IN THE SUPREME COURT OF MISSOURI

No. SC98122

MARAL ANNAYEVA, Appellant,

v.

SAB of the TSD of the City of St. Louis, Respondent,

and

TREASURER OF THE STATE OF MISSOURI,
as custodian of the Second Injury Fund,
Respondent.

Appeal from the Labor and Industrial
Relations Commission
#13-000909

SUBSTITUTE BRIEF OF APPELLANT MARAL ANNAYEVA

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JURISDICTIONAL STATEMENT

This appeal concerns a workers' compensation case in which Maral Annayeva (hereinafter "Claimant") sought recovery from the SAB of the TSD of the City of St. Louis (hereinafter "Employer") and the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund (hereinafter "Fund"). The case involved allegation of injury sustained by way of a traumatic accident on January 8, 2013. On May 18, 2018, the Honorable Marvin O. Teer, Administrative Law Judge of the Division of Workers' Compensation, St. Louis office, issued a Final Award which found that neither Employer nor the Fund, is liable for workers' compensation benefits. Claimant appealed the judgments to the Labor and Industrial Relations Commission, claiming that the Administrative Law Judge erred in failing to award benefits. On January 17, 2019 the Commission affirmed the Judge's findings by a two-to-one vote. An appeal was then taken to the Missouri Court of Appeals, Eastern District, pursuant to the general appellate jurisdiction of the Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri, as amended 1970. The Eastern District reversed the Commission's Award on July 30, 2019, ordering that the matter be remanded to the Commission for further proceedings consistent with its opinion. Both Employer and the Fund thereafter filed a Motion for Rehearing and Application for Transfer to the Supreme Court of Missouri, though the motions were denied by the Eastern District on September 9, 2019. Both Employer and the Fund thereafter filed an Application for Transfer with this Court on

June 12, 2006, both of which were sustained on November 19, 2019.

STATEMENT OF FACTS

The parties stipulated in this matter that on January 8, 2013: Maral Annayeva (hereinafter "Claimant") was an employee of the Special Administrative Board of the TSD of the City of St. Louis (hereinafter (Employer); both parties were operating under and subject to the Missouri Workers' Compensation law; Employer had notice of an injury; a claim for compensation was filed within the time prescribed by law; venue was proper in the St. Louis office of the Division of Workers' Compensation; Employer was self-insured for workers' compensation liability; Claimant has compensation rates of $705.56 for total disability benefits, and $433.58 for partial disability benefits; and Claimant reached a point of maximum medical improvement on November 16, 2015. (Tr. 1-2).

The issues to be resolved at the hearing were: whether Claimant was involved in an accident which arose out of and in the course of her employment with Employer; whether Claimant's injuries were medically caused by the accident of January 8, 2013; whether Claimant was entitled to payment of past medical bills in the amount of $43,530.24; whether Claimant was entitled to past temporary total disability benefits from January 20, 2013 through November 16, 2015; whether Claimant was entitled to future medical care; whether Claimant was entitled to permanent disability benefits; and whether Claimant was entitled to an award against the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund (hereinafter "Fund"), for disability benefits. (Tr.

2-4).

Claimant's Testimony

Claimant testified that she was born on February 14, 1964. (Tr. 6). She is five feet and four inches tall, and weighs 198 pounds. (Tr. 6). She is a U.S. citizen who emigrated to the United States in 2003 from her home country of Turkmenistan. (Tr. 6). She takes anti-inflammatories, muscle relaxers, pain medications, asthma medications, anti-depressants and anti-anxiety medications, medications for stomach and colon problems, and medications for "female" complaints. (Tr. 6-10).

Claimant's education includes a bachelor's and master's degree from a college in Turkmenistan. (Tr. 12). She received a Public Administration degree from Southern Illinois University at Carbondale in 2006.

Claimant began working for Employer on October 29, 2007. (Tr. 12). Her last position was that of a high school teacher, teaching English as a Second Language. (Tr. 13). She has not worked since she last worked for Employer. (Tr. 12).

Claimant testified that she was injured on January 8, 2013, at which time she was working for Employer at Roosevelt High School. (Tr. 16). She arrived at work that day around 7:30 in the morning, and said she was happy and healthy, neither sick, nor lightheaded nor dizzy. (Tr. 15). She got to work that day by driving her car, thereafter parking on the school lot. (Tr. 16). She said the lot is on the school grounds, next to the school building. She had previously been advised to park in this lot by her supervisors. (Tr. 16). She described it as a large paved lot. She had been using this lot since 2012,

and the other teachers park there as well. (Tr. 16).

On the day of the accident Claimant was dressed in black pants, a shirt, a vest and boots. (Tr. 16). Her pants came down as high as the top of her ankles. (Tr. 17). Her boots had a heel of two-and-a-half to three inches, and a rubber sole. (Tr. 17). Her coat came down approximately to her knees. (Tr. 17). In her hands she was carrying folders to administer testing, along with a curriculum folder, student papers, and lesson plans. (Tr. 17). She had to walk through the parking lot, approximately 20 spaces, to get to the school entrance. (Tr. 18). This was the same entrance that she had always used. (Tr. 18). The parking lot was covered with salt, ice and dirt, which she walked through. (Tr. 18). When she got to the school building she had to pass through a set of double doors. (Tr. 18). There were no mats on the outside of the building, on which she could wipe her feet. (Tr. 18). There were no mats between the two sets of doors. (Tr. 19). And there were no mats on the inside of the second set of doors. (Tr. 19).

After entering the building, she had to walk past a guard station. (Tr. 19). There were no grab bars or other assistive devices available. (Tr. 19). She described the floor inside the building as being linoleum tile. (Tr. 19). She did not see any defects in the floor, though it was dirty and moist. (Tr. 20). After entering the building, Claimant was headed to the clock room so that she could "clock in". (Tr. 20). As she began to walk she slipped on the floor and fell forwards, landing on her hands and knees, and dropping her bags to the floor. (Tr. 21). She did not trip over her coat or her pants. (Tr. 21). The guards at the entrance came over and helped her get up and sit on a chair. (Tr. 21). She

noticed that her clothes were dirty. (Tr. 21). The school nurse then came and helped her walk back to the nursing office. (Tr. 21). In the nursing office she laid down, feeling pain and dizziness, and shaking. (Tr. 22). The nurse took her vitals and placed ice on her knees. (Tr. 21). She felt pain in her back and knees. (Tr. 22).

Claimant identified a report of injury she filled out on the date of the accident. (Tr. 22). Regarding the first page of the exhibit, she stated that this was her handwriting, but not her signature. (Tr. 22). She indicated that when it says that she "slept" it means that she "slipped". (Tr. 23). The report indicates that she was dizzy, though she clarified that she was dizzy after the accident, not before. (Tr. 23). On the second page she stated that this was her handwriting and her signature. (Tr. 23). She stated that it was a mistake that the report said the date of accident was January 8, 2012. (Tr. 24). It should have been January 8, 2013. (Tr. 24). On the third page she again said that this was her handwriting, but not her signature. (Tr. 24). The third page states that she could not determine the cause of her accident, which she agreed she wrote. (Tr. 24). She said that she filled this out in the nurse's office immediately after the accident, while she was dizzy and in pain. (Tr. 24). She said she did not investigate the scene of the accident before she completed the form. (Tr. 24).

Claimant was taken to the St. Mary's Hospital Emergency Room, where she was treated with ice and pain medications. (Tr. 25). She then went home but returned to the emergency room on the next day due to the amount of pain she was having. (Tr. 25). After this, she was referred by Employer to Concentra for medical treatment, where she

was provided with a knee brace and physical therapy. (Tr. 26). She attended two sessions of physical therapy but was then advised that further medical treatment had been denied through the workers' compensation system. (Tr. 27).

Claimant testified that she returned to work for several days after the accident. However, she was having a great deal of difficulty performing her job, as she was in pain. (Tr. 27). She therefore stopped working. She did not work again until August of 2013 when the new school year began. (Tr. 27). She returned to work for two more days but was then advised that she could no longer work as she was in too much pain. (Tr. 28). She has not worked since that time. (Tr. 28).

Claimant stated that she sought medical treatment on her own, after further care was denied. (Tr. 28). She initially was evaluated by Dr. Bowen, her primary care physician. (Tr. 28). He provided her with medication and an injection in her knee. (Tr. 28). She went to the Logan College of Chiropractic for adjustments and physical therapy. (Tr. 29). She was seen by a nurse practitioner named Corri Payton in the Washington University Department of Orthopedics, who ordered various radiological studies, and provided her with physical therapy and medications. (Tr. 29). She also saw Dr. Adam Labore in the same office, and his concern over Claimant's head pain lead him to order an MRI of her head, before ordering both physical therapy and water therapy. (Tr. 31). She went to see Dr. Rivkin, who provided her with medications, physical therapy and referral to a neurologist. (Tr. 30). She went to the Breakthrough Pain Relief Clinic where she received chiropractic adjustments, injections and physical therapy. (Tr. 31).

She was receiving psychiatric medications through Dr. Farzana, a psychiatrist, though Dr. Farzana retired. (Tr. 32). She has seen several neurologists, including Dr. Black, Dr. Goldring and Dr. Benzaquen. (Tr. 30). She continues to receive treatment from Dr. Benzaquen, who provides her with both pain and psychiatric medications, along with injections. She went to Germany in 2015 to visit a clinic, where she was provided with evaluations and medications. (Tr. 33). She went on one occasion to the St. Louis University Department of Orthopedics. (Tr. 34). She continues to receive treatment for other conditions through the Grace Hill Clinic. (Tr. 34).

Claimant talked about her ongoing complaints. (Tr. 35). At trial she was wearing a neck travel pillow, which she wears due to constant pain in her neck. (Tr. 35). If she removes the pillow and tries to hold her head level, she gets pain. (Tr. 35). She was also wearing a stocking cap at trial as she indicated that temperature changes affect the pain she has in her head. (Tr. 36). Her head pain is constant, always at a level of "2", and becoming worse with activity. (Tr. 37). It can also be worse with taking a shower, talking and laughing. (Tr. 37). She described the pain as being in the back and right side of her head. (Tr. 37). She states that her head is tender to the touch. She states that her head can feel better with heat and with medications. (Tr. 37).

Claimant has constant pain in her neck. (Tr. 37). This is made worse by activities and weather changes. (Tr. 37). She has lost range of motion in her neck and cannot put her chin to her chest. (Tr. 37). If she tries to look upwards she becomes dizzy. (Tr. 38). She has increased pain when she is dizzy.

With regard to her back, Claimant has constant pain which is made worse by activities and weather changes. (Tr. 38). The pain goes through her shoulders, arms and fingers. (Tr. 38). She is constantly in a bent forward position, as she feels worse when trying to straighten up. (Tr. 39).

Claimant has complaints in both of her legs. (Tr. 39). She has pain in the right hip which goes down the leg to the foot. (Tr. 39). She gets sciatica in both legs. (Tr. 39). The sciatic pain is mainly in the left leg, but she also has it in the right leg. (Tr. 39). She treats these complaints with ointments, massage, medication, heat, oils, physical therapy and bed rest. (Tr. 40).

Claimant has complaints in her arms including pain which extending down to her fingers. (Tr. 40). This is worsened by activity. (Tr. 40).

Claimant has problems with depression and anxiety. (Tr. 40). She states that she cannot sleep or socialize. (Tr. 40). She is always scared and anxious. (Tr. 40). She is sad and depressed all the time. (Tr.40).

Claimant complains also of problems with her stomach, with her liver, with cysts on her fingers, with her face drooping, with breathing through her nose, with dizziness, and with nausea. (Tr. 41).

Before the work accident Claimant had some pain in her back when she overturned a golf cart. (Tr. 41). She felt that her complaints were resolved within a few weeks. (Tr. 42). She later had back complaints after a slip and fall on a parking lot while working for Employer. (Tr. 42). Employer thereafter provided her with medical care and

her back complaints improved after a short period of time. (Tr. 43). She stated that her back was fine prior to January 8, 2013. (Tr. 43). Claimant also had problems with anxiety on one occasion in the past. (Tr. 43). She saw Dr. Dalu and received a prescription for an anti-anxiety medication. (Tr. 43).

Claimant described her current daily activities as being a constant effort to not increase her pain complaints. (Tr. 44). She states she usually stays in bed applying heat, after taking her medications. (Tr. 44). She tries to do some stretching. (Tr. 44). Sometimes she will go grocery shopping, but only with her daughters. (Tr. 44). She tries to do a little walking with her dog. (Tr. 44). Sometimes she can only walk from her door to the street; other times she can walk between four and seven blocks. (Tr. 45). Her daughters wash her laundry due to her pain. (Tr. 45). She tries to do a little cleaning, though has increased complaints with this. (Tr. 45). She does not generally read because of her head pain which causes her to be unable to concentrate. (Tr. 45). She might do a little work in the yard during the summertime, such as watering flowers. (Tr. 45-46). She does not mow the lawn, and this is done by her daughters or by friends. (Tr. 46). She has only driven three times in the last year. (Tr. 46). She does not have a car. (Tr. 46). When she drives her pain worsens. (Tr. 46). Her sleep is not very good, and she is often awake with pain. It is difficult for her to stand and she generally she has to lean to one side to lessen her symptoms. (Tr. 47). She also must lean while she is sitting due to increased complaints. (Tr. 47). She can climb stairs but must do this one step at a time. She is not able to take care of all her personal needs. Her daughters give her showers and

get her dressed. (Tr. 47). She is able to put on some small, loose items of clothing.

