IN THE
SUPREME COURT MISSOURI

No. SC98122

MARAL ANNAYEVA, Appellant,
v.
SAB OF THE TSD OF THE CITY OF ST. LOUIS 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 RESPONDENT SAB OF THE TSD OF THE CITY OF ST. LOUIS OF THE TSD OF THE CITY OF ST. LOUIS

Matthew D. Leonard #50807
Early & Miranda, P.C.
800 Market Street, Suite 351
St. Louis, Missouri 63101

Attorney for Respondent
SAB OF THE TSD OF THE CITY OF ST. LOUIS OF THE TSD OF THE CITY OF ST. LOUIS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Respondent hereby adopts Appellant's Jurisdictional Statement as outlined in Appellant's Brief, with the exception of the last sentence as the Employer and Fund actually filed their Application for Transfer with this Court on September 24, 2019, both of which were sustained on November 19, 2019.

STATEMENT OF FACTS

The claimant, Maral B. Annayeva filed a Claim for Compensation against the Board of Education City of St. Louis alleging she sustained physical and psychiatric injuries when she fell on January 9, 2013. The employer filed an Answer to the Claim for Compensation admitting employment, but denying all other allegations. A Final Hearing was held on February 14, 2018 in St. Louis, Missouri. The issues in dispute at the hearing were accident, arising out of and in the course of employment, medical causation, future medical care, liability for past medical expenses, temporary total disability, permanent partial/total disability and Second Injury Fund liability. (Tr. 3)

On May 18, 2018 the Administrative Law Judge issued an Award denying the Claim for Compensation on the basis that the claimant did not meet her burden of proving the incident of January 8, 2013 was the prevailing factor causing her physiological and/or psychologic complaints. (Record on Appeal P. 10-22). Following the issuance of the Award the employee filed an Application for Review. (Record on Appeal P. 23-31). The employer/insurer filed an Answer to the Application for Review requesting that the Award be affirmed. (Record on Appeal P. 32).

On January 17, 2019 the Labor and Industrial Commission issued an Award affirming the decision of the Administrative Law Judge and denying the Claim for Compensation. The Commission also issued a supplemental opinion finding that the claimant did not establish that her injury arose out of her employment because the risk source of walking was one to which she was equally exposed in her normal non-employment life. (Record on Appeal P. 33-36) . They also found that the claimant's testimony regarding the condition of the hallway at the time of the injury was not credible. (Record on Appeal P. 35).

The claimant, Maral B. Annayeva testified on her own behalf. (Tr. 5-6). She testified that she was born on February 14, 1964 in Turkmenistan. (Tr. 6). She is five feet four inches tall and weighs approximately 200 pounds. (Tr. 6). The claimant has a Bachelors Degrees in Linguistics and Masters Degrees in Public Administration and English. (Tr. 12). She began working for St. Louis Public Schools on October 29, 2007. (Tr. 12-13). She came to the United States in 2003 and prior to working for St. Louis Public Schools taught at Harris Stowe University. (Tr. 13). She held a Graduate Assistantship while a student at SIU Carbondale and also did work for the defense department as a language specialist. (Tr. 14). The claimant testified she was proficient in Microsoft Office Programs

and could type 72 words per minute when she applied to St. Louis Public Schools. (Tr. 55). She also had work experience as a Translator and Office Manager. (Tr. 56).

She testified that she was hired by the school district as a Supervisor for World Languages which required her to develop curriculum. (Tr. 53). In June 2012 her employer changed her position and she began working as a high school teacher. (Tr. 54). The change in position was not of the claimant's choosing and resulted in less pay. (Tr. 54-55). The claimant's last job for the St. Louis Public Schools was working as an English as a Second Language teacher at Roosevelt High School. (Tr. 13).

On January 8, 2013 she arrived at the school and parked in the parking lot outside the building. (Tr. 16). She was wearing black pants, shirt, vest and a wool vest and black leather boots with two to three inch heels. (Tr. 16-19). She was carrying a bag with curriculum folders. (Tr.17). She testified there was snow, ice, salt and dirt on the parking lot that she walked through prior to getting to the school entrance. (Tr. 18).

When she got to the school entrance she went through a double set of doors. (Tr. 18). She testified there was no mat on the floor. (Tr. 18-19). She walked past

the security guard and around the metal detector. (Tr. 19). She testified the floor was made of linoleum tile and was dirty, but did not have anything chipped or broken. (Tr. 19-20). On her way to the clock room to clock in the claimant testified that she slipped and fell forward. (Tr. 20-21). She landed on her hands and knees, but did not strike her head. (Tr. 51). After falling she was taken by the security officers to the school nurse's office where she was given ice for her knee and allowed to lay down. (Tr. 21-22). She testified that she felt dizzy and had pain in her knees, hip, and lower back. (Tr. 22). On the date of the incident the claimant completed a form at the request of her employer. (Tr.1040). In response to the question as to what event or condition caused the accident the claimant answered that she "could not determine the cause of the accident." (Tr. 1042). She completed a pain diagram where she marked both knees and low back as to where she was feeling the pain. (Tr. 1041). She testified that at the time she completed the form that is where she felt pain. (Tr. 50).

The claimant called a friend who took her to the emergency room at St. Mary's Medical Center. (Tr. 25). She returned to the emergency room at St. Mary's the next day due to knee and leg pain. (Tr. 25-26). She was subsequently sent by her employer to Concentra where she was given a knee brace. (Tr. 26).

The claimant returned to work for two days, but then complained of head and neck pain so she missed a day of work. (Tr. 27). She returned to work for two days after that and then stopped working. (Tr. 27).

