOT described both as evidence that the legislature, in enacting the 2005 revisions to the Act, was trying to tighten up provisions and requirements that were viewed as too lax. (MoDOT's Subs. Br., p. 27).

The Employee's arguments regarding the "similarly situated employee" analysis of *Williams v. DePaul Health Center* mischaracterize both the opinion in *Williams* and the application of it urged by MoDOT. (Employee's Subs. Br., pp. 31-32); *Williams*, 996 S.W.2d 619 (Mo.App. ED 1999). MoDOT agrees that *Williams* does introduce "a whole new set of considerations", but vigorously disputes the notion that those considerations have "nothing to do with the underlying merits of a case". (Employee's Subs. Br., pp. 31-32). On the contrary, MoDOT argues – and argued – that the Eastern District in *Williams* was seeking to satisfy the Act's requirement to look to "objective standards" in determining whether alleged work-related mental stress is "extraordinary and unusual" and, therefore, whether the claim is compensable. (MoDOT's Subs. Br., pp. 23-24, 36). In order to

determine what is "extraordinary and unusual", one must first determine what is ordinary and usual; only after that has been done can one determine whether the allegations exceed that standard. Determining what sort of mental stresses are ordinary and usual for people working in the sort of job, and under the kinds of conditions, experienced by a workers' compensation claimant is therefore not "extraneous", nor can it be plausibly argued that it "has nothing to do with the underlying merits of a case." Furthermore, the question which so confounds the employee – *What is a "similarly situated employee?"* – is, in fact, not difficult at all, and requires merely the application of common sense. (Employee's Subs. Br., p. 31). To respond to the employee's hypotheticals:

> *(1) 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?*

No, a police officer who works in a small crime-free town is not "similarly situated" to a police officer working in a high-crime district in an urban area, because the "situations" in which they work are self-evidently dissimilar. Luckily for police officers in small, crime-free towns, however, both other police officers who work in the same small crime-free town, and officers who work in different small crime-free towns, are very likely to be similarly situated, so they would not be without opportunities to present such evidence.

> *(2) Is a desk sergeant in a high crime area, the same as an undercover drug officer?*

No, a desk sergeant in a high crime area is not the same as an undercover drug officer – again, because the "situations" in which they work are self-evidently dissimilar.

Desk sergeants do not work undercover, nor do they typically work in the field. Other desk sergeants, however – whether they work for the same or a different police station – most likely would be similarly situated.

The employee asked whether it would matter if all similarly-situated employees were diagnosed with Post-Traumatic Stress Disorder *["PTSD"]*, then asserted that, under *Williams*, "the only thing that matters is whether the hypothetical employees suffering with post-traumatic stress disorder are 'similarly situated. (Employee's Subs. Br., pp. 31-32). This both mischaracterizes the holding in *Williams* and introduces unnecessary confusion regarding a very clear standard. Under *Williams*, it would not matter one whit if every last similarly-situated employee in the state had been given a diagnosis of PTSD; what would matter is whether the stress the employee experienced was extraordinary and unusual when compared to the stress experienced by those similarly-situated employees. *Williams* at 628-629.

The employee argued that the Commission determined that she "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, ... from any 'objective' point of view, this event would be described as 'extraordinary and unusual'." (Employee's Subs. Br., p. 32). As it stands, however, the employee introduced absolutely no objective evidence that any of the gruesome scenarios sprinkled throughout her brief ever actually occurred – no incident reports, no police or accident reports, no co-worker or witness testimony, no photographs, no notes she or anyone else made at the scene, no newspaper articles, no videos of television news segments, no audio recordings of radio

news reports. She offered nothing but her own personal recollections – recollections which, as Dr. Stillings testified, she herself informed him she might have "created". (T. 483). Furthermore, the employee's Substitute Brief rather misleadingly noted that "observing a co-employee that one has worked with for years, having their head crushed would affect virtually anyone." (Employee's Subs. Br., p. 35). This makes it seem as if she saw this happen; however, while she testified that she learned of co-workers or state highway troopers or other people who had been injured or killed, she admitted that she had only ever heard about such events after the fact; she never actually witnessed any such event. (T. 73-74).

The employee asserted that, under the approach urged by MoDOT, "... a police officer after being shot and wounded in the line of duty could be denied treatment for [PTSD] because perhaps it is not that 'extraordinary or unusual' for police officers to be shot." (Employee's Subs. Br., p. 34). Leaving aside the fact that police officers are now included with firefighters in having a lower bar to clear for mental-stress claims – under §287.067.6, they merely need to establish a direct causal connection – even if police were held to the same, higher standard applied to other kinds of workers, such officers could submit evidence regarding, *e.g.*, the number of police officers in Missouri who are shot each year, and compare it against the total number of police officers in the state.

The employee urges this Court to adopt the definition(s) of "objective" cited by the Commission, but ignores the fact that the Eastern District used a different definition despite the fact that, unless and until this Court overturns the Eastern District's Opinion, it is the Eastern District's definition that is relevant and controlling. (Employee's Subs. Br., pp. 23-

26, 32, 34-35).

The Commission defined "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.'* Webster's Third New International Dictionary 1556 (2002)." (Appendix to MoDOT's Substitute Brief, A52; LF 31). The Eastern District, by contrast, looked to Black's Law Dictionary: "*'[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)." (Appendix to MoDOT's Substitute Brief, A14; ED Opinion p. 12). The Eastern District also noted that Missouri courts have interpreted the Act's two other uses of "objective" "straightforwardly" "and consistently with the definition … 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.,* footnote 3).

One of the Act's other two uses of "objective" cited by the Eastern District is the requirement that "[i]n determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures." (*Id.;* RSMo. §287.190.6(2)). The Court then went on to say that the employee's diagnoses of depressive disorder "proved her work-related mental injury under an 'objective' standard." (*Id.*). However, the Eastern District failed to recognize that the diagnoses which support the employee's claims

were provided by Dr. Jovick, who specifically testified that his "diagnoses" *were not based on any kind of objective testing*, but rather were merely his therapeutic clinical impressions (T. 326); because he took a therapeutic, rather than forensic, approach, he worked on the assumption that everything the employee told him was true, and had absolutely no idea if any of the incidents she described ever actually occurred (T. 327); and the employee was his *only* source of information (T. 319-322). In other words, applying the definitions employed by the Eastern District makes it clear that Dr. Jovick's "diagnoses" cannot be considered objective.

Ultimately, what matters is not how many graphic, unsettling vignettes the employee can describe, but whether or not she met her burden of proof under §287.120.8 of the Workers' Compensation Act. She offered no objective evidence that the incidents she described were "extraordinary and unusual" when "measured by objective standards and actual events." (RSMo §287.120.8). Indeed, she failed even to offer any objective evidence – that is, any external verification – that any of the incidents she described ever occurred. She specifically testified that her co-workers would also have witnessed numerous incidents such as those she described. (T. 70-71, 73-74). As a result, it would not have been difficult for her to find someone who could corroborate at least one or two of her stories – and yet she failed to do so.

CONCLUSION

WHEREFORE, the Employer and Insurer pray that the Final Award of the Labor and Industrial Relations Commission – and the Opinion of the Eastern District – be reversed.

Respectfully submitted,

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CERTFICATE OF COMPLIANCE

The undersigned certifies that this brief conforms to the requirements of Rules 84.06 and Rule 55.03. This brief contains 1,820 words.

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