Deposition Testimony of Dr. Volarich

Dr. David Volarich was deposed on behalf of Claimant on November 2, 2016. Dr. Volarich described Claimant's whiplash-type injury as a rapid flexion/extension force to the spine, in this case, to both her neck and back. (Tr. 89-90). When Dr. Volarich examined Claimant, she reported pain in her neck and headaches starting at the base of her head. (Tr. 91). In the physical examination, Dr. Volarich noted hypersensitivity with pinprick testing, but an otherwise normal motor, sensory, and reflex examination. (Tr. 93). Dr. Volarich explained that the hypersensitivity was part of Claimant's pain syndrome. (Tr. 93). Claimant also had difficulty with squatting and toe walking due to pain in her back and right hip. (Tr. 93). Claimant's worst pain was with left rotation and left-side bending. (Tr. 93). Claimant also had pain with palpation in the left shoulder girdle. (Tr. 94). Dr. Volarich found multiple trigger points in this area. (Tr. 94).

In the lumbar spine, Dr. Volarich noted a 20-percent loss in side-bending on both sides and a 40-percent loss in extension. (Tr. 94). Claimant also had pain upon palpation in the paraspinal muscles from L2 through S1, in the sacroiliac joints, and over the left hip trochanteric bursa. (Tr. 94). Dr. Volarich identified multiple trigger points in the right hip girdle. (Tr. 95). Claimant's straight leg test on the right side was positive at 45 degrees. (Tr. 95). Dr. Volarich also found that Claimant's right calf was smaller than the left, which he attributed to the radiating pain going into the right leg and her disuse of the leg due to those symptoms. (Tr. 96).

In Claimant's right shoulder, Claimant's range of motion was decreased. (Tr. 95). The impingement test was mildly positive, which Dr. Volarich testified was part of the reason Claimant continued to have shoulder pain. (Tr. 95).

In Claimant's right knee, Claimant had trace patellofemoral crepitus, or grinding, and mistracking. (Tr. 96). The joint was not dislocating, but the kneecap was shifting side to side and was not a smooth track. (Tr. 96). Claimant also had pain in the infrapatellar region anteriorly and along the borders of the infrapatellar tendon. (Tr. 96).

Dr. Volarich diagnosed Claimant with severe cervical strain with left shoulder girdle myofascial pain and post-traumatic headaches. (Tr. 101). He also diagnosed a right shoulder strain/sprain with residual myofascial pain, lumbar strain/sprain and disc protrusion at L5-S1 without radicular symptoms, right hip trochanteric bursitis, and a right knee contusion. (Tr. 101). He testified that the accident on January 8, 2013, caused a whiplash injury to her neck and low back and jammed her right shoulder and right hip, and is the primary and prevailing factor causing each diagnosis. (Tr. 102). Dr. Volarich further stated that the work injury was the prevailing factor in causing Claimant's symptoms, need for treatment, and resulting disabilities. (Tr. 102).

Dr. Volarich diagnosed Claimant with conditions that preexisted her work injury, including a lumbar compression fracture as well as back and shoulder pain after a fall in 2011, but noted that the symptoms had resolved and were asymptomatic. (Tr. 104).

Dr. Volarich testified that if a vocational assessment was unable to identify a job for which she was suited, then it was his opinion that Claimant is permanently and totally

disabled as a direct result of the work-related injury of January 8, 2013. (Tr. 108).

Dr. Volarich testified that Claimant needed ongoing care to help control her pain syndrome, which included the use of narcotic and non-narcotic pain medication, muscle relaxants, physical therapy, and similar treatment. (Tr. 109). He also placed restrictions on her physical activities due to her work-related injury of January 8, 2013. (Tr. 109). The restriction to change positions frequently and rest when needed meant that Claimant may need to rest lying down in a recliner, bed, or couch to get her body weight off of her spine. (Tr. 109).

Deposition Testimony of Dr. Randolph

Dr. Bernard Randolph was deposed on behalf of Employer on February 8, 2017. Dr. Randolph diagnosed Claimant with contusions to her knees and a lumbar strain resulting from the injury of January 8, 2013. (Tr. 1183). Dr. Randolph did not impose any work restrictions as a result of these injuries. (Tr. 1185).

Dr. Randolph said that Claimant sustained a one-percent permanent partial disability to each lower extremity rated at the knee due to the effects of the contusions that occurred on January 8, 2013. (Tr. 1184). He also estimated that Claimant had a four-percent permanent partial disability of the person as a whole related to the effects of the lumbar strain. (Tr. 1184).

Dr. Randolph estimated that Claimant had preexisting permanent partial disabilities of two percent of each lower extremity rated at the knee related to osteoarthritis and three percent of the body as a whole related to Claimant's lumbar

degenerative disk disease. (Tr. 1185). He also estimated a four percent permanent partial disability related to the effects of degenerative disease at the cervical level. (Tr. 1185).

Deposition Testimony of Dr. Bassett

Dr. Bassett is a board-certified psychiatrist with training in forensic psychiatry. (Tr. 151). He diagnosed Claimant with pre-injury anxiety disorder (propensity for palpitations and arm discomfort when under stress); work-injury-related persistent somatic symptom disorder with predominant pain, severe with a component of persistent conversion disorder (functional neurological symptom disorder) with special sensory symptoms; and work-injury-related major depressive disorder, single episode, severe, flowing from pain and perceived disability caused by the work-injury related somatic symptom disorder and conversion disorder (visual) symptoms. (Tr. 155).

Dr. Bassett explained that a somatic symptom disorder is a pattern of physical symptoms and complaints in the absence of or in excess of findings of physical examination or diagnostic testing. (Tr. 163). With a somatic symptom disorder, the symptoms are not made up, and the person is not in control of the symptoms. (Tr. 164). A person suffering from this type of disorder really hurts, and they really have the disability that they perceive. (Tr. 164). Claimant's somatic symptom disorder includes a component of persistent conversion disorder, which is a type of somatoform disorder that gives the appearance of a neurological deficit. (Tr. 155). For Claimant, this manifests as blurriness, darkness, or "dirtiness" in her vision and a reported inability to see part of her vision field. (Tr. 156).

Dr. Bassett testified that Claimant's major depressive disorder flows from her pain and her perceived disability caused by the work-injury-related somatic symptom and conversion disorders. (Tr. 157). He explained that Claimant did not have symptoms of depression before her work injury. (Tr. 158). After her work injury, Claimant developed and sought treatment for many physical symptoms, including symptoms that Dr. Bassett believed were part of her somatic symptom disorder. (Tr. 158). After her development of these physical symptoms and the disability that she perceives that she has, she developed symptoms that meet the criteria of major depressive disorder. (Tr. 158).

Dr. Bassett testified that the work accident of January 8, 2013, was the prevailing factor in Claimant's development of somatic symptom disorder with predominant pain and a component of conversion disorder with a special sensory symptom, visual. (Tr. 166). Dr. Bassett also testified that the depressive disorder flowed from the work accident. (Tr. 166).

Dr. Bassett opined that Claimant is at maximum medical improvement. (Tr. 167). He recommended continued palliative-type care or management to keep Claimant from doctor shopping and having invasive diagnostic or therapeutic things done to her. (Tr. 168).

Dr. Bassett assessed a 35% percent permanent partial disability as a consequence of her somatic symptom disorder and a 15% percent permanent partial disability with regard to her major depressive disorder, for a total of 50% percent permanent partial disability of the body as a whole. (Tr. 170). Dr. Bassett also found that Claimant has a

2% percent permanent partial disability related to her preexisting anxiety disorder. (Tr. 171).

Deposition Testimony of Dr. Harbit

Dr. Harbit is a psychiatrist and an associate professor at Washington University in the Department of Psychiatry. (Tr. 1221). As part of her practice, Dr. Harbit evaluated Claimant on October 12, 2016. (Tr. 1223). She diagnosed Claimant with somatic symptom disorder. (Tr. 1225). In her opinion, the work incident of January 8, 2013, was not the prevailing factor in Claimant's somatic symptom disorder. (Tr. 1226). Dr. Harbit based her opinion on Claimant's history and examination. (Tr. 1226).

Deposition Testimony of Mr. Dolan

Mr. Dolan is a vocational rehabilitation counselor who is board certified by the American Board of Vocational Experts. (Tr. 263-264). As part of his evaluation, he performed testing, reviewed medical records, and prepared a report. (Tr. 266). Mr. Dolan met with Claimant for three and one-half hours. (Tr. 267). During that time, Claimant changed her seating to a more cushioned, reclining chair about two hours into the assessment. (Tr. 268). She stood seven times, and she cried four times. (Tr. 268). Twice, she took medication that she said was Tramadol, which is a mild narcotic pain medication. (Tr. 268). Mr. Dolan questioned Claimant about her daily activities and compared them to her stated limitations. (Tr. 271). He testified that her daily activities supported what she thought her limitations were, as she does basically nothing. (Tr. 268).

Mr. Dolan also compared Claimant's limitations and daily activities to her

doctors' restrictions. (Tr. 272). He testified that none of the doctors gave her restrictions that come close to what she says her limitations are, with the exception of her treating psychiatrist. (Tr. 272). Dr. Farzana gave Claimant a Global Assessment Functioning (GAF) score of 36, which Mr. Dolan testified means that she is unable to maintain employment due to her psychiatric symptoms alone. (Tr. 272).

Mr. Dolan tested Claimant's abilities using the Wide Range Achievement Test 4. (Tr. 272-273). Claimant's abilities to read, spell, and do math were much lower than her actual level of education. (Tr. 273). Mr. Dolan testified that the fact that English was her second language could have played a role in her results, as could her mental health issues. (Tr. 273). He did not see anything that led him to believe that she was malingering; she seemed to be sincerely trying to do her best. (Tr. 273). In his report, he noted that there appeared to be a somatic component to Claimant's current physical complaints. (Tr. 278). After he completed his report, he received two psychiatric reports that diagnosed somatoform disorder, which supported what he thought about Claimant. (Tr. 278).

Mr. Dolan testified that, to a reasonable degree of professional certainty, he believes that Claimant no longer has access to a reasonably stable labor market. (Tr. 278). He based that opinion on Claimant's age, academic achievement levels, her work skills, and the restrictions from Dr. Volarich and Dr. Farzana. (Tr. 278).

Deposition Testimony of Mr. Kaver

Mr. Kaver is a vocational rehabilitation counselor certified to provide vocational services in Missouri. (Tr. 1311). Mr. Kaver met with Claimant on January 27, 2017 and

prepared a report regarding his evaluation of her. (Tr. 1312). As part of his evaluation, Mr. Kaver reviewed medical and psychiatric reports, transcripts, and vocational reports. (Tr. 1313). Mr. Kaver noted that Claimant's walk was slow and unsteady, her posture was stiff and had a forward lean, she shifted in her chair and stood periodically, and she grimaced and groaned during the interview. (Tr. 1313). Claimant reported that her pain level could be as high as a ten, but that her pain was at the typical level of four or five during the evaluation. (Tr. 1313-1314). She also cried during the interview. (Tr. 1314). Mr. Kaver testified that if she presented this way to a potential employer, she would not be hired. (Tr. 1322).

Mr. Kaver testified that Claimant was highly educated. (Tr. 1314). He explained that Claimant can translate Turkmen, English, and Russian, and she had the ability to read and write German, Latin, and Turkish. (Tr. 1315). He said that a person who is more highly educated would have more access to the labor market. (Tr. 1315). Mr. Kaver also noted that Claimant's computer skills were good, in that she could operate computers using MS Word and publishing software. (Tr. 1316-1317). Claimant also has skills and experience in scheduling, supervising, writing, and speaking. (Tr. 1317).

Mr. Kaver explained the significance of the GAF score of 36 that was given by Dr. Farzana. (Tr. 1317-1318). He testified that someone with a GAF score of 36 would be unable to work and would have difficulty functioning just in everyday life. (Tr. 1318). He said that a GAF score can fluctuate week to week, noting that a person receiving weekly counseling could have a GAF score go up and down each week. (Tr. 1318). As

to Dr. Volarich's restrictions, Mr. Kaver testified that Claimant could work at a sedentary level, except for the restriction that Claimant should rest when needed. (Tr. 1318-1319). He said that if the restriction meant that she needed an occasional break, Claimant could work at a sedentary level. (Tr. 1319). But if the restriction meant that she needed to recline periodically, and this would take up a significant part of her eight-hour day, she would be unable to work. (Tr. 1319). Mr. Kaver indicated in his report that if he were to assume Claimant's subjectively described activity restrictions, she would be unable to return to work. (Tr. 1330).

Mr. Kaver testified that Claimant was cooperative with the interview. (Tr. 1322). He acknowledged that he did not see anything in her medication records that indicated that she was engaged in malingering. (Tr. 1330).

Administrative Law Judge's Award

The Administrative Law Judge found that Claimant failed to provide credible testimony to the Court, such that she had failed to meet her burden of proving that the incident of January 8, 2013 was the prevailing factor in causing her physiological or psychological complaints. As such, he denied the claim in its entirety.

Labor and Industrial Relations Commission Award

The majority opinion of the Labor and Industrial Relations Commission (hereinafter "Commission") affirmed the decision of the Administrative Law Judge with a Supplemental Opinion in which it denied compensability of Claimant's claim based upon a finding that Claimant's injuries did not arise out of and in the course of her

employment.

POINTS RELIED ON

I.