The claimant was told her claim was denied under workers' compensation so she sought medical care on her own with her primary care physician, Dr. Bowen. (Tr. 28). She then sought additional medical care with Logan Chiropractic, nurse practitioner Corrie Peyton and Dr. Adam LaBore at Washington University Orthopedics. (Tr. 29-30). She also saw Dr. Rivkin who referred her to a neurologist. (Tr. 30). She was subsequently examined by Dr. Black, Dr. Goldring and Dr. Benzaquen. (Tr. 30). The claimant saw Dr. Farzana for psychiatric treatment. (Tr. 32). She also traveled to Germany in 2015 where she treated at a clinic for a few months. (Tr. 33). She continues to see Dr. Benzaquen for pain management. (Tr. 31-32).

The claimant wore a travel pillow around her neck during the hearing. (Tr. 35). She testified this was due to constant pain in her neck at the base of her skull and back of her head. (Tr. 35). She also wore a stocking cap, which she testified was due to pain. (Tr 36). She complained of pain from talking, laughing, and crying. (Tr. 37). She had continuing complaints of dizziness, trouble holding her

neck straight, neck pain, low back pain, and pain through her fingers, arms and shoulders. (Tr. 37-38). She also complained of hip pain, pelvic pain, and leg pain, which makes it difficult for her to walk and stand. (Tr. 38-39). The claimant also attributed pain complaints in both arms, stomach problems, liver problems, breathing problems, and depression and anxiety to the fall on January 8, 2013. (Tr. 40-41). The claimant had an accident with an overturned golf cart in 2005. (Tr. 42). She received treatment at Carbondale Hospital. (Tr. 42). She was diagnosed with a L-1 compression fracture. (Tr. 61). She testified that she had problems with migraine headaches prior to January 8, 2013. (Tr. 52). The claimant also testified that she saw Dr. Dalu for anxiety in 2011 and rheumatoid arthritis in 2010. (Tr. 52). The claimant testified that one of her daughters resides with her and helps with activities of daily living. (Tr. 57). She also testified that her daughter works so she is on her own some of the time. (Tr. 57). She testified that she walks to the drug store for medications and also walks her dog. (Tr. 44-45, 58). She does some cleaning, but her daughter helps with laundry. (Tr. 44-45). She testified that she does not have a car and drove three times in the last year. (Tr. 46).

In October 2017 the claimant took a trip with her former fiancé to Las Vegas. (Tr. 58). She flew on an airplane and the trip included walking along the

Strip and sightseeing at the Grand Canyon. (Tr. 59). She also took a trip with her daughters to Chicago where she rode in a car. (Tr. 59). She shopped on the Magnificent Mile and went to Navy Pier. (Tr. 60). The claimant owns a smart phone that has internet access. (Tr. 56). Following the January 8, 2013 injury the claimant applied for a teaching job in Sweden, but did not get the job because she did not have a Ph.D. The claimant is fluent in English, Russian and Turkmen. (Tr. 55). She has experience using Microsoft Publisher for formatting and editing. (Tr. 55).

The claimant was seen in the emergency room at St. Mary's Hospital on January 8, 2013. (Tr. 353). She gave a history of constant bilateral knee and lower back pain secondary to a fall that occurred around 7:15 a.m. (Tr. 353). It was noted there was no loss of consciousness and the injury and pain location was to the left knee, right knee, left hand and right hand. (Tr. 353). X-rays were taken of the lumbar spine and right knee. (Tr. 354). She was prescribed pain medication, diagnosed with a contusion, and discharged. (Tr. 355 – 357).

Claimant returned to the emergency room at St. Mary's Hospital the next day complaining of right and left knee pain after a fall the day before. (Tr. 381). She was prescribed additional pain medication and a splint and immobilizer were

ordered. (Tr. 400). The diagnosis remained contusion of the knee. (Tr. 400).

Claimant was evaluated at Concentra on January 11, 2013. (Tr. 1043). She gave a history of walking in, saying hello to security, and falling down. (Tr. 1043). She reported she fell forward on both knees and strained her low back. (Tr. 1043). She was diagnosed with bilateral knee contusions and lumbar sprain and instructed to continue the medications she was given in the emergency room. (Tr. 1044). When she returned to Concentra on January 15, 2013 it was noted that she had been working within her restrictions and tolerating the job well. (Tr. 1045). She was instructed to continue physical therapy and modified work duty. (Tr. 1046).

The claimant was examined by Dr. Bowen on January 18, 2013. (Tr. 729). She reported recurrent headaches and muscular pain in the back, hips and knees which was worsened by standing at work. She was given a cortisone shot in the knee and referred to an orthopedist. (Tr. 729).

The claimant sought chiropractic care at Logan College of Chiropractic on January 24, 2013. (Tr. 470). She complained of low back pain, mid back pain, headaches, bilateral knee pain and right arm pain. (Tr. 547). She reported walking through salt prior to coming inside the school building on January 8, 2013, and that while carrying her bag and coffee she slipped and fell to the ground hitting

both of her knees and torso on the ground abruptly. (Tr. 547). The claimant reported that she was prescribed medication for pain in the emergency room, but that it only made her sicker causing tension headaches, dizziness and nausea. (Tr. 547). It was noted the claimant lived a very stressful life style which had caused her to gain unwanted weight in the last two years. (Tr. 547). The claimant's subjective complaints included low back pain, knee pain and tension headache. (Tr. 547).

The claimant underwent a whole body bone scan at Mallinckrodt Institute of Technology on February 1, 2013. (Tr. 1101). The scan showed mild L1 vertebral body height loss without associated increased tracer uptake most consistent with an old compression deformity and mildly increased tracer uptake in both knees consistent with osteoarthritis. (Tr. 1101). A lumbar MRI scan from February 6, 2013 showed a chronic L1 compression deformity and mild to moderate degenerative disc disease at the L5-S1 level. (Tr. 1103-1104). A brain MRI from Professional Imaging taken on March 18, 2013 was unremarkable. (Tr. 1096).