The Labor and Industrial Relations Commission erred in finding that Claimant did not prove she sustained injury by way of an accident which arose out of her employment with Employer, because §287.020.3 of the workers' compensation act does not require an injured worker to identify the specific cause of an accident where reasonable inferences can be drawn from the sufficient competent evidence to establish the presence of a work-related risk source, in that the Commission first improperly determined Claimant to be untruthful by imposing its own medical opinion of Claimant's psychiatric state, in place of that of the board-certified psychiatrists who established that Claimant's symptoms are driven by a Somatic Symptom Disorder, and in that the Commission then coupled that determination with a refusal to draw reasonable inferences from the substantial weight of the evidence, which had proven that Claimant's injuries occurred due to the fact that her job required her to walk across a linoleum floor which was slickened by an accumulation of salt, dirt and moisture which had been tracked into Employer's building.

Dorris v. Stoddard County, 436 S.W.3d 586 (Mo.App. 2014).

Scholastic, Inc. v. Viley, 452 S.W.3d 680 (Mo.App. 2014).

Pope v. Gateway to the W. Harley Davidson, 404 S.W.3d 315 (Mo.App. 2012).

II.

The Labor and Industrial Relations Commission erred in finding that Claimant did not prove she sustained accidental injury which occurred in the course of her employment with Employer, because under §287.020.3 of the workers' compensation act an injury occurs in the course of the employment relationship when it occurs within the time and place where the employee may reasonably be engaged in either fulfilling the duties of her employment, or something incidental thereto, in that the sufficient and competent evidence found by the Commission proved that Claimant's injuries occurred while she was traveling upon Employer's premises as she was headed to her assigned work area when she slipped and fell.

Abel v. Mike Russell's Std. Serv., 924 S.W.2d 502 (Mo.banc 1996).

Zahn v. Associated Dry Goods Corp., 655 S.W.2d 769 (Mo.App. 1983).

III.

The Labor and Industrial Relations Commission erred in finding that Claimant failed to prove a medical causal connection between her accident and her injuries, through its determination that Claimant's subjective complaints were not caused by her diagnosed medical condition, because Missouri law holds that the Commission may not substitute its own judgment for that of the expert medical witnesses on complicated medical issues, and because the substantial and competent weight of the evidence did not support the Commission's determination, such that the Commission acted without or in excess of its powers, in that there was a unanimity of medical opinion from the board-certified psychiatrists that Claimant's subjective complaints are an expected manifestation of her diagnosed Somatic Symptom Disorder and are not a result of lying or malingering, and in that the Commission's Award is not supported by the sufficient and competent evidence required by law.

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

ARGUMENT I

The Labor and Industrial Relations Commission erred in finding that Claimant did not prove she sustained injury by way of an accident which arose out of her employment with Employer, because §287.020.3 of the workers' compensation act does not require an injured worker to identify the specific cause of an accident where reasonable inferences can be drawn from the sufficient competent evidence to establish the presence of a work-related risk source, in that the Commission first improperly determined Claimant to be untruthful by imposing its own medical opinion of Claimant's psychiatric state, in place of that of the board-certified psychiatrists who established that Claimant's symptoms are driven by a Somatic Symptom Disorder, and in that the Commission then coupled that determination with a refusal to draw reasonable inferences from the substantial weight of the evidence, which had proven that Claimant's injuries occurred due to the fact that her job required her to walk across a linoleum floor which was slickened by an accumulation of salt, dirt and moisture which had been tracked into Employer's building.

I. Preservation of Error

The issue of "accident arising out of employment" was preserved for appellate review. Following the Administrative Law Judge's Award of May 18, 2018 (Record on

Appeal p. 8-22), Claimant filed an Application for Review with the Labor and Industrial Relations Commission (hereinafter "Commission") on May 22, 2018 (Record on Appeal p. 23-31), in which this issue was raised. Then, following the Award of the Commission on January 17, 2019 (Record on Appeal p. 33-52), Claimant filed her Notice of Appeal with the Missouri Court of Appeals, Eastern District (Record on Appeal p. 53-79) on January 23, 2019, in which this issue again was raised.

II. Standard of Review

This Court should reverse an award when 1) the Commission acted without or in excess of its authority, 2) the award was procured by fraud, 3) the facts found do not support the award, or 4) the record does not contain sufficient competent and substantial evidence to support the award. Mo.Rev.Stat. §287.495.1 (2013). See also *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo.banc 2003). A review of an award from the Commission must include a determination of whether it was authorized by law and supported by competent and substantial evidence on the whole record. See *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo.banc 2012).

When examining the record, the Court determines whether, when considering the whole record, there is "sufficient competent and substantial evidence to support the award." *Malam v. Dep't of Corr.*, 492 S.W.3d 926, 928 (Mo.banc 2016). That requires that the Court look at the entire record, not just the evidence that supports the lower decision. See *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 258 (Mo.App. 2008).

While the Court should defer to the Commission on issues involving the credibility of witnesses, the Court is not bound to defer to the Commission's interpretation and application of the law. *Malam*, 492 S.W.3d at 929 then *Greer v. Sysco Food Servs.*, 475 S.W.3d 655, 664 (Mo.banc 2015). "Nothing requires this Court to review the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the Commission's decision." *Hornbeck*, 370 S.W.3d at 629. The whole record is considered to determine if there is sufficient competent and substantial evidence to support the Commission's award. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo.banc 2012). "When the relevant facts are not in dispute, the issue of whether an accident arose out of and in the course of employment is a question of law requiring *de novo* review." *Id.*, (*citing Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671, 672 (Mo.banc 2009)).

III. Controlling Statutory Provisions

The Missouri workers' compensation law defines an "accident" as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." Mo.Rev.Stat. §287.020.2. (2017). The statute also requires that the injury must arise out of and in the course of employment. Mo.Rev.Stat. §287.020.3. (2017). Injuries are only deemed to arise out of and in the course of employment if:

(a) It is reasonably apparent, upon consideration of all the

circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.

Mo.Rev.Stat. §287.020.3(2) (2017). It has long been held that the phrases "arising out of" and "in the course of" are not synonymous, but rather, are separate tests which must be met.[1] *Leilich v. Chevrolet Motor Co.*, 40 S.W.2d 601, 605 (Mo. 1931), *superseded on other grounds by constitutional amendment*, Mo. Const. art. V §22, *as recognized in Davis v. Research Medical Ctr.*, 903 S.W.2d 557, 562 (Mo.App. 1995), *overruled in part by Hampton*, 121 S.W.3d at 223.

IV. How the Commission used an error of law to adjudge Claimant to be untruthful, thereafter analyzing all legal and factual issues through that lens

It is well known that, in American society, persons with psychiatric illnesses are viewed differently than persons with physical illnesses. The United States Supreme Court recognized this in a 1979 decision, stating:

Appellees overlook a significant source of the public reaction to the

[1] The Court should note that the Commission's Award decided the separate issues of "arising out of" and "in the course of" under a single heading entitled "*Employee's Injury did not Arise out of Employment*". (emphasis original) (Record on Appeal p. 34). Since these issues are distinct, and for purposes of clarity, Appellant addresses them in separate points. See Appellant's Point II for a discussion of the "in the course of" issue.

> mentally ill, for what is truly "stigmatizing" is the symptomatology of a mental or emotional illness. The pattern of untreated, abnormal behavior – even if nondangerous – arouses at least as much negative reaction as treatment that becomes public knowledge. A person needing, but not receiving, appropriate medical care may well face even greater social ostracism resulting from the observable symptoms of an untreated disorder.

Parham v. J.R., 442 U.S. 584, 601 (1979) (*citing Addington v. Texas*, 441 U.S. 418, 429 (1979) and Schwartz, Myers, & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Archives of General Psychiatry 329 (1974)).

In this country, persons with psychiatric illness are therefore subject not only to the effects of their disease, but also to the effects of negative societal perceptions. Those perceptions can bleed into the judicial system.

Nevertheless, there are times when legitimate judicial judgments must be made concerning a person's psychiatric illness, such as here, where a workers' compensation case is being pursued. The key is to understand the illness, and not simply judge the symptoms. Factual judgments in workers' compensation cases generally fall upon the Labor and Industrial Relations Commission (hereinafter "Commission"), which is vested with many different powers. They may determine the credibility of witnesses, and they may issue certain orders. *See Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756 (Mo.App. 2002), overruled on other grounds by *Hampton*, 121 S.W.3d at 223, then *State ex. rel. River Cement Co. v. Pepple*, 585 S.W.2d 122 (Mo.App. 1979). They may assess costs,

and they may issue subpoenas. *See Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo.banc 2003), overruled on other grounds by *Hampton*, 121 S.W.3d at 223, then Mo.Rev.Stat. §287.560 (2017). They have a broad variety of powers, but there is one thing they may never do: *they may never determine complicated medical issues without support from an expert medical witness.* This is reflected in long-standing Missouri precedent, which prevents the Commission – in complex medical issues – from interjecting its own opinion in place of that of the expert medical witnesses:

> [w]here the condition presented is an acute aggravation of a pre-existing degenerative back condition with nerve root irritation, *or any other sophisticated injury, which requires surgical intervention or other highly scientific technique for diagnosis*, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor – in the absence of expert diagnosis – is the finding of causation within the competency of the administrative tribunal.

(emphasis added). *Griggs v. A. B. Chance Company***,** 503 S.W.2d 697, 704-705 (Mo.App. 1973). *See also, Silman v. William Montgomery and Assoc.*, 891 S.W.2d 173 (Mo.App. 1995), overruled on other grounds by *Hampton*, 121 S.W.3d at 223 and *Pruett v. Fed. Mogul Corp.*, 365 S.W.3d 296 (Mo.App. 2012).

In this matter, the Commission majority ventured outside its competency and used its own beliefs – unsupported by expert diagnosis – to determine a complex medical issue: that being the nature and cause of Claimant's psychiatric illness. It then used that determination to negatively judge Claimant's credibility, and deny her coverage under the law.

The Commission majority's error began with its adoption of the findings made by the Administrative Law Judge in his Final Award. After hearing the evidence in this case, the Judge did not determine most of the issues that were presented at trial.[2] Instead, he said this:

> [i]nitially, the Court finds, as to Claimant's credibility, she has failed to provide credible testimony to this Court. It is clear Claimant's description of her injuries and their subsequent effects verge on the point of malingering. As all, if not most, of Claimant's medical expert testimony relies is (sic) substantial part on her own subjective description of her maladies, this Court finds the conclusions subsequently provided are equally specious. There is little or no objective medical finding to support any of Claimant's anomalies. Claimant has not met her burden of showing the incident of January 8, 2013 was the prevailing factor causing the physiological and/or psychological complaints. This Court, therefore shall deny this claim on the basis of lack of medical causation. Consequently, all other issues are therefore moot.

(Record on Appeal p. 21). In essence, he reasoned:

> 1) there is a discrepancy between Claimant's complaints and physical findings;

[2] The issues at trial were 1) accident arising out of and in the course of employment; 2) medical causation; 3) coverage of past medical bills; 4) coverage of past temporary total disability benefits; 5) future medical care; 6) permanent disability benefits; and 7) liability of the Second Injury Fund. (Tr. 2-4).

2) such a discrepancy can only be explained as lying;

3) since Claimant's case is built on lies, she has not established the essential elements of her workers' compensation claim.

Claimant was labeled a malingering, abject liar, proffering specious testimony under oath. (Record on Appeal, p. 21). Upon appeal, the Commission majority adopted and incorporated these findings. (Record on Appeal, p. 36).

First of all, this Court should make no mistake as to one aspect of the evidence in this case: *many of Claimant's physical complaints are not supported by findings on her physical examination*. That is a fact. That is an assertion which even Claimant's counsel is making, as Claimant's expert testimony established this to be true. (Tr. 163-164). So the Commission, in adopting the findings of the Administrative Law Judge, was correct in that one respect: that many of Claimant's subjective complaints are not supported by the physical examinations.

The problem is that the Commission majority, after making that finding, then employed flawed logical reasoning, which resulted in flawed findings. Their analysis was performed in a manner which employed the use of what is known as a "presumption fallacy," which, as its name suggests, occurs when a fact – without proper support – is presumed to be true.[3] The Commission presumed this statement to be true: "if a person's subjective complaints are not supported by their physical examination, they are not being

[3] E.g., women earn less than men earn for doing the same work; Oprah Winfrey is a woman; therefore, Oprah Winfrey earns less than male talk-show hosts.

truthful." They essentially reasoned:

a) If a person's subjective complaints do not match their findings on physical examination, then they must be lying.

b) Claimant's complaints do not match her findings on physical examination.

c) Claimant is therefore lying.

At the heart of this matter is the testimony of two board-certified psychiatrists, one provided by Claimant, and the other provided by Employer. Both Dr. Bassett (Claimant witness) and Dr. Harbit (Employer witness) agreed that Claimant suffers from the psychiatric diagnosis of Somatic Symptom Disorder. (Tr. 155-157; 1225). Dr. Bassett explained the nature of a Somatic Symptom Disorder, saying it consists of a pattern of physical symptoms and complaints in the absence of – or in excess of – findings on physical examination or diagnostic testing.[4] (Tr. 163). In other words, a patient with this disorder has *subjective* complaints that don't match up with their findings on *physical* examination. But that doesn't mean the patient is feigning their complaints; nor does it mean they are "malingering" or "specious". In fact, *the discrepancy is the hallmark of the disorder*. You can't make the diagnosis without having the discrepancy.

Dr. Bassett explained that while a patient's subjective symptoms may not match up with their physical findings, those symptoms are still very real to the patient. (Tr. 164). He said the patient really does feel the pain they are describing, and they really do

[4] See also the required criteria for a diagnosis of Somatic Symptom Disorder, located in the Diagnostic and Statistical Manual of Mental Disorders, version 5. (Tr. 1294-1300).

have the disability which they perceive. (Tr. 164). In other words, it is not a matter of malingering or falsehood.[5] The DSM V, the definitive diagnostic tool of every American psychiatrist, says that with a Somatic Symptom Disorder "[t]he individual's suffering is authentic, whether or not it is medically explained." (emphasis added) (Tr. 1296). Dr. Harbit, for Employer, agreed with Dr. Bassett's diagnosis. (Tr. 1225).

For the vocational experts, Mr. Stephen Dolan, Claimant's board-certified vocational expert, said that he saw nothing which led him to believe that Claimant was malingering; he said that she seemed to be sincerely trying to do her best. (Tr. 273-274). Mr. Tim Kaver, Employer's board-certified vocational expert, testified that he did not see anything in her medical records that indicated that Claimant was engaged in malingering. (Tr. 1330).

And so, both of the board-certified psychiatrists arrived at the same psychiatric diagnosis, a diagnosis which they assert is causing Claimant to *legitimately* perceive physical complaints, even though the complaints are not supported by physical findings. But instead of relying upon the expert witnesses for a diagnosis of her illness, the Commission majority instead *offered its own medical opinion*, essentially stating: "no, the psychiatric diagnosis is wrong; Claimant does not have Somatic Symptom Disorder; she is simply an abject liar." That means their ruling is contrary to the expert medical opinions of Drs. Bassett and Harbit, and therefore in violation of Missouri's prohibition

[5] Dr. Bassett testified: "in my opinion she's not making it up. None of the other doctors whose records I've looked at here think she's making it up". (Tr. 179).

on the Commission substituting its own personal opinion – on complex medical issues – for the uncontradicted testimony of qualified medical experts.[6] *Wright v. Sports Associated*, 887 S.W.2d 596, 599 (Mo.banc 1994), overruled on other grounds by *Hampton*, 121 S.W.3d at 223. *See also Elliott v. Kansas City, Mo., School Dist.*, 71 S.W.3d 652, 657-58 (Mo.App. 2002), overruled on other grounds by *Hampton*, 121 S.W.3d at 223 (the uncontroverted opinion of the psychiatrist should stand and any ruling to the contrary would rest solely on surmise or speculation); *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo.App. 2004) (causation is established by medical testimony and the commission cannot find no causation if the uncontroverted medical evidence is otherwise). "Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause." *Malam v.*

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[6] The Commission dissent agreed, saying that "[t]he commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." (citing *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo.App. 2004) and *Elliott v. Kansas City Missouri School District*, 71 S.W.3d 652, 657-658 (Mo.App. 2002). (Record on appeal p. 39). He said:

> The administrative law judge was not qualified to make a medical causation opinion contrary to the only medical expert opinions in the record. Both medical experts diagnosed [Claimant] with somatic symptom disorder. The hallmark of this disorder is precisely the lack of objective evidence to support subjective symptoms. Regardless of this lack of objective support, [Claimant] still experienced the subjective pain and discomfort she described. Therefore, [Claimant] was not malingering, she was truthfully stating what she was experiencing.

Id.

Dep't of Corr., 492 S.W.3d at 928. (Ascertaining whether Mr. Malam's workplace accident caused him to suffer a hypertensive crisis requires expert medical testimony).

Because of her psychiatric diagnoses, the veracity of Claimant's complaints is part and parcel of a "sophisticated injury, which requires surgical intervention or other highly scientific technique for diagnosis," such that it is "not within the realm of lay understanding." *Griggs***,** 503 S.W.2d at 704-705. The Commission acted without or in excess of its powers by determining that the discrepancy between Claimant's subjective complaints and her physical findings is not a result of her Somatic Symptom Disorder, but rather, due to lying. Without any expert witness *disputing* the Somatic Symptom Disorder diagnosis, the Commission majority overruled the psychiatric diagnoses and determined a complex medical issue on their own, thereby committing an error of law. They then analyzed the entirety of Claimant's case under the belief that she is an abject liar.

V. The Commission's Findings on the Issues of "Accident," and "Arising Out Of the Employment"

The Missouri workers' compensation law defines an "accident" as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." Mo.Rev.Stat. §287.020.2. (2017). The statute also requires that the injury must arise out of and in the course of employment. Mo.Rev.Stat. §287.020.3.

(2017). Injuries are only deemed to arise out of and in the course of employment if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.

Mo.Rev.Stat. §287.020.3(2) (2017). It has long been held that the phrases "arising out of" and "in the course of" are not synonymous, but rather, are separate tests which must be met.[7] *Leilich v. Chevrolet Motor Co.*, 40 S.W.2d at 605.

A. "Accident"

Claimant clearly showed that she was involved in an "accident," as she provided proof that met all of the required elements of an accident, as stated by this Court in *White v. Conagra Packaged Foods, LLC*, 535 S.W.3d 336, 338-339 (Mo. 2017). *White* said:

> [a]n "accident" for purposes of section 287.120.1 is (a) "an unexpected traumatic event or an unusual strain;" (b) "identifiable by time and place of occurrence;" (c) "producing . . . objective symptoms of an injury;" and (d)

[7] The Court should note that the Commission's Award decided the separate issues of "arising out of" and "in the course of" under a single heading entitled "*Employee's Injury did not Arise out of Employment*". (emphasis original) (Commission majority award, p. 2). Since these issues are distinct, and for purposes of clarity, Appellant addresses them in separate points. See Appellant's Point II for a discussion of the "in the course of" issue.

"caused by a specific event during a single work shift."

Id, (*quoting* Mo.Rev.Stat. §287.020.2). No one contested that Claimant did in fact fall,[8] and immediately afterwards she was diagnosed at several medical facilities with contusions, strains and objective signs of injury. (Tr. 335, 1045, 1091). Numerous other physicians documented injuries occurring as a result of the fall, including Dr. Randolph, one of Employer's expert medical witnesses. (Tr. 1183). So Claimant did sustain an "accident," as defined by §287.020.2.

B Arising Out Of Employment

1. The Need for a "Risk Source"

Workplace injuries occur through a myriad of employee activities. The present case occurred when Claimant slipped and fell while walking into Employer's school building, where she worked as a teacher. (Tr. 17-21). Other Missouri decisions have dealt with similar "walking" type injuries, including the Supreme Court's decision in *Johme v. St. John's Mercy* Healthcare, 366 S.W.3d 504, 510 (Mo.banc 2012). *Johme* explained that injuries are not rendered compensable simply because they "happened at work;" it is not enough to show the injury occurred *while* at work: it has to occur *because*

[8] Employer admitted in its Report of Injury that Claimant slipped and fell on its premises on January 8, 2013. (Tr. 1144). The same Report admits that there was a "sprain or tear" to "multiple body parts because of the fall." (Tr. 1144). The Report of Injury "is analogous to a pleading and is admissible and binding in the same way as a pleading as to admissions therein against interest, and is admissible in evidence in the same manner as a pleading." *Jacobs v. Bob Eldridge Constr. Co.*, 393 S.W.2d 33, 41 (Mo.App. 1965).

of work. *Id*. This distinction is generally described as the search for an employment-related "risk source," meaning the search for a cause-and-effect relationship between the employment environment and the injury. *Gleason v. Treasurer of the State of Missouri*, 455 S.W.3d 494, 499 (Mo.App. 2015). As a general rule, there must be a risk that is unique to the work environment, rather than a risk to which the employee was also exposed in "normal nonemployment life". *Id*.

Sometimes the courts refer to "injuries while walking" as "smooth surface" cases, with *Gleason* describing the general policy as this:

> It is a matter of common acceptance that the "risk source" of walking across a smooth surface is a "risk source" a worker is equally exposed to in normal nonemployment life. Thus, in such cases, where the identified cause of an accident involves a risk source to which a worker is equally exposed in normal nonemployment life, unless the worker can establish something about the "risk source" that differentiates it from the equivalent risk in normal nonemployment life, the worker will be unable to establish the required causal connection between a work activity and the injuries sustained.

Gleason, 455 S.W.3d at 501. In other words, the thought is that people walk across smooth surfaces outside of work, so injuries from an accident of this sort only arise out of the employment if the employment environment somehow increased the risk of injury.

In *Porter v. RPCS, Inc*., 402 S.W.3d 161 (Mo.App. 2013), an eighty-three year-old employee somehow fell in the company bathroom and fractured her hip. *Id.*, at 164. Ms. Porter had no memory of her fall or its cause, and could only recall washing her hands and then waking up on the floor. *Id.*, at 164-165. While she speculated the floor might have been wet, no one witnessed the fall, and no one testified to moisture or debris on the

floor. *Id*. At the same time, it was shown that Ms. Porter had several pre-existing medical conditions, including scoliosis, spondylosis, osteoporosis, osteopenia, degenerative disc disease, cardiac dysrhythmia, and atrial fibrillation. *Id*. Medical testimony was offered, with one physician finding that the fall was most likely a result of pre-existing medical conditions, whereas another said it was more likely to have occurred from a slip and fall. *Id.*, at 167-168.

Also testifying in *Porter* was her grandson, who resided with her. *Id*. He was called to assist his grandmother, and thereafter described the accident scene as a clean tile floor which was clear of water, oil or other debris. *Id*. Other testimony came from co-employees, one of whom testified that Ms. Porter's clothes were not wet, sticky or oily after the injury. *Id.*, at 167.

Following a hearing, it was determined that Ms. Porter's injury did not arise out of her employment because she failed to identify a risk or hazard which would establish a causal connection with her work. In other words, she posited no "risk source" in the workplace bathroom which made it more likely that she could be injured; she was just as likely to have been injured in the same manner in her nonemployment life.

In the present matter, the Commission majority similarly found that Claimant's injuries did not arise out of her employment, because "[t]here was nothing about employee's work that caused her to fall". (Record on Appeal, p. 34). And this is one area where the Commission committed error, because the facts found by the Commission do not support such a finding, and in fact the sufficient competent evidence found by the

Commission points to a risk source connected to the employment. The whole record is to be considered to determine if there is sufficient competent and substantial evidence to support the Commission's award. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d at 509.

2. The Commission Majority's Factual Findings

These are the five basic factual findings made by the Commission majority concerning the "arising out of" issue:

1) Claimant was injured on January 8, 2013 when she passed through an entryway at the beginning of her workday as a high school teacher, at which time she passed through a set of double doors, past a security guard, when she fell and landed on her hands and knees. (Record on Appeal p. 33).
2) Claimant was walking on an even, flat surface when she fell; there was nothing about Claimant's work that caused her to fall. (Record on Appeal p. 34).
3) Claimant's testimony concerning the condition of the floor is not credible because she did not state that there was dirt, dust, ice and moisture on the floor until she was specifically asked if there were any substances on the floor. (Record on Appeal p. 35).
4) There was no mention of any substance on the floor in Employer's accident report. (Record on Appeal p. 35).
5) There is no other support in the record for Claimant's claim of a hazardous condition being present on the hallway floor. (Record on Appeal p. 35).

Some of these findings are supported by sufficient competent evidence, whereas others are not. They are discussed as follows.

Commission Majority Finding #1: Claimant fell on the beginning of the workday

The Commission majority's first finding, that Claimant was injured when she passed through an entryway at the beginning of her workday as a schoolteacher, is supported by sufficient competent evidence in the record. (Record on Appeal p. 33). Largely, the finding is made based upon the testimony of Claimant. (Tr. 18-21). Supporting evidence includes a report of injury which Claimant completed on the same day. (Tr. 24, 1042). There are also medical records which back this up. (Tr. 353-357, 547, 593, 685, 679, 1043, 1091). And there is Employer's Report of Injury filed with the Division of Workers' Compensation, which acts as an admission against interest in that Employer admitted that Employee slipped and fell on their premises. (Tr. 1144). *Jacobs v. Bob Eldridge Constr. Co.*, 393 S.W.2d at 41. The Court should note, however, that the Commission could only find that Claimant fell at the beginning of the workday by first concluding that Claimant's testimony was credible in this regard.

Commission Majority Finding #2: Claimant was walking on an even, flat surface, with nothing from her work causing her to fall

The sufficient competent evidence supports the Commission majority's finding that Claimant was in fact walking on an even, flat surface at the time she fell. (Record on

Appeal p. 34; Tr. 18-21). Again, note that the Commission finds Claimant credible in this regard. But then, the Commission majority takes the next step and finds that there was "nothing from her work which caused her to fall". In this sense, they liken this matter to the *Porter* decision, where multiple eyewitnesses testified that there was no evidence of any substance on the floor.

In this matter, the testimony from Claimant, *which was unrebutted*, was that on the day of her accident she parked her car on Employer's parking lot and then walked through salt, ice and dirt on that lot before entering Employer's building. (Tr. 18). She carried her school bag, containing work materials such as student tests and lesson plans; and as she entered Employer's building, there were no floor mats upon which she might wipe her feet, such that the interior linoleum tile floor was moist and dirty. (Tr. 17-20). Claimant testified that she then slipped and fell. (Tr. 21). Note that the Commission majority had found all of Claimant's testimony to be credible right up to where she said the floor was soiled; she was credible as to how she got to work, how she walked through a dirty parking lot, how she entered the building, what she was carrying, and where she was going. The reason they now found her testimony to be not credible is found in their third finding.

<u>Commission Majority Finding #3: Claimant's testimony concerning the condition of the floor is not credible because she did not state that there was dirt, dust, ice and moisture on the floor until she was specifically asked if there were any substances on the floor</u>

So why did the Commission majority decide, at this point, that Claimant was no longer credible? They explained that it is because of this portion of Claimant's testimony:

Q. The floor, once you got through the second set of doors and you're inside the building, what sort of floor is into this building?