The claimant was evaluated by nurse practitioner Corrie Payton at Washington University Orthopedics on January 28, 2013. (Tr. 689). She gave a history of a fall on January 8, 2013 and complained of pain in the back, hips, legs

and right knee. (Tr. 689). It was noted she had a past medical history of migraine headaches. (Tr. 689). It was noted that x-rays from St. Mary's on January 28, 2013 demonstrated an L1 compression fracture of indeterminate age so a bone scan was recommended. (Tr. 690). Following additional diagnostic imaging the claimant was referred to Dr. LaBore at Washington University Orthopedics who examined claimant on March 7, 2013. (Tr. 678). He reviewed x-rays of the claimant's knees, low back and pelvis along with the bone scan and MRI of the lumbar spine. (Tr. 679). He believed there were no significant findings with minimal degenerative changes in the spine and knees. (Tr. 679). Dr. LaBore noted there did not appear to be a significant structural or neurologic injury and that the vast majority of the symptoms were mechanical/muscular/functional. (Tr. 680). The claimant reported severe neck pain when she followed up on April 25, 2013 with Dr. LaBore. (Tr. 676). He assessed the claimant with severe neck pain of uncertain etiology and recommended an MRI of the cervical spine. (Tr. 676). He believed the claimant's presentation was concerning for high levels of anxiety which may play a role if he was unable to identify a patho anatomical correlate to her symptoms. (Tr. 676-677).

The claimant was examined by Dr. Goldring on April 29, 2013 where she

presented with complaints of right occipital pain that made her want to collapse. (Tr. 1059). She stated that it felt like her bones were breaking down and that her symptoms worsened just with talking loudly. (Tr. 1059). Dr. Goldring noted the claimant's MRI imaging of the brain and head CT were unremarkable. (Tr. 1059). He stated that it was difficult to put together her multitude of symptoms with a fall where she landed on her hands and knees. (Tr. 1059). He recommended physical therapy for cervical strain. (Tr. 1059).

Dr. Black at Washington University Neurology examined the claimant on May 13, 2013. (Tr. 719). The claimant complained of pain in the back of her head, episodes of loss of orientation and screaming attacks for which she went to the emergency room. (Tr. 719). Dr. Black did not believe the claimant had vertigo, but that she had dizziness and that a major problem was her posterior neck pain which was probably a variant of her old migraine. (Tr. 720-721). He also believe the claimant had diffuse back and leg pain due to fibromyalgia. (Tr. 721).

The claimant was evaluated by a neurologist, Dr. Benzaquen on August 14, 2013. (Tr. 1055). She complained of cervicalgia and pain in both occipital nerves. (Tr. 1055). Dr. Benzaquen gave the claimant a nerve block and requested her prior imaging studies. (Tr. 1055-1056). The claimant continued to follow up with Dr.

Benzaquen through 2015. On November 16, 2015 it was noted that the claimant had improved somewhat yet still had complaints of chronic migraine and myofascial pain. (Tr. 1369).

The claimant began seeing a psychiatrist, Dr. Farida Farzana on July 7, 2014. (Tr. 1135). She expressed concerns about her daughter who had graduated with a business degree but had no job and was doing part time work at Walgreens while her other daughter was studying at St. Louis University wanting to be a doctor. (Tr. 1135). She reported that she had been terminated as a teacher and her house was in foreclosure. (Tr. 1135). She complained of being unable to sleep at night due to nightmares and fear of getting hurt and talked about the oppression at home in her country of Turkmenistan where her sister was in prison. (Tr. 1135). Dr. Farzana diagnosed the claimant with a tension headache and assessed her with major depressive disorder. (Tr. 1137).

Prior to January 8, 2013 the claimant received treatment for low back pain at Memorial Hospital of Carbondale on July 7, 2005. (Tr. 935). She gave a history of being in an overturned golf cart and landing on her back. (Tr. 935). An x-ray of the lumbar spine was taken which revealed a fracture compression involving the L1 vertebral body. (Tr. 940).

The claimant saw Dr. Dalu for medical treatment in 2010 and 2011. (Tr. 947-954). On May 4, 2010 she complained of multiple joint pains that had been ongoing for six months and was diagnosed with rheumatoid arthritis. (Tr. 947). She was diagnosed with hypothyroidism and obesity on August 13, 2010 and a blood screen was recommended. (Tr. 948). She was seen for severe anxiety on January 5, 2011 and reported a family member had cancer. (Tr. 949). She was assessed with anxiety neurosis and prescribed Xanax when she had anxiety complaints on October 7, 2011. (Tr. 948-949).

Claimant was seen at Barnes Care on December 17, 2010 after slipping on the sidewalk at work. (Tr. 663). She was diagnosed with a shoulder contusion, open wound to the left foot, a lumbar sprain, and contusion of the lower leg. (Tr. 665). It was noted she had a history of migraine headaches. (Tr. 667).