A. It's linoleum tile.

Q. Linoleum?

A. Linoleum tiles.

Q. What was the condition of the floor in there?

A. Normal, I think.

Q. Did you say "normal"?

A. Yes.

Q. Okay. And was there any, anything broken? Anything chipped? Anything like that?

A. I didn't mention it, I didn't see it.

Q. Okay.

THE COURT: You have to keep your voice up, I'm sorry, 'cause I can barely hear you.

THE WITNESS: I didn't see that.

THE COURT: Okay.

THE WITNESS: I don't know.

Q. (By Mr. Christianson) Was there anything on the floor? Was it clean? Dirty? Can you say?

A. Well, it wasn't clean. There was foot traffic, teachers pass by.

Q. And in what way was it dirty? Did you see anything on the floor dirt-wise?

A. There was some particles of dirt, ice, dust, moist. The floor, the doors were open so the floor was slippery, moist.

(Tr. 19-20). So the Commission majority took this testimony and ruled that it actually proves that there was *no* salt, dirt or moisture on the floor. (Record on Appeal p. 35). And how did they know this? They said that they could tell because when Claimant was first asked about the condition of the floor she said "normal," before she said it wasn't clean. (Record on Appeal p. 35).

In other words, the Commission majority denied this case based upon what they perceived as a "Freudian slip." They concluded in essence: "if she truly thought the floor was dirty, she never would have used the word "normal," so she must be lying about the salt, dirt and moisture." In their opinion, Claimant's subconscious caused her to say that the floor was "normal," before she caught herself and testified that the floor was soiled. It's an incredible finding, really. But if you have already concluded that a person is an abject liar, then you begin to perceive things such as Freudian slips.

First of all, with regard to Claimant's use of the word "normal," that word doesn't mean "clean" or "unsoiled," it means a "typical state or condition." So leaping to the conclusion that Claimant's use of the word "normal" means a clean, non-skid surface is

fairly ridiculous, especially when it is remembered that she had just testified moments earlier that she walked through "snow, ice, salt, dirt." (Tr. 18). And second, it must be remembered that English is a second language to Claimant. (Tr. 6). No, Claimant is not claiming that she doesn't understand the English language, but the fact remains that English is not her native tongue, as evidenced by the *professional testing which showed her abilities to read and spell were much lower than her actual level of education*. (Tr. 273, 324, 326). Mr. Dolan, the vocational expert who performed the testing, said that the results were either due to the fact that English is her second language, or due to her mental health issues. (Tr. 273). Either way, he did not see anything that led him to believe she was malingering in her testing, saying she seemed to be sincerely trying to do her best. (Tr. 273). Nevertheless, the Commission majority deduced a Freudian slip, and used it as the first leg of their stool, supporting the denial of benefits.

Commission Majority Finding #4: no mention of any substance on the floor in Employer's accident report.

One way to test the Commission majority's "Freudian slip" theory is to compare Claimant's testimony with documentary evidence. The Commission did this in one aspect, though their analysis was flawed, because the documentary evidence they cited does not contain sufficient competent evidence to support their finding. The documentary evidence they reviewed was the paperwork which Claimant completed immediately after the accident, at Employer's request. (Record on Appeal p. 35).

After she fell, Claimant was taken to the school nurse's office, where she was given forms to complete. Those forms were admitted into evidence. (Tr. 1040-1042). The Court will note that the paperwork is made up of two separate forms, constituting a total of three pages. Pages one and two constitute an *Employee* Report of Injury, which Employer commands is to be "Typed and executed by Employee". (Tr. 1040-1041). The nurse did not type it, instead telling Claimant fill it out. (Tr. 24). Then the third page constitutes an Accident Investigation Report, which Employer commands is to be "Typed and executed by *Supervisor* or designee". (emphasis added) (Tr. 1042). This also was not typed, and was not executed by a supervisor or their designee. For reasons unknown, Employer's agent, the school nurse, also told Claimant to complete the Supervisor's Report, despite the fact that she is not a supervisor, and she had not gone back to perform the necessary accident scene investigation. (Tr. 24).

In the Employee Report of Injury – a document which the Commission majority never acknowledges – Claimant indicated that she was injured when she "slept"[9] and fell. (Tr. 1040). This document establishes the manner in which Claimant fell to the floor: she slipped. This means that we can debate *what caused her to slip* – that is all fine and good – but we cannot in good faith contest the fact that immediately after the accident

[9] As a further indication of the challenges Employee has with the English language, the Court should note that Employee actually wrote in the Report that she was injured when she "slept" at work. (Tr. 1040). At trial she clarified this, stating that she meant to say that she had "slipped". (Tr. 23).

Claimant stated in writing that she slipped.[10] That differentiates this case from *Porter*, because Ms. Porter had no idea how she ended up on the floor.

Instead of acknowledging that Claimant said in her Report of Injury that she had slipped, the Commission majority ignored that report and instead focused its attention on the Supervisor's "Accident Investigation Report," which again, Claimant was told to complete. It was this document which constituted the second leg of the stool upon which the Commission rests its determination that no foreign substances had been tracked onto Employer's floor; the reason: Claimant wrote in that report that she "could not determine the cause of the accident." (Tr. 1042). So the Court should picture in its mind how this form was filled out:

1) Employer fails to follow protocol and instead tells Claimant to complete the supervisor's form;
2) Claimant completed it without having performed the necessary "investigation" of the accident scene; and
3) Claimant completed it while she was lying on a cot in the nurse's office, dizzy and in pain from her fall.

(Tr. 24). That is where the Commission majority places its case. That along with its abject liar determination, and its Freudian slip theory.

Claimant asks the Court to compare this situation with the Eastern District's *Thompson* decision handed down just a year ago. *Thompson v. Treasurer of Missouri* –

[10] Employer admitted in its Report of Injury, an admission against interest, that Employee

Custodian of the Second Injury Fund, 545 S.W.3d 890 (Mo.App. 2018). Before *Thompson* made it to the Eastern District, it was decided at the Commission level. At issue were certain statements made by Ms. Thompson in her report of injury. The Commission said that it would not overly rely on discrepancies in the report of injury because:

> [w]e are not persuaded that an *injured employee's* failure to focus on such details, especially in the moments after suffering a traumatic injury resulting . . . in the immediate loss of sensation in her lower extremities, constitutes a persuasive evidence that there was not a wet, shiny substance on the floor, after all. (emphasis original).

Winifred Thompson-Jamison v. Treasurer of the State of Missouri, Injury No. 06-066635, LIRC, February 15, 2017. And when the matter was reviewed by Missouri's Eastern District, the finding of compensability was affirmed. *Thompson*, 545 S.W.3d 890. The Supreme Court denied transfer.

Commission Finding #5: There is no other support in the record for Claimant's claim of a hazardous condition being present on the hallway floor.

As stated, it is fine for the Commission to examine and debate "what caused Claimant to slip," but the substantial and competent evidence clearly establishes that Claimant did in fact slip. So what does the substantial and competent *medical* evidence say about the cause of Claimant's slip? Remember that in *Porter* there was evidence her pre-existing medical conditions caused her to fall. But in the present matter, there was no

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slipped. (Tr. 1144). See *Jacobs v. Bob Eldridge Constr. Co.*, 393 S.W.2d at 41.

such evidence.[11] The medical documentation consists of several sets of records containing "accident" histories:

1. Emergency Room records. On the day of the injury (January 8, 2013), the emergency room staff recorded several statements concerning the cause of the fall: "patient states she was walking at the time of injury and is unsure what caused her to fall", "the fall occurred walking", and the "fall [occurred] from other slipping, tripping, or stumbling". (Tr. 353-357).
2. Concentra Medical Centers. Three days after the accident (January 11, 2013), Employer directed Claimant to begin treatment at Concentra. Employer's physician recorded that "two days ago as she entered school and slipped and fell forward on both knees and strained her low back". (Tr. 1043). And: "I walked in, said hello to a security and that time I fell down."[12] (Tr. 1043).
3. ProRehab. Seven days after the accident (January 15, 2013), Claimant began a physical therapy program at Employer's direction. Employer's therapist recorded a history that "patient reports that on 1/8/13 patient was entering school door #4 on her way into work and proceeding past the security area when she slipped on the linoleum and fell forward landing on both hands and knees". (Tr. 1091).
4. Logan College of Chiropractic. Sixteen days after the accident (January 24,

[11] Prior to the fall, Employee was healthy and active, testifying that she danced twice weekly, played tennis, ran for exercise, and "walked all day" at work. (Tr. 64).

[12] Note again her grammatically incorrect language.

2013), Claimant began a treatment program at the Montgomery Health Center located at the Logan College of Chiropractic. The Doctor recorded this history:

> "This is all stemming from an incident that occurred on January 8, 2013. When she arrived at her place of work she had walked through lots of salt which covered the road in the parking lot before coming inside the building. When Maral walked into the building carrying her bag and coffee in both hands she recalls she slipping (sic) and falling to the ground, hitting both of her knee (sic) and torso on the ground very abruptly".[13] (Tr. 547).

5. Dr. Rivkin. Twenty-one days after the accident (January 29, 2013), Claimant sees Dr. Rivkin for an initial visit. (Tr. 593). He records a history of "fell at work, 3 weeks ago." (Tr. 593)
6. Corri Payton RN, ANP-BC. Twenty days after the accident (January 28, 2013), Claimant sees Corri Payton, a nurse practitioner at the Washington University Department of Orthopedics. (Tr. 685). She records this history: "on January 8, 2013 she fell, landing on her hands and knees." (Tr. 685).
7. Vidan Family Chiropractic. Two months after the accident (February 28, 2013), Claimant is seen at Vidan Family Chiropractic. (Tr. 1065). They record this history: "the onset of the pain was sudden and was first noticed 2 months ago."

[13] Note that this history was given by Employee on January 24, 2013. Employee didn't hire counsel until May 2013. (Tr. 1152).

(Tr. 1065).

8. Dr. Labore. Two months after the accident (March 7, 2013), Claimant sees Dr. Labore a physician at the Washington University Department of Orthopedics. (Tr. 679). He records this history: "a 49-year-old female who reports falling forward onto her hands at work on January 8." (Tr. 679).

None of these records supports the Commission's finding that there *wasn't* a dangerous substance on the floor. Some of them simply say that "she fell," or "she slipped." One of them supports Claimant's testimony that she walked through a lot of salt to get into the building. The ones that discuss the *cause* of her fall include the initial emergency room visit (unsure what caused her to fall; fall caused by slipping, tripping or stumbling), Concentra Medical Center (she slipped and fell), ProRehab (she slipped on linoleum and fell), and the Logan College of Chiropractic (walked through lots of salt in the parking lot before entering the school, slipping, and falling).[14]

3. Claimant's Burden of Proof

We know for certain that *there was a slip*, as there were numerous references to this throughout the record. But the question is *what caused her to slip*, because Claimant

[14] Note that the Commission majority said that it could not rely on the history from Logan College because its history did not *also* contain the words "moist and dirty:" words which were used by Employee at trial. (Award p. 1, footnote 1). This ruling reveals an unrealistic expectation that a human being will speak robotically over time, and an unrealistic expectation that a doctor's records will contain the same level of detail as testimony given in a legal proceeding, recorded by a stenographer. "There is no requirement that the medical records report employment as the source of injury." *Daly v.*

has to prove a risk source connected with her employment. Some things can be eliminated from consideration. We know from the medical records and opinions that Claimant had no pre-existing medical conditions that would cause her to fall, so that is ruled out. (Tr. 64). We also know from Claimant's testimony that there weren't any potential causes from things unrelated to her employment, such as her clothing, so that is ruled out as well. (Tr. 16-17). And we know from Claimant's testimony and the Logan records that the floor was soiled. So the question for the Court is this: is this enough to establish compensability? That is, do evidentiary principles require Claimant to present testimony, for instance, from a physicist who states that the chemical composition of the linoleum floor, together with the skid resistance of her rubber soled shoes – combined with her weight, speed and stride – resulted in a coefficient of friction which was overcome by the chemical mixture of sodium chloride and moisture to result in the slippage of her boot? No they don't. As stated by the Commission dissent (Record on Appeal p. 38), Missouri law says just the *opposite*. The Eastern District has said:

> [t]here is no requirement that Claimant must personally identify the specific cause of her fall; a reasonable inference regarding the cause was sufficient. In fact, it is well settled that to prove causation in slip-and-fall cases "a plaintiff may rely on circumstantial evidence" because he or she "will not know exactly what happened or what caused the fall.

Dorris v. Stoddard County, 436 S.W.3d 586, 590 (Mo.App. 2014). The Southern District has said the same. *Tiger v. Quality Transp., Inc.*, 375 S.W.3d 925, 927 (Mo.App. 2012). And the Western District has as well. *Brown v. Morgan County*, 212 S.W.3d 200, 204

Powell Distrib., Inc., 328 S.W.3d at 259.

(Mo.App. 2007). See also the Supreme Court's case of *Georgescu v. K Mart Corp.*, 813 S.W.2d 298, 300 (Mo.banc 1991) (in a matter involving a slip and fall, a submissible case on the issue of causation can be made on circumstantial evidence). So in other words, even without a detailed investigation having been performed, the substantial competent evidence leads only to the conclusion, through circumstantial evidence, that Claimant slipped because of an accumulation of salt, or moisture, or ice, or dirt – or some combination of them all – being tracked from Employer's parking lot onto a slick linoleum floor: a condition created at least partially by Employer's failure to provide any sort of floor mats to absorb the pollutants. (Tr. 18-19).

And it is important to remember when considering whether an inference is reasonable, such a determination does not have to be done with "certainty." Claimant only needs to prove that it is *probable* (more likely than not) that there was a risk source connected to her employment. *Cole v. Alan Wire Co.*, 521 S.W.3d 308, 315 (Mo.App. 2017).

4. Equal Exposure in Non-Employment Life

Intertwined in the "arising out of" analysis is the concept that sometimes slip and fall cases aren't compensable because the employee was equally exposed to the same risk of injury in their non-employment life. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d at 512. In other words, if the general public was exposed to the same risk, then the employment has not created a "risk source" that is peculiar to the employment. *Id.* In

Scholastic, Inc. v. Viley, 452 S.W.3d 680 (Mo.App. 2014), the employee slipped and fell on a parking lot while leaving work, thereby sustaining injury to his right knee. The Court found that the claim was compensable, because even though the employee was exposed to icy parking lots in his non-employment life, the employer controlled the parking lot, and "the hazard at issue was *not* the hazard of slipping on ice in general, but rather the hazard of slipping on *that* ice in *that particular* parking lot." (emphasis original). *Id.*, (*quoting Dorris v. Stoddard County*, 436 S.W.3d 586, 592 (Mo.App. 2014)); see also *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863, 867-868 (Mo.App. 2012) (finding that the employee's injury resulted from being in an unsafe location as a function of this employment and slipping due to the unsafe icy conditions).

In *Missouri Dep't of Soc. Services v. Beem*, 478 S.W.3d 461, 468 (Mo.App. 2015), the Western District put it this way:

> [a] claimant is not required to prove both that the hazard from which her injury arose was related to her employment and that the hazard was one which she was not equally exposed to in her nonemployment life. Rather, the claimant has the burden of proving that her injury was caused by [a] risk related to her employment activity *as opposed to* a risk to which she was equally exposed in her "normal nonemployment life." Meaning, implicit in a finding that the claimant was exposed to the risk from which her injury arose *because* of her employment, is a finding that the claimant could have avoided the risk outside of her employment.

(emphasis original).

It is also important to remember that Claimant was carrying work materials at the time that she fell, something which could cause her to walk more awkwardly, or prevent her from catching herself and preventing the fall. (Tr. 17). In *Pope v. Gateway to the W.*

Harley Davidson, 404 S.W.3d 315 (Mo.App. 2012), the employee was injured when he stumbled on stairs while carrying a motorcycle helmet that his employment required him to have. The Court found that the helmet differentiated his case from the *Johme* decision, because his employment required him to carry his helmet, and the helmet thereby increased his risk of injury. *Id.* at 320. This was despite the fact that he also carried and wore a helmet in his non-employment life. *Id.*

And so, the issue is not a matter of whether we can conceive of an instance where a member of the general public could also be exposed to a similar hazard; the issue is whether the general public is exposed to *that* hazard at *that* jobsite. In the present matter, the general public was not exposed to *that* slippery floor in *that* school building. And the general public certainly isn't parking on the staff parking lot, walking through Employer's salt and ice, before heading past security, and into the school building. And they aren't distracted by a greeting from a security guard. (Tr. 1042-1043). Claimant was exposed to the risk of slipping and falling *because of* her employment.

5. Deference to the Commission on Questions of Fact

The appellate courts generally defer to the Commission "on issues involving the credibility of witnesses and the weight to be given [to] testimony," acknowledging that "the Commission may decide a case upon its disbelief of uncontradicted and unimpeached testimony." *Abt v. Mississippi Lime Co.*, 388 S.W.3d 571, 577 (Mo.App. 2012). That deference is meant to acknowledge that the Commission was designed to be

the trier of fact. But as with most things, deference has limitations. The Commission can't just label someone to be a liar without having some proof that they have lied. This is a concept throughout American jurisprudence. See, *e.g.*, *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo.banc 2000) (in a defamation action, a cause of action may only proceed if there is evidence that the defamatory statement was in fact false). Reputation is protected, and if you label someone as a liar, you had better have evidence that they are, in fact, a liar.

The same reasoning applies to decisions of the Commission: their powers of deciding factual issues are not unlimited; they can't label someone to be a specious, malingering liar without some proof that they are in fact so. "[W]here the record reveals no conflict in the evidence or impeachment of any witness, the reviewing court may find the award was not based upon disbelief of the testimony of the witnesses." *Abt*, 388 S.W.3d at 578 (*quoting Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo.banc 1960)). It is true that the Commission is free to disbelieve uncontradicted and unimpeached testimony, but only when the Commission has expressly declared that it disbelieves the testimony, or where its award shows that its disbelief of the employee or her doctor was the basis of the award. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 907 (Mo.App. 2008). But while doing so, "[t]he Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their finding upon conjecture or their own mere personal opinion

unsupported by sufficient competent evidence." *Id*.; see, also, *Abt*, 388 S.W.3d at 578.

When it is understood that Claimant's Somatic Symptom Disorder is causing the discrepancy between her complaints and her examination findings, there was nothing else upon which the Commission majority could criticize her credibility. The majority never said they found an inconsistency in her testimony; nor did it find she had a history of lying. And neither Employer nor the Fund presented any contrary testimony which impeached Claimant's testimony. So it simply comes down to the Commission majority overruling two board-certified psychiatrists on Claimant's diagnosis, and proceeding on with a rather fantastical "Freudian slip theory." The Commission majority clearly had no support from the "competent and substantial evidence," as the law requires them to have.[15] Of course they found discrepancies in the medical records: they were looking for something to "hand their hat on." But the only discrepancies they could come up with were small and strange. They judged the case backwards, first deciding she is a liar, and then looking for proof, instead of the other way around.

The Commission majority erred in finding that Claimant's injuries did not arise

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[15] Compare with *Adamson v. DTC Calhoun Trucking, Inc.*, 212 S.W.3d 207, 216 (Mo.App. 2007) (affirming the Commission's decision where "[t]he Commission found [c]laimant is not believable and, unfortunately presents with a history of being less than truthful"); *Porter*, 402 S.W.3d at 174 (affirming the Commission's award where "the Commission found there was a 'lack of any credible evidence of the circumstances of [claimant's] fall'"); *Thompson*, 545 S.W.3d at 892, 894 (affirming the Commission's award, in which the Commission relied solely on claimant's testimony that a foreign substance was present on the floor where claimant slipped; the Commission found claimant to be credible because she testified consistently in her deposition and before the Administrative Law Judge that she slipped on a wet surface).

out of her employment, as the Commission failed to apply Missouri law, which allows an injured worker to prosecute their case based upon reasonable inferences drawn from circumstantial evidence. *Dorris v. Stoddard County*, 436 S.W.3d at 590. The Commission's Award should be reversed and replaced with a finding that the substantial and competent evidence proves that Claimant met her burden in establishing that her injuries occurred as a result of a risk-hazard connected with her employment, such that her injuries can be said to arise out of her employment with Employer.

ARGUMENT II

The Labor and Industrial Relations Commission erred in finding that Claimant did not prove she sustained accidental injury which occurred in the course of her employment with Employer, because under §287.020.3 of the workers' compensation act an injury occurs in the course of the employment relationship when it occurs within the time and place where the employee may reasonably be engaged in either fulfilling the duties of her employment, or something incidental thereto, in that the sufficient and competent evidence found by the Commission proved that Claimant's injuries occurred while she was traveling upon Employer's premises as she was headed to her assigned work area when she slipped and fell.

I. Preservation of Error

The issue of "accident arising in the course of employment" was preserved for appellate review. Following the Administrative Law Judge's Award of May 18, 2018 (Record on Appeal p. 8-22), Claimant filed an Application for Review with the Labor and Industrial Relations Commission (hereinafter "Commission") on May 22, 2018 (Record on Appeal p. 23-31), in which this issue was raised. Then, following the Award of the Commission on January 17, 2019 (Record on Appeal p. 33-52), Claimant filed her Notice of Appeal with the Missouri Court of Appeals, Eastern District (Record on Appeal p. 53-79) on January 23, 2019, in which this issue was raised.

II Standard of Review

This Court should reverse an award when 1) the Commission acted without or in excess of its authority, 2) the award was procured by fraud, 3) the facts found do not support the award, or 4) the record does not contain sufficient competent and substantial evidence to support the award. Mo.Rev.Stat. §287.495.1 (2013). See also *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo.banc 2003). A review of an award from the Commission must include a determination of whether it was authorized by law and supported by competent and substantial evidence on the whole record. See *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo.banc 2012).

When examining the record, the Court determines whether, when considering the whole record, there is "sufficient competent and substantial evidence to support the award." *Malam v. Dep't of Corr.*, 492 S.W.3d 926, 928 (Mo.banc 2016). That requires that the Court look at the entire record, not just the evidence that supports the lower decision. See *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 258 (Mo.App. 2008). While the Court should defer to the Commission on issues involving the credibility of witnesses, the Court is not bound to defer to the Commission's interpretation and application of the law. See *Malam*, 492 S.W.3d at 929, then *Greer v. Sysco Food Servs.*, 475 S.W.3d 655, 664 (Mo.banc 2015). "Nothing requires this Court to review the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the Commission's decision." *Hornbeck*, 370 S.W.3d at 629. The whole record is considered to determine if there is sufficient competent and substantial evidence

to support the Commission's award. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo.banc 2012). "When the relevant facts are not in dispute, the issue of whether an accident arose out of and in the course of employment is a question of law requiring *de novo* review." *Id.*, (*citing Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671, 672 (Mo.banc 2009)).

III. Controlling Statutory Provisions

The Missouri workers' compensation law defines an "accident" as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." Mo.Rev.Stat. §287.020.2 (2017). The statute also requires that the injury must arise out of and in the course of employment. Mo.Rev.Stat. §287.020.3 (2017). Injuries are only deemed to arise out of and in the course of employment if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.

Mo.Rev.Stat. §287.020.3(2) (2017). It has long been held that the phrases "arising out of" and "in the course of" are not synonymous, but rather, are separate tests which must be met. *Leilich v. Chevrolet Motor Co.*, 40 S.W.2d 601, 605 (Mo. 1931), *superseded on*

other grounds by constitutional amendment, Mo. Const. art. V §22, *as recognized in Davis v. Research Medical Ctr.*, 903 S.W.2d 557, 562 (Mo.App. 1995), *overruled in part by Hampton*, 121 S.W.3d at 223.

IV. The Commission Majority's Findings on "in the course of"

As noted supra, it is also incumbent upon Claimant to also prove that her injury occurred "in the course of" her employment. "An injury occurs 'in the course of' employment 'if the injury occurs within the period of employment at a place where the employer reasonably may be fulfilling the duties of employment.'" *Abel v. Mike Russell's Std. Serv.*, 924 S.W.2d 502, 503 (Mo.banc 1996) (*quoting Shinn v. General Binding Corp.*, 789 S.W.2d 230, 232 (Mo.App. 1990)).

Claimant was injured on Employer's premises, in Employer's building, after parking her car on Employer's parking lot. (Tr. 16). When the fall occurred, she was on her way to "clock in", before heading to her classroom. (Tr. 20). She was carrying folders to administer testing, along with a curriculum folder, student papers, and lesson plans. (Tr. 17). She was briefly distracted as she turned her head to say "hello" to a security guard. (Tr. 1042-1043). There was no evidence in the Record which contradicted this testimony. But the Commission majority reviewed this same evidence and determined that Claimant's injuries *did not* occur "in the course of" her Employment. They said:

> [w]e also note that employee had not even clocked in for work, was not on any work assignment, and had not taken any action related to work before

> the incident, e.g., checked in with the principal or department head, entered a classroom, made copies for class, etc. Employee was not in her course of employment at the time of the incident because she had not started for the day."

(Record on Appeal, p. 35).

The Commission majority's rationale is in direct contradiction to years of Missouri appellate precedent. In *Yaffe v. St. Louis Children's Hospital*, 648 S.W.2d 549, 551 (Mo.App. 1982), the inquiry into whether an accident occurred "in the course of" employment was described as such:

> [a]n employee's injury occurs in the course of employment if the injury is the result of an activity which is reasonably incidental to the conditions or performance of her work and the employer could have reasonably anticipated it. In determining whether or not the injury arose in the course of employment, the focus is on the mutual benefit to the employer and employee of the activity in which the employee was involved when injured. Activities within reasonable limits of time and place, for the comfort or convenience of the employee, are considered incidental to employment because they benefit the employee and thereby indirectly benefit the employer. Therefore, injuries which occur during these incidental activities are held to have been in the course of employment.
>
> *Id. (citing Jones v. Bendix Corp.*, 407 S.W.2d 650, 652-53 (Mo. App. 1966) then *Thompson v. Otis Elevator Co.*, 324 S.W.2d 755, 758-59 (Mo. App. 1959)).

The Commission majority's reliance on Claimant not having "clocked in" was clear error, as this is a legal principle that was resolved long ago:

> [a]rrival and departure are adjuncts to the performance of duty and are thus in furtherance of the employer's business, providing the event occurs on the employer's premises.

Zahn v. Associated Dry Goods Corp., 655 S.W.2d 769, 773 (Mo.App. 1983). Here is another:

> [o]rdinarily, injuries sustained by an employee on his employer's premises before or after work while he is either entering or leaving the premises are deemed to arise out of and in the course of employment, and therefore satisfy that requirement for compensability under The Workers' Compensation Law.

Goodman v. St. Louis Auto Auction, 667 S.W.2d 22 (Mo.App. 1984).