Dr. David Volarich testified by deposition on behalf of the claimant. (Tr. 85). It was his opinion that when the claimant fell forward onto her hands and right knee on January 8, 2013, that the process caused a whiplash injury to her neck and low back, a rapid flexion/extension injury and in the process jammed her right shoulder and her right hip when she fell. (Tr. 102). He testified the work injury was the prevailing factor causing the claimant's cervical strain syndrome with neck

and left shoulder myofascial pain as well as post traumatic headaches, lumbar strain and protrusion at L5-S1, plus significant lumbar right hip girdle myofascial pain, right shoulder strain with myofascial pain, right hip with myofascial pain, trochanteric bursitis and right knee contusion. (Tr. 102). Dr. Volarich testified the claimant had permanent partial disability of 25% of the body as a whole relative to the cervical spine, 20% of the body as a whole relative to the lumbar spine, 15% of the right shoulder, 15% of the right hip, and 15% of the right knee secondary to the January 8, 2013 injury. (Tr. 103-104). He testified the claimant had permanent partial disability of 5% of the body as a whole due to the pre-existing compression fracture. (Tr. 105). Dr. Volarich acknowledged that teaching was a less physically demanding type of work and that he was unsure if the physical restrictions he gave the claimant would cause her trouble if she tried to work as a high school teacher. (Tr. 115-116). He testified that the "lions share" of his workers' compensation evaluations are performed at the request of the claimant. (Tr. 117). Dr. Bernard Randolph testified on behalf of the employer by deposition. (Tr. 1177). Dr. Randolph examined the claimant and reviewed her records and imaging studies and diagnosed her with contusions to the knees and a lumbar strain in regard to the January 8, 2013 injury. (Tr. 1183). Dr. Randolph testified the claimant had

reached maximum medical improvement in regard to the January 8, 2013 injury and did not require any work restrictions. (Tr. 1184). He testified the claimant had permanent partial disability of 4% of the body as a whole referable to the lumbar spine and 1% of each knee referable to the January 8, 2013 injury. (Tr. 1184). He also testified the claimant had pre-existing permanent partial disability of 2% of each knee related to osteoarthritis and 3% of the body as a whole referable to degenerative disc disease of the lumbar spine and 4% of the body as a whole due to degenerative disease of the cervical spine. (Tr. 1185). Dr. Randolph testified that he did not believe the claimant required a year of pain management to address the effects of her injuries as the claimant did not have complaints regarding the neck or head in the early medical records and due to the minor nature of the injury she sustained in the fall. (Tr. 1186-1187). Dr. Randolph testified the claimant complained of dizziness with various movements, but had no physiological or medical explanation for her complaints. (Tr. 1189-1190).

Dr. Greg Bassett testified by deposition on behalf of the claimant. (Tr. 147). Dr. Bassett is a physician specializing in general psychiatry. (Tr. 151). He diagnosed the claimant with somatic symptom disorder with predominant pain with a component of persistent conversion disorder as a result of the January 8,

2013 injury. (Tr. 155). He also diagnosed the claimant with a major depressive disorder single episode severe flowing from pain and perceived disability caused by the January 8, 2013 injury. (Tr. 157). He also testified the claimant had a pre-existing diagnosis of anxiety disorder. (Tr. 155). Dr. Bassett testified that the injury of January 8, 2013 was the prevailing factor in the claimant's development of a constellation of physical symptoms that resulted in a decreased ability to function which was out of proportion to the mechanism of injury and physical findings. (Tr. 166). He believed the claimant had reached MMI in regard to her psychological conditions. (Tr. 167). Dr. Bassett opined the claimant had permanent partial disability of 50% as a consequence of the aggregate effects of her somatic symptom disorder of which he apportioned 35% to somatic symptom disorder and 15% with regard to major depressive disorder. (Tr. 170-171). He believe the claimant has pre-existing permanent partial disability of 2% of the body as a whole. (Tr. 171). Dr. Bassett testified that he believed the claimant had a psychological condition and that the jolt of the claimant's hands and knees did not do anything to her physically in regard to her head, neck, and vision. (Tr. 179). Dr. Bassett testified the claimant gave poor effort on tests of sustained concentration and that one explanation would be her depression. (Tr. 160). He testified that

whether or not somatic symptom disorder was a response to a single event, or was something that developed over time, depended on the availability of sufficient records documenting the patient with a host of physical symptoms in the absence of finding some physical exam or diagnostic testing. (Tr. 182-183). Dr. Bassett did not review any of the claimant's medical records prior to 2005. (Tr. 183).

Dr. Melissa Harbit testified by deposition on behalf of the employer. (Tr. 1219). Dr. Harbit is the Director of Forensic Psychiatry at Washington University, as well as the Medical Director of some of the in-patient psychiatric units at Barnes-Jewish Hospital. (Tr. 1222). Dr. Harbit diagnosed the claimant with somatic symptom disorder after reviewing her medical records, taking a history from the claimant, and doing a mental status examination. (Tr. 1225). It was Dr. Harbit's opinion that the work incident of January 8, 2013 was not the prevailing factor causing the claimant's somatic symptom disorder. (Tr. 1226). Her opinion was based on the claimant's medical records and history, which in her opinion showed evidence of somatic symptom disorder prior to the work incident of January 8, 2013. Specifically noting the claimant's treatment with Dr. Dalu for multiple joint complaints and anxiety. (Tr 1226-1227). Dr. Harbit testified that somatic symptom disorder is a sort of coping style for people who may be under

stress and react in physical ways. (Tr. 1227). She testified that somatic symptom disorder usually happens over time and is more of a life long type of disorder rather than in response to an event. (Tr 1227-1228). Dr. Harbit testified the claimant did not have an psychiatric disability relative to the January 8, 2013 work incident. (Tr. 1228-1229). Dr. Harbit testified she did not review any records indicating the claimant had psychiatric treatment prior to January 8, 2013, but that typically patients with somatic symptom disorder have something happen and then they seek medical attention rather than going to see psychiatrists. (Tr. 1246-1247). She testified the claimant told her she felt unfairly treated after being relieved of her higher level position by her employer and because none of her medical bills were paid and she was denied disability. (Tr. 1250-1251).