And in *Kunce v. Junge Baking Company*, 432 S.W.2d 602 (Mo.App. 1968), an employee was injured while on his way to his workstation. The court noted that an injury "arises 'in the course of' the employment when it occurs within the period of the employment at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto." *Kunce*, 432 S.W.2d at 609 (*citing Lampkin v. Harzfeld's, Mo*, 407 S.W.2d 894, 897 (Mo. 1966)). "It cannot be denied it is most necessary, and thus incidental to the employment, that an employee travel to and from the entrance at his place of labor on his employer's premises to get to and from his assigned place of employment." *Id.* "The inevitable acts of human beings in ministering to their personal comfort while at work, such as seeking warmth and shelter, heeding a call of nature, satisfying thirst and hunger, washing, resting or sleeping, and preparing to begin or quit work, are held to be incidental to the employment under the personal comfort doctrine." *Id.* "These conclusions are justified because as long as the employee is on the employer's premises, he is subject to all the environmental hazards associated with the employment and to the employer's right to

control and direct." *Id.*

The years of judicial precedent on this issue are still applicable today, despite changes to the workers' compensation statute which took place in 2005. In *Scholastic, Inc. v. Viley*, 452 S.W.3d 680 (Mo.App. 2014), the court discussed the 2005 statutory changes and said that cases such as Claimant's are still deemed to occur in the course of her employment, because she was injured on the Employer's premises. They said:

> [i]n 2005, section 287.020.5 was rewritten. It now provides, in pertinent part, that:
>
> > The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.
>
> Thus, the amendment effectively codified a portion of the judicially created "extension of premises" doctrine.

Id., 452 S.W.3d at 683 (*quoting* Mo.Rev.Stat. § 287.020.5 (2005)).

Claimant's injury occurred as she was on school grounds, entering through an approved area of ingress and egress, and headed toward her area of performing her work duties. The Commission majority finding that Claimant's injuries did not occur in the course of her employment was clear error. Injuries occurring on an employer's premises are compensable so long as the employee is engaged in fulfilling the tasks of her employment or something incidental thereto. The courts determined long ago that injuries on the employer's premises, on the way to "clock in," are injuries which occur in the course of the employment relationship. The Commission's Award should be reversed

and replaced with a finding that the substantial and competent evidence proves that Claimant met her burden in establishing that she was injured while fulfilling the duties of her employment, or something incidental thereto, such that it can be said that her injuries occurred in the course of her employment.

ARGUMENT III

The Labor and Industrial Relations Commission erred in finding that Claimant failed to prove a medical causal connection between her accident and her injuries, through its determination that Claimant's subjective complaints were not caused by her diagnosed medical condition, because Missouri law holds that the Commission may not substitute its own judgment for that of the expert medical witnesses on complicated medical issues, and because the substantial and competent weight of the evidence did not support the Commission's determination, such that the Commission acted without or in excess of its powers, in that there was a unanimity of medical opinion from the board-certified psychiatrists that Claimant's subjective complaints are an expected manifestation of her diagnosed Somatic Symptom Disorder and are not a result of lying or malingering, and in that the Commission's Award is not supported by the sufficient and competent evidence required by law.[16]

[16] The Administrative Law Judge said he had decided this matter based upon the issue of "medical causation," meaning the causal relationship between Claimant's fall and her injuries. (Record on Appeal, p. 21). The Commission majority indicated in its Award that it was deciding this matter based solely on the issues of "arising out of" and "in the course of" employment, saying "[a]ll other issues are moot". (Record on Appeal, p. 35). On the other hand, the Commission majority also stated that its Award is "supplemental" to that of the Administrative Law Judge, meaning its Award is "in addition" to that of the Judge. (Record on Appeal, p. 33). Since Employee is uncertain as to whether the Commission has also determined the medical causation issue, as did the Judge, she proceeds with this third point, which challenges the medical causation finding made by the Administrative Law Judge. If the Court finds that the Commission did not in fact decide the medical causation issue, then Claimant believes this is one of the issues which needs to be addressed by the Commission upon remand.

I. Preservation of Error

The issue of "medical causation of Claimant's injuries" was preserved for appellate review. Following the Administrative Law Judge's Award of May 18, 2018 (Record on Appeal p. 8-22), Claimant filed an Application for Review with the Labor and Industrial Relations Commission (hereinafter "Commission") on May 22, 2018 (Record on Appeal p. 23-31), in which this issue was raised. Then, following the Award of the Commission on January 17, 2019 (Record on Appeal p. 33-52), Claimant filed her Notice of Appeal with the Missouri Court of Appeals, Eastern District (Record on Appeal p. 53-79) on January 23, 2019, in which this issue was raised.

II. Standard of Review

This Court should reverse an award when 1) the Commission acted without or in excess of its authority, 2) the award was procured by fraud, 3) the facts found do not support the award, or 4) the record does not contain sufficient competent and substantial evidence to support the award. Mo.Rev.Stat. §287.495.1 (2013). See also *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220, 223 (Mo.banc 2003). A review of an award from the Commission must include a determination of whether it was authorized by law and supported by competent and substantial evidence on the whole record. See *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo.banc 2012).

When examining the record, the Court determines whether, when considering the whole record, there is "sufficient competent and substantial evidence to support the

award." *Malam v. Dep't of Corr.*, 492 S.W.3d 926, 928 (Mo.banc 2016). That requires that the Court look at the entire record, not just the evidence that supports the lower decision. See *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 258 (Mo.App. 2008). While the Court should defer to the Commission on issues involving the credibility of witnesses, the Court is not bound to defer to the Commission's interpretation and application of the law. *Malam*, 492 S.W.3d at 929 then *Greer v. Sysco Food Servs.*, 475 S.W.3d 655, 664 (Mo.banc 2015). "Nothing requires this Court to review the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the Commission's decision." *Hornbeck*, 370 S.W.3d at 629. The whole record is considered to determine if there is sufficient competent and substantial evidence to support the Commission's award. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo.banc 2012). "When the relevant facts are not in dispute, the issue of whether an accident arose out of and in the course of employment is a question of law requiring *de novo* review." *Id.*, (*citing Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671, 672 (Mo.banc 2009)).

III. Medical Causation of Claimant's Psychiatric Condition

There is agreement among the psychiatrists that Claimant has a psychiatric disorder, so the question arises as to whether that disorder was caused by the accident of January 8, 2013. Dr. Bassett found Claimant to have three separate psychiatric disorders: 1) *pre-injury* Anxiety Disorder (propensity for palpitations and arm discomfort when

under stress), 2) *work-injury-related* persistent Somatic Symptom Disorder with predominant pain, severe with a component of persistent conversion disorder (functional neurological symptom disorder) with special sensory symptoms, and 3) *work-injury-related* Major Depressive Disorder, single episode, severe, flowing from pain and perceived disability caused by the work-injury related somatic symptom disorder and conversion disorder (visual) symptoms. (Tr. 155-157). He explained that Claimant's accident caused the Somatic Symptom Disorder, which then produced a Depressive Disorder. (Tr. 158, 166). He specified Claimant's Somatic Symptom Disorder type, saying it is a "Somatic Symptom Disorder with predominant pain and a component of conversion disorder with a special sensory symptom, visual". (Tr. 166). He further specified that it classified as "persistent" because it has been present for more than six months. (Tr. 166). He said that the depressive disorder thereby flowed from the work accident. (Tr. 167).

Like Dr. Bassett, Dr. Harbit diagnosed Claimant with a Somatic Symptom Disorder. (Tr. 1225). However, she testified the work incident of January 8, 2013, was not the prevailing factor in causing it. (Tr. 1226). Rather, she said it was a pre-existing condition. In explaining her conclusion, she noted evidence of Claimant having pre-existing physical symptoms which were unexplained by the physicians. (Tr. 1226). Specifically, she noted that Claimant complained of multiple joint complaints to her primary care physician in 2010 which resulted in a workup for rheumatoid arthritis. (Tr. 1226). She reasoned that Claimant had been very anxious about this, such that she was

prescribed Xanax.[17] (Tr. 1227). She testified that it was therefore her opinion that there was evidence of a Somatic Symptom Disorder prior to the work accident of January 8, 2013. (Tr. 1226). She explained:

> [a Somatic Symptom Disorder] does not usually happen in response to an event. It's usually something that is more pervasive. So it's usually more of a life-long kind of a disorder. So we tend to think of it sort of developing gradually, maybe starting late teens, early adulthood, and then kind of usually fluctuating over time, but is always there to some degree.

(Tr. 1228).

Both Dr. Bassett and Dr. Harbit are credible in that they are both board-certified psychiatrists. However, Dr. Bassett's opinion is more persuasive because he explained how Claimant's Somatic Symptom Disorder does not meet the criteria for being a pre-existing condition. He was specifically asked whether the disorder develops from a single event (such as Claimant's work accident), versus something that is more gradual. He said:

> [t]hat's a good question. And the answer is, it depends. Certainly there are times where you, where I encounter a patient who has a host of physical symptoms in the absence of or in excess of findings on physical exam and diagnostic testing. And *if I have sufficient medical records or data or*

[17] Dr. Harbit later admitted on cross-examination that she was wrong in this regard, that there was no evidence of anxiety with these complaints, nor was Xanax prescribed. (Tr. 1240).

> *historical information*, I'm able to ascertain that that individual has had somatic symptom disorder type symptoms for years. And then there are also people, and [Claimant] is more in that group, who don't have much, if any, in the way of a somatic symptom disorder history and something happens, and then they have a host of somatic symptom disorder symptoms. I've seen it both ways. (emphasis added).

(Tr. 183). Dr. Bassett also explained why Claimant could *not* be diagnosed with a pre-existing Somatic Symptom Disorder, saying:

> [y]ou have to have enough unexplained symptoms to make the diagnosis of somatic symptom disorder, and she doesn't have a lot of them before this injury.[18]

(Tr. 195-196). And so, he was then asked about the pre-existing symptoms that Claimant *did* have, and he likened Claimant's pre-existing complaints to an "earache". He said:

> [i]f someone comes in and sees me and is like, I've got an earache that nobody can explain, but I'm doing my job okay, and I still spend time with my wife and kids, and I'm still doing all of my hobbies, and working out in the yard, and pretty much everything's okay in my life except I've got this weird feeling in my ear; I mean, I guess you could argue it's a somatic symptom disorder, but not a really bad one. It's not causing them a lot of

[18] Note that the psychiatric manual used by both psychiatrists requires a finding of "one or more somatic symptoms that are distressing or result in significant disruption of daily life". Otherwise the diagnosis cannot be made. (Tr. 1296).

problem.

(Tr. 196).

The question of whether Claimant's Somatic Symptom Disorder was caused by the work accident therefore turns to a large degree on the question of whether Claimant had sufficient symptoms *before she fell at work* on January 8, 2013 to allow for a diagnosis of Somatic Symptom Disorder. And second, if she did have pre-existing signs of Somatic Symptom Disorder, does it matter to the analysis of the medical causation issue?

A. Did Claimant have somatic complaints prior to January 8, 2013?

Dr. Harbit testified that she believes Claimant's Somatic Symptom Disorder pre-existed her work injury because Claimant had pre-existing physical symptoms which were evaluated and found to have no explanation for the symptoms. (Tr. 1226). Specifically, she based her opinions on the notes of Dr. Dalu in 2010 which she said resulted in a workup for rheumatoid arthritis, without producing results. (Tr. 1226). She said that Claimant was very anxious about this, and she was prescribed Xanax.[19] (Tr. 1227). It is easy enough to review Claimant's pre-existing medical records, as entirety of the records

[19] There is no support in the record for Dr. Harbit's statement that Employee was prescribed Xanax due to anxiety related to complaint of joint pain. Dr. Dalu's records show that the only time Employee received Xanax was when a family member was diagnosed with cancer. (Tr. 949). Dr. Harbit later admitted on cross-examination that she was wrong in this regard. (Tr. 1240).

in the Transcript consists of these medical entries:

- 6/3/05 SIU Student Health (Tr. 912): routine PAP test.
- 7/7/05 Memorial Hospital (Tr. 935): low back pain after overturning a golf cart.
- 7/28/05 Memorial Hospital (Tr. 931): routine mammogram.
- 12/12/06 Memorial Hospital (Tr. 922): chest pain on exertion.
- 5/4/10 Dr. Dalu (Tr. 947): multiple joint pain for six months.
- 5/12/10 Dr. Dalu (Tr. 947): still has pain in left shoulder.
- 12/17/10 BarnesCare (Tr. 663): right shoulder and left foot pain after fall at work.
- 1/5/11 BarnesCare (Tr. 665): pain in shoulders, back and left calf after fall at work.
- 1/5/11 Dr. Dalu (Tr. 949): has [severe?] anxiety because her family member has cancer. Anxiety neurosis.
- 6/20/12 Dr. Dalu (Tr. 950): sinusitis.

Once again, this is the *entirety* of the evidence concerning Claimant's pre-existing medical conditions. And as can be seen, every one of Claimant's subjective complaints is explainable by the findings on her physical examination, other than, perhaps, the entries in May of 2010 with Dr. Dalu. In those two entries Claimant had pain that was not due to

a fall or accident, and the cause of the complaints were not found.[20] What this means is that *Dr. Harbit has only two notes in the prior medical records that could plausibly be said to somehow support her diagnosis of a pre-existing Somatic Symptom Disorder*. Other than that, she has nothing.[21]

In the end, the conclusions drawn by Dr. Harbit are simply not supported by Claimant's testimony or the pre-existing medical records. At best we have two entries in May of 2010 for complaints that weren't explained. And as Dr. Bassett testified, such entries make a very weak case for a pre-existing Somatic Symptom Disorder. (Tr. 196). Remember that Dr. Harbit agreed she was able to achieve her opinion – that the disorder was preexisting – by application of the diagnostic criteria required by the Diagnostic and Statistical Manual of Mental Disorders, otherwise known as the DSM V. (Tr. 1237). The manual requires that the pre-existing symptoms result in *significant disruption of daily life* (there is no evidence Claimant ever missed work in the past), requires that *the symptoms are persistent* (not just two entries in a doctor's chart), requires that *there is persistent high anxiety* (Claimant was seen for anxiety one time, when a relative had cancer), and requires that *"the state of being symptomatic" is persistent*, meaning more than six months (Claimant did have prior symptoms of joint pain for six months, but then

[20] Note that the psychiatric manual used by both psychiatrists requires a finding that "the state of being symptomatic is persistent (typically more than 6 months)". Otherwise the diagnosis cannot be made. (Tr. 1296).