Vocational Rehabilitation Counselor J. Stephen Dolan testified by deposition on behalf of the claimant. (Tr. 260). He testified that none of the claimant's doctors gave her restrictions that came close to her self-described limitations with the exception of Dr. Farzana who gave her a GAF score of 36. (Tr. 272). Mr. Dolan administered a wide range achievement test and noted that her ability to read and spell and do math was much lower than her actual level of education. (Tr. 272-273). He concluded that based on the claimant's age, academic achievement,

work skills, and restrictions from Dr. Farzana and Dr. Volarich that she no longer had access to a reasonable stable labor market. (Tr. 278). Mr. Dolan did not have the psychiatric reports at the time he prepared his vocational report. (Tr. 292). He testified that the claimant being highly educated was a benefit in seeking employment. (Tr. 293-294). He also testified that the claimant's skills and experience interpreting and translating Russian, Turkmen and English should be an advantage for finding employment in those areas absent functional limitations. (Tr. 296). He also acknowledged the claimant had computer skills that would transfer to many types of jobs. (Tr. 300). He testified that the claimant's inability to access the labor market was based primarily on her psychiatric issues and condition. (Tr. 304).

Vocational Rehabilitation Counselor Timothy Kaver testified by deposition on behalf of the employer/insurer. (Tr. 1309). He testified that from a vocational perspective the claimant was highly educated and that people who are higher educated have more access to the labor market. (Tr. 1314-1315). He testified that while Dr. Farzana gave the claimant a GAF score of 36, GAF scores can fluctuate from week to week. (Tr. 1317-1318). He also testified that the restrictions from Dr. Volarich would allow the claimant to work at a sedentary level except for the

restriction of rest when needed which he believed was a vague restriction that would depend on how much rest was needed. (Tr. 1318-1319). In Mr. Kaver's opinion the claimant had the skills and educational background to do sedentary level work. (Tr. 1319-1320). On cross-examination he testified that if you were to assume the claimant's subjectively described restrictions then she would be unable to return to work. (Tr. 1330).

POINTS RELIED ON

I.

The Labor and Industrial Relations Commission did not err in finding that the claimant failed to establish that her injuries arose out of her employment under Section 287.020.3 because the Commission did not find the claimant's testimony regarding the alleged condition of the hallway floor to be credible in that the most contemporaneous evidence immediately following the injury did not support the claimant's testimony regarding the condition of the floor at the time of her injury, and in that the Commission determines issues of facts, credibility of witnesses, and the weight given to conflicting evidence.

Thompson v Treasurer of the State of Missouri, 545 S.W. 3d 890, 891 (Mo.App.ED 2018)

*Hornbeck v Spectra Painting, Inc.,*370 S.W. 3d 624, 626 (Mo.banc 2012)

Treasurer of the State of Missouri v Witte, 414 S.W. 3d 455, 460 (Mo.banc 2013)

II.

The Labor and Industrial Relations Commission did not err in finding that the Employee failed to prove her accident occurred in the course of her employment because Section 287.020.3(2) of the Missouri Workers' Compensation law requires that for an injury to arise out of and in the course of employment it does not come from a hazard or risk unrelated to the employment in which the worker would have been equally exposed outside of and unrelated to the employment in normal non-employment life, in that the risk source the employee was exposed to of walking on a flat, even surface is one to which she was equally exposed in normal non-employment life, and thus the Labor and Industrial Commission Determination that the accident did not occur in the course of employment is supported by the substantial and competent evidence in the record.

Miller v Missouri Highway and Transportation Commission, 287 S.W. 3d 671 (Mo. 2009)

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

III.

The Labor and Industrial Relations Commission did not err in finding that the Employee failed to prove a medical causal connection between her accident and her injuries, because it is the function of the Commission to determine credibility of witnesses and expert testimony in that the Commission acted within its powers in finding employee failed to meet her burden of proving medical causation in that employee's medical experts relied on her subjective descriptions of her condition in reaching their conclusions and she was determined by the trier of fact to not be credible.

Silman v William Montgomery & Associates, 891 S.W. 2d 173, 175 (Mo.App. E D 1995)

*Hornbeck v Spectra Painting, Inc.,*370 S.W. 3d 624, 626 (Mo.banc 2012)

Durbin v Ford Motor Co., 370 S.W. 3d 305, 311 (Mo.App. 2012)

ARGUMENT

I.

The Labor and Industrial Relations Commission did not err in finding that the Employee failed to establish that her injuries arose out of and in the course of her employment because the Commission did not find the employees testimony regarding the alleged condition of the hallway floor to be credible in that the most contemporaneous evidence following the injury does not support the employee's testimony regarding the condition of the floor at the time of her injury, and in that the Commission determines issues of facts, credibility of witnesses, and the weight given to conflicting evidence.

The review of a Commission Decision is governed by Section 287.495.1 R.S.Mo. which states in part "the Court, on appeal, shall review only questions of law and may modify, reverse, remand for re-hearing, or set aside the Award upon any of the following grounds and no other:

1. That the Commission acted without or in excess of its powers.
2. That the Award was procured by fraud.
3. That the facts found by the Commission do not support the Award.
4. That there was not sufficient competent evidence in the record to warrant the making of the Award.

The Appellate Court defers to the Commission's factual findings and recognizes that it is the Commission's function to determine credibility of witnesses. *Hornbeck v Spectra Painting, Inc.* 370 S.W. 3d 624, 629 (Mo.banc 2012). The Commission's findings are not disturbed unless they are unsupported by competent and substantial evidence on the whole record. *Id.* at 632. Findings of fact made by the Commission within its powers shall be conclusive and binding. *Thompson v Treasurer of the State of Missouri, as the Custodian of the Second Injury Fund,* 545 S.W. 3d 890, 893 (Mo.App. ED 2018).