[21] The Court should note that Dr. Harbit previously spoke at a seminar for insurance claims professionals entitled "Aggressively Defending the Most Common Stress-related Claims: The Forensic Psychiatric IME". (Tr. 1303).

there was nothing in the three years leading up to the work accident). (Tr. 1296). Claimant testified that before the work accident she danced twice per week, played tennis, and ran for exercise in St. Louis' Forest Park. (Tr. 64).

B. Even if it were found that Claimant had prior somatic complaints, would it matter to the analysis?

Even if we were to assume for the moment that Dr. Harbit is correct – that Claimant had a pre-existing Somatic Symptom Disorder – this would not change the fact that Claimant's health took a severe turn for the worse after the fall at work on January 8, 2013. Missouri workers' compensation law is well settled in holding that where a work accident is the prevailing factor in aggravating or exacerbating a pre-existing condition, the resulting aggravation is compensable.[22] See *Maness v. City of De Soto*, 421 S.W.3d 532 (Mo.App. 2014). Dr. Bassett explained that "there are also people, and [Claimant] is more in that group, who don't have much, if any, in the way of a somatic symptom disorder history and something happens, and then they have a host of somatic symptom

[22] In analyzing this issue, it is important to remember that the law does not require the injured worker to prove that the accident caused the "diagnosis". She only needs to prove that the accident caused the "condition". *Bowman v. Central Missouri Aviation, Inc.*, 497 S.W.3d 312, 321 (Mo.App. 2016). So, for instance, in the present matter, Employee does not even need to prove that her injury caused the diagnosis of Somatic Symptom Disorder, she only needs to prove that the accident was the prevailing factor in causing her current *condition*, meaning proof that her pre-existing *diagnosis* was aggravated to the point of being a disabling *condition*. The Labor and Industrial Relations Commission has explained that a "condition" is "a mode or state of being," or "the physical status of the body as a whole . . . or one of its parts". *Bowman v. Central Missouri Aviation, Inc.*, 2015 MOWCLR LEXIS 111 (2015).

disorder symptoms". (Tr. 183). The condition of Claimant's Somatic Symptom Disorder is medically causally related to her work accident.

A review of an award from the Commission must include a determination of whether it was authorized by law and supported by competent and substantial evidence on the whole record. See *Hornbeck*, 370 S.W.3d at 629. The Commission did not have competent and substantial evidence to support its Award, denying benefits to Employee for her psychiatric injury.

IV. Medical Causation of Claimant's Physical Injuries

A. Factual Evidence

With regard to her allegation of *physical* injury from the work accident, Claimant produced the testimony of Dr. David Volarich. He diagnosed Claimant with a severe cervical strain with left shoulder girdle myofascial pain and post-traumatic headaches. (Tr. 101). He also diagnosed a right shoulder strain/sprain with residual myofascial pain, a lumbar strain/sprain and disc protrusion at L5-S1 without radicular symptoms, a right hip trochanteric bursitis, and a right knee contusion. (Tr. 101). He testified that the accident on January 8, 2013 caused a whiplash injury to Claimant's neck and low back and jammed her right shoulder and right hip; and he said the accident was the primary and prevailing factor causing each diagnosis. (Tr. 102).

On the other hand, Employer/Insurer produced the testimony of Dr. Bernard Randolph. He diagnosed Claimant with contusions to her knees and a lumbar strain

resulting from the injury of January 8, 2013. (Tr. 1183).

The initial conclusion to be drawn from the opinions of Dr. Volarich and Dr. Randolph stems from their *agreements*. They agree that the fall at work on January 8, 2013 caused injuries to Claimant in the form of a lumbar sprain/strain and a right knee contusion.[23]

Then there is the issue of the Doctors' *disagreements*. Dr. Volarich found a disc protrusion, a right hip bursitis, a neck injury and a right shoulder injury (Tr. 101-102), whereas Dr. Randolph did not. Dr. Randolph found a contusion to Claimant's left knee (Tr. 1183), whereas Dr. Volarich did not. Then we have the medical records, which contain a variety of diagnoses from the various physicians. *In general*, these are the diagnoses made by the various treating physicians:[24]

1. St. Mary's Hospital ER: contusion of unspecified site. (Tr. 335)
2. Concentra: bilateral knee contusions and lumbar strain. (Tr. 1045).
3. ProRehab: bilateral knee contusions and lumbar strain. (Tr. 1092).
4. Dr. Bowen: recurrent headaches, muscular back pain, pain in hips and knees. (Tr. 617).

[23] Given this agreement, it is impossible to rationalize the Commission majority's determination that absolutely no injury occurred as a result of the fall at work.

[24] Some of the physicians changed their diagnoses from time to time, such that a complete review of their records may show some discrepancies with the information contained in this paragraph. The changes appear to have been in reaction to the results of testing, as well as to changes in Employee's complaints and findings during treatment, which, this writer would argue, is a result of the Somatic Symptom Disorder.

5. Logan College of Chiropractic: low back pain, knee pain, and tension headaches. (Tr. 553).

6. Dr. Cutuk: right iliotibial band syndrome, early bilateral knee osteoarthritis, old L1 compression fracture, mechanical back pain. (Tr. 1080).

7. Vidan Family Chiropractic: injury to lumbar nerve root; spondylosis lumbosacral spine without myelopathy; rib fracture unspecified; closed fracture of lumbar vertebra without mention of spinal cord injury; post trauma headaches; segmental dysfunction cervical, thoracic and lumbar spines; backache; pain in hip and thigh. (Tr. 1064).

8. Corri Payton, RN, ANP-BC: extension bias low back and posterior pelvic pain, no dural tension, L1 superior endplate compression fracture, age indeterminate. (Tr. 690). Later: nonbiased low back and right leg pain concern for radiculopathy; right knee pain with underlying arthritis. (Tr. 687).

9. Dr. Labore: severe neck pain of uncertain etiology. (Tr. 676).

10. Dr. Rivkin: left knee joint pain, vertigo, headache, and back pain. (Tr. 574). In other notes she was diagnosed with nausea, vertigo, neuropathy, GERD and sciatica.

11. Breakthrough Pain Relief Clinic: neck sprain/strain, myalgia, thoracic and lumbar intersegmental joint dysfunction. (Tr. 787-788).

12. Dr. Goldring: cervical strain and vertigo. (Tr. 1059).

13. Dr. Black: dizziness, neck pain, migraine, back and leg pain due to

fibromyalgia. (Tr. 720-721).

14. Dr. Benzaquen: chronic headache, cervical and lumbosacral pain, cervicalgia. (Tr. 1048).

Again, the diagnoses are varied. Some of the differences appear to be related to the specialties of the various physicians, as they are orthopedists, physiatrists, neurologists, internists, chiropractors, and occupational medicine doctors. And in addition to these diagnoses of physical conditions, we have to overlay the entire physical evaluation with the specter of the Somatic Symptom Disorder, as there is obviously an interplay between the two.

B. Analysis of Opinions Concerning Physical Injuries

With regard to the medical causation issues of Claimant's physical conditions, it was shown supra that the physicians agree that Claimant sustained a lumbar strain and a right knee contusion as a result of the work accident. The Commission should have found these injuries to be medically caused by the fall at work.

Left knee contusion. Then we have Dr. Randolph's diagnosis of a left knee contusion, which is supported by other medical records such as the records of Concentra immediately after the accident. (Tr. 1045).

Head and Cervical spine. Dr. Volarich testified for Claimant that Claimant had a cervical strain with a disc protrusion at C5-6, and post-traumatic headaches. Dr. Randolph testified for Employer/Insurer that he did not believe the work accident caused

the head and neck problems; he explained: "[b]ecause when I looked at the records early on she really did not have any complaints referable to the neck or head, so I didn't see where the incidents had caused injury to her cervical spine or to her head". (Tr. 94). That comment obviously raises the question of whether Claimant *did* have head and neck complaints from her accident. A review of the records shows, contrary to Dr. Randolph's statement, that when Claimant was seen by Dr. Bowen on January 18, 2013 – just ten days after the accident – she complained of headaches. (Tr. 617). When Claimant was seen at the Logan College of Chiropractic on January 24, 2013 she complained of headaches, dizziness and nausea. (Tr. 547). When Claimant saw her primary care physician (Dr. Rivkin) on January 29, 2013 she complained of severe headaches "for a few weeks" with intermittent vertigo and nausea. (Tr. 574). Even a CT scan of Claimant's head was performed on January 31, 2013, and an MRI of her brain was performed on March 18, 2013. (Tr. 612, 609). Dr. Black, a neurologist, noted headaches on May 13, 2013. (Tr. 720). Dr. Benzaquen, a neurologist, found cervicogenic headaches and occipital nerve neuralgia on August 14, 2013. (Tr. 1048). These are not the entirety of the record entries concerning Claimant's head and neck, but it is easy to see that Dr. Randolph's statements are unsupported.[25]

[25] Dr. Randolph's testimony is also suspect because he gave contradictory answers. He testified that the medical treatment Employee received through St. Mary's, Concentra, Corri Payton, Dr. Labore, and Logan Chiropractic was reasonable and necessary to cure and relieve the effects of Employee's fall at work. (Depo p. 17-18). Such treatment included care for head and neck pain. So in essence, he found treatment for the head and neck to be necessary because of the work injury, but he then says the opposite, that the conditions are not work-related.

Right hip. Dr. Volarich testified that Claimant has right hip bursitis as a result of her fall at work on January 8, 2013. Claimant has treated for her hip complaints since shortly after her work accident. At Vidan Family Chiropractic she was diagnosed, among other things, with pain in her hip and thigh. (Tr. 1064). Corri Payton, diagnosed "extension bias low back and posterior pelvic pain", among other things. (Tr. 690). The Breakthrough Pain Relief Clinic diagnosed right hip bursitis, among other things. (Tr. 872, 877).

When Claimant was examined by Employer/Insurer's expert, Dr. Randolph, she advised him of her hip complaints, and he examined the hip – finding lost strength. But *he did not offer any opinion* as to whether her problems were related to the work accident. As with the cervical complaints, he said that Claimant's initial medical treatment was necessary treatment for her fall at work, which would logically seem to include the treatment for Claimant's hip. Since Dr. Randolph did not provide an opinion on the relationship of the hip to the work injury, that leaves Dr. Volarich as the only physician to comment upon the subject. The Commission should therefore have found that Claimant sustained a right hip contusion and bursitis as a result of the fall at work on January 8, 2013.

Right shoulder. Dr. Volarich recorded that Claimant had ongoing pain, popping, and limited motion in her right shoulder. (Tr. 91). He said Claimant's right shoulder range of motion was decreased ten to fifteen percent. (Tr. 95). The impingement test was mildly positive, which Dr. Volarich testified was part of the reason Claimant

continued to have shoulder pain. (Tr. 95). He also diagnosed a right shoulder strain/sprain with residual myofascial pain. (Tr. 101). He testified that the accident on January 8, 2013, caused a whiplash injury to her neck and jammed her right shoulder, and is the primary and prevailing factor causing the diagnosis. (Tr. 102). The Commission should therefore have found that Claimant sustained a right shoulder strain/sprain when she fell at work on January 8, 2013.

A review of an award from the Commission must include a determination of whether it was authorized by law and supported by competent and substantial evidence on the whole record. See *Hornbeck*, 370 S.W.3d at 629. The Commission did not have competent and substantial evidence to support its Award, denying benefits to Employee for her physical injuries.

CONCLUSIONS

Claimant asserts that the Labor and Industrial Relations Commission erred as a matter of law in determining the issues of "accident arising out of", "in the course of", and "medical causation." Claimant requests a ruling which reverses the determination made by the Commission majority. Claimant believes that the substantial and competent weight of the evidence proves that it is reasonable to infer that her injury arose from a work-related risk source, while she was on Employer's premises, such that it should have been found that her injuries occurred by way of an accident which arose out of and in the course of her employment. The decision of the Commission majority to overrule the opinions of the expert witnesses should also be reversed in favor of a ruling which states that the substantial and competent evidence proves that some of Claimant's subjective complaints are not a result of lying or malingering, but rather, a result of a Somatic Symptom Disorder. Claimant finally requests that this matter be remanded to the Labor and Industrial Relations Commission for a determination of the remaining factual issues, which includes those of medical causation (i.e. whether psychiatric and physical symptoms are all from the work accident, versus partially pre-existing), temporary total disability, past medical bills, permanent disability, liability of the Second Injury Fund, and future medical care.

Respectfully submitted,
SCHUCHAT, COOK & WERNER

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_____

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby states that on this 5th day of December 2019, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet.

The undersigned further certifies that this brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 20,706 words. Further, this brief complies with Rules 84.06(c) and 55.03.

/s/ Dean L. Christianson
_____
Dean L. Christianson