In the present case the claimant testified that she went through the school entrance through a double set of doors and walked past the security guard around a metal detector on a floor made of linoleum tile. (Tr. 18-20) On her way to clock in she testified that she slipped and fell forward. (Tr. 20-21) In response to her questioning from her attorney she testified that there were some particles of dirt, ice, dust and that the floor was slippery. (Tr. 20) There was no corroborating evidence produced of the condition of the floor so the Commission was forced to rely on the claimant's credibility regarding the condition of the floor. They properly noted that the claimant's initial response to questioning about the condition of the floor changed after more specific questioning from her attorney. (Record on Appeal P.35). (Tr. 20). She initially described the floor as "normal",

but then in response to a question as to in what way the floor was dirty, she first mentioned ice, dust and moisture. (Tr. 20).

The appellant attempts to argue that the use of the word "normal" was a "Freudian slip" and she did no intend that to mean the floor was a clean non-skid surface. However, this argument misses the point. It is not the role of the reviewing court to determine what the claimant meant by her use of the term "normal" in describing the floor. The condition of the floor at the time of the claimant's injury is a finding of fact that is to be determined by the Labor and Industrial Relations Commission. The only evidence that there were particles of dirt, ice, dust, and moisture on the floor was the claimant's testimony.

Therefore, the Commission properly evaluated the testimony of the claimant in determining her credibility and ultimately reaching their factual conclusion in regard to the alleged hazardous condition of the hallway floor. (Record on Appeal P.35).

The Commission also relied on other evidence in the record in reaching their factual determination regarding the condition of the hallway floor such as the Accident Investigation Report which was completed on the date of injury and much more contemporaneous than the employee's testimony five years later. (Record on Appeal P.35). The Accident Investigation Report was completed by the

claimant on January 8, 2013 and was admitted into evidence. (Tr. 1040-1042). The claimant acknowledged completing the forms. (Tr. 49). Among the forms, the Commission paid the most attention to the Employee/Supervisory Injury Report because it would be the most relevant in regard to any issue concerning the condition of the floor as the employer has an interest in knowing the cause of a reported injury. A question specifically asks, "what if any events or condition caused the accident: i.e. wet floor, fight, standing on unstable surface, etcetera". (Tr. 1042). The form actually gave examples of possible things that could be wrong with the floor, but in response to this question the claimant herself responded "I could not determine the cause of the accident." (Tr. 1042). The Appellant referenced the Report of Injury which was filed with the State of Missouri. However, it should be noted this form was not dated or signed, nor is it very descriptive regarding what occurred on January 8, 2013. (Tr. 1144). The Employer/Supervisory Injury Report would be much more relevant as it was completed by the claimant shortly after the incident. (Tr. 49, 1042). Additionally, there is nothing in the Report of Injury filed with the Division of Workers' Compensation that indicates the reason for the claimant's fall has anything to do with the condition of the hallway. (Tr. 1144).

The Commission did not base their decision exclusively on the claimant's

testimony, and injury reports also considering the most contemporaneous medical records in evaluating the claimant's credibility regarding the alleged hazardous condition on the floor. (Record on Appeal P. 35). The history in the emergency room records from St. Mary's Hospital where the claimant initially received treatment on the date of her injury, was more consistent with the Accident Investigation Report than her testimony at hearing. The staff recorded that the claimant states that she was walking at the time of the injury and was unsure what caused her to fall. (Tr. 353). She did not mention anything about snow or ice to the staff at St. Mary's when she came back the next day on January 9, 2013, nor when she was evaluated at Concentra January 11, 2013, or when she saw Dr. Bowen on January 18, 2013. (Tr. 381, 1043, 729). There is no mention of anything about ice or snow in the parking lot in the medical records until she presents to Logan Chiropractic on January 24, 2013 over two weeks after the injury. (Tr. 547). The Appellant tries to hide behind the fact that English is her second language, but the Court should remember that at the time of the injury the claimant was working as a teacher, *teaching* English as a second language. (Tr. 13). She also has work experience as a translator and has also done work for the Defense Department as a Language Specialist. (Tr. 14, 56). The Commission properly concluded the employee's testimony regarding the alleged condition of the floor was not credible.

It is well established precedent in Missouri that in reviewing an Award of the Commission, the other reviewing party must defer to the Commission regarding the determination of credibility. *Treasurer of the State of Missouri v Witte*, 414 S.W. 3d 455, 460 (Mo.banc 2013). "An Appellate Court will defer to the Commission on issues of fact, the credibility of the witnesses, and the weight given to conflicting evidence." *Id*.

The reviewing Court "may not substitute its judgement on the evidence, and when the evidence before an administrative body would warrant either of two opposed findings, the reviewing Court is bound by the Administrative determination and it is irrelevant that there is supportive evidence for the contrary finding". *Thompson v Treasurer of the State of Missouri as Custodian of the Second Injury Fund,* 545 S.W. 3d 890, 893 (Mo.App.2018). In *Thompson* the claimant was alone in the break room at the time of her accident and the issue in dispute was whether the claimant slipped and fell on a wet substance or whether she "just fell". *Id.* at 892. The sole evidence of a foreign substance on the floor was claimant's testimony as three witnesses testified they did not observe any foreign substance and there is no mention of a foreign substance in the claimant's medical records. *Id.* The Commission found the claim compensable, specifically

finding that the claimant's testimony that she slipped on a wet substance was credible. *Id*. In affirming the Commission decision the Court stated "we need not decide whether such a hazard existed, but whether there is substantial evidence to support the Commission's Award". *Id.* at 893.

The Appellant argues that the Commission's power to decide factual issues is limited and that they erred in their decision because the claimant's testimony was unimpeached and they did not find the claimant had a history of lying. The Missouri Supreme Court addressed Commission findings regarding credibility in *Corp v. Joplin Cement Company* 337 S.W. 2d, 252,258 (Mo.banc 1960), when it held that the Industrial Commission has the right to pass upon the credibility of witnesses, but where the record reveals no conflict in the evidence or impeachment of any witness, then the reviewing Court may find the Award was not based upon disbelief of the testimony of the witnesses. The Court held "the Commission cannot 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 mere personal opinion unsupported by competent evidence." *Id.* This Corp Rule is not in contradiction to the general rule that acceptance or rejection of evidence is for the Commission and it is free to disbelieve uncontradicted and unimpeached

testimony. *Copeland v Thurman, Stout, Inc.,* 204 S.W. 3d 737,743 (Mo. Appellate 2006). The Court in *Copeland* compared the general rule of deferring to the Commission on factual issues (known as the Alexander Rule) to the Corp Rule finding they are not contradictory. *Id.* "If the Commission expressly declares that it disbelieves, uncontradicted or unimpeached testimony, or if reference to the Award shows that the Commission's disbelief of the claimant or their doctor was the basis for the Award then the Alexander Rule attends. On the other hand, the Corp Rule attends where the record is wholly silent concerning the Commission's weighing of credibility. *Id at 745.*

In this case, the record is not silent concerning the Commission's weighing of credibility as both the Commission and Administrative Law Judge clearly addressed the claimant's credibility. Thus, the general rule of deferring to the Commission, (The Alexander Rule) would apply. The Administrative Law Judge clearly made a credibility finding when he stated "initially, the Court finds, as to the claimant's credibility, she had failed to provide credible testimony to this Court. It is clear the claimant's description of her injuries and her subsequent effects verge on the point of malingering." (Record on Appeal P.21). The Commission affirmed the Administrative Law Judge's credibility finding and also made additional specific findings regarding the claimant's credibility concerning

the condition of the hallway on the date of injury. They noted the claimant initially testified the condition of the floor was "normal" and that she did not focus on the alleged hazardous condition of the floor until asked by her attorney. (Record on Appeal P.35). They noted the lack of any corroboration of claimant's testimony in the record and also that the medical records at the time of injury did not indicate any mention of a hazardous condition in regard to the hallway floor. Finally, the Commission noted the inconsistency of the accident report with the claimant's testimony where she stated in the report completed shortly after the incident that she "could not determine the cause of the accident" which is different than her testimony five years later. These are clearly credibility findings the Commission weighed in evaluating the factual issues of whether there was any type of foreign type substance on the hallway floor where the claimant fell. The record is not wholly silent concerning the Commission's weighing of credibility and there was clearly conflicting evidence in the record which the Commission resolved in favor of the employer and Second Injury Fund.

If the Commission expressly declared that it disbelieves uncontradicted or unimpeached testimony, or if reference to the Award shows that the Commission's disbelief of the employee or his or her doctor was the basis of the Award, then the general rule that the Commission is free to disbelieve uncontradicted and

unimpeached testimony applies. *Cardwell v Treasurer of State of Missouri* 249 S.W. 3d 902, 907 (Mo.App. 2008) This is not a situation where the Commission based their credibility finding on an incorrect statement which has been held to be a reason for a reviewing court to review credibility findings. See *Abt v Mississippi Lime Company*, 388 S.W. 3d 571, (Mo. App. 2012). This is also not a situation where the Administrative Law Judge and Commission wrote nothing regarding the credibility of any of the witnesses or experts. See *Houston v Roadway Express,* 133 S.W. 3d 173, 179 (Mo Appellate 2014).

The present case involves a factual dispute as to the condition of the hallway floor. The Commission's finding as to whether or not the employee was exposed to a hazardous condition while walking in the employer's hallway is a finding of fact made by the Commission and should be deferred to by the reviewing court. *Johnson v Denton Construction Co.,* 911 S.W. 2d 286, 288. (Mo.banc 1995). The Commission finding that the claimant did not sustain an injury in the course and scope of employment is supported by the substantial and competent evidence in the record.

II.

The Labor and Industrial Relations Commission did not err in finding that the Employee failed to prove her accident arose out of and in the course of her employment because Missouri law requires that for an injury to arise out of and in the course of employment it does not come from a hazard or risk unrelated to the employment in which the worker would have been equally exposed outside of and unrelated to the employment in normal non-employment life, in that the risk source the employee was exposed to of walking on a flat, even surface was one in which she was equally exposed in normal non-employment life, and thus the Labor and Industrial Commission determination that the accident did not occur in the course of employment is supported by the substantial and competent evidence in the record.

The Missouri Workers' Compensation law requires that the injury must arise out of and in the course of employment under Section 287.020.3 (1) R.S.Mo. For any injury to be deemed to arise out of and in the course of employment it must 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. Section 287.020.3 (2)(b) R.S.Mo.

The present case involves an injury that occurred while the claimant was walking on a flat surface. (Tr. 19-21). The Missouri Supreme Court addressed whether this type of injury arises out of employment in the case of *Miller v Missouri Highway and Transportation Commission* 287 S.W. 3d 671 (Mo. 2009). In *Miller* the claimant was walking briskly on a flat road surface and felt a pop in his knee. *Id.* at 672. The Missouri Supreme Court held that the risk leading to the injury, walking, was one to which the worker would have been exposed equally in normal non-employment life and thus the injury did not arise out of employment. *Id*. at 674. The Supreme Court addressed the issue more recently in *Johme v St. John's Mercy Healthcare* 366 S.W. 3d 504 (Mo.banc. 2012). In *Johme* the claimant was making coffee on a smooth tile kitchen floor when she fell either as she was finishing making the coffee or was returning to her desk. *Id.* at 506. The Court noted that in *Johme* that Section 287.020.10 expressly abrogated cases that permitted the recovery of workers' compensation benefits for injuries caused by risks to which the employees would have been exposed equally outside of work. *Id*. at 508. Therefore, the *Johme* Court held that "for an injury to be deemed to arise out of and in the course of the employment under Section 287.020.3 (2)(b). the claimant/employee must show a causal connection between the injury at issue and the employee's work activity. *Id.* at 510. The Court had found that *Johme*

failed to meet her burden to show that her injury was compensable because she did not show that it was caused by a risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal non-employment life. *Id.* at 512.

The Appellant concedes that the employee was in fact walking on an even, flat surface at the time she fell. (App.Brief P.48, Record on Appeal P.35). (Tr. 18-21) The claimant's risk source of the injury, walking, was a risk to which she would have been equally exposed in her normal non-employment life. She testified that the condition of the floor was normal and that there was nothing chipped or broken. (Tr. 20).

The Appellant tries to argue that the risk source connecting the claimant's fall to her employment should be inferred because it had nothing to do with her clothing, because of the claimant's testimony regarding the condition of the floor and the one mention in the medical records from Logan Chiropractic that the floor was soiled. In support of this inference, Appellant cites *Dorris v Stoddard County* 436 S.W. 3d 586, 590 (Mo.App. 2014). However, the employee in *Dorris* was walking across a busy street that had cracks in it. *Id.* at 588. In this case the claimant was walking on a smooth tile floor at a school.

Appellant asserts that the claimant was not equally exposed to the risk source

of her injury, walking, in her non-employment life because the general public is not exposed to the particular floor at Roosevelt High School, saying hello to a security guard, or walking through the alleged salt and ice. In support of this they cite *Scholastic, Inc., v Viley* 452 S.W. 3d 680 (Mo.App. 2014). However, the claimant in *Viley* slipped and fell on ice in a parking lot. *Id.* at 681. In this case the claimant was not exposed to the risk of ice in a parking lot, but rather the risk of walking on a tile floor. The only evidence that there was any foreign substance on the floor was the claimant's testimony which the fact finder determined was not credible. (Record on Appeal P. 35).

The employee testified that she was carrying curriculum folders in her bag when she fell. (Tr. 17). Therefore the Appellant argues the situation is similar to *Pope v Gateway to the W. Harley Davidson,* 404 S.W. 3d 315 (Mo.App. 2012) where the employee was injured when he stumbled on stairs while carrying a motorcycle helmet that his employment required him to have. *Id.* at 316. However in *Pope* the employee was carrying the actual helmet while in the present case the claimant was carrying her work related materials inside of her bag. (Tr. 17). Additionally, the employee in *Pope* was walking down stairs which would involve more risk as opposed to walking on a smooth floor which is the risk source in the

present case.

The claimant also cites *Abel v Mike Russell's Standard Service,* 924 S.W. 2d 502, 503 (Mo. 1996) and *Yaffe v St. Louis Children's Hospital,* 648 S.W. 2d 549, 551 (Mo. App. 1982) for the proposition that the claimant's injury occurred in the course of employment. However, these cases were decided prior to the 2005 Amendments to the Workers' Compensation Law. Under current law, the mere fact that an employee was at work when the incident occurred is not enough to render a case compensable. In *Miller v Highway and Transportation*, 287 S.W. 3d 671 (Mo. 2009) the employee's injury was held to not be compensable even though it occurred while he was walking at work and performing his job duties. *Id* at 674. In *Johme v St. John Mercy Healthcare* 366 S.W. 3d 504 (Mo. banc 2012) the claimant fell while making coffee in the employee break room during business hours and workers' compensation benefits were also denied. Simply being at work on the employer's premises is not enough for finding that the injury occurred in the course and scope of employment. There has to be a causal connection between the alleged injury and the work activity. The claimant's walking on a flat surface on her way to clock in has no connection to her work activities other than she was on her employer's premises.

The Labor and Industrial Relations Commission finding that the claimant's injury did not arise out of and in the course of her employment is supported by the substantial and competent evidence in the record and should be affirmed.

III.

The Labor and Industrial Relations Commission did not err in finding that the Employee failed to prove a medical causal connection between her accident and her injuries, because it is the function of the Commission to determine credibility of witnesses and expert testimony and the Commission acted within its powers in finding employee failed to meet her burden of proving medical causation in that employee's medical experts relied on her subjective descriptions of her condition in reaching their conclusions and she was determined by the trier of fact to not be credible.

The Courts have long held that an employee bears the burden of proving that not only did an accident occur, but it also resulted in injury. *Silman v William Montgomery & Associates,* 891 S.W. 2d 173, 175 (Mo.App. E D 1995). In cases involving medical causation, which is not within the common knowledge or experience, the claimant must present medical or scientific evidence of the cause and effect relationship between the complained of condition *and* the asserted cause. *McGrath v Satellite Sprinkler Systems* 877 S.W. 2d 704, 708 (Mo.App. E D 1994).

The Administrative Law Judge who personally observed the claimant testify stated that "it is clear claimant's descriptions 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 in substantial part on her own subjective description of her maladies, this Court finds the conclusions subsequently provided are equally specious." (Record on Appeal P.21). In adopting the Administrative Law Judge's Award the Commission is not necessarily disagreeing with the claimant's diagnosis, but the claimant's description of the effects of the injury of January 8, 2013. The claimant's complaints at the hearing included neck pain, dizziness, low back pain, mid back pain, sciatica, pelvic pain, groin pain, thigh pain, pain up and down the legs, pain in the shoulders, finger, heel, stomach difficulties, liver problems, depression, anxiety, headaches and nausea, all of which she related to the incident of January 8, 2013 when she fell and landed on her hands and knees on a tile floor. (Tr. 36-41). The claimant wore a travel pillow around her neck and a fur hat for complaints of pain at the hearing. (Tr. 35-36). There was no indication in the medical records of any doctor recommending these pain control methods. The claimant complained of pain while showering talking, laughing, and crying. (Tr. 37). She described her complaints as constant, but was still able to travel with her daughters to Chicago and with her ex-fiancé to Las Vegas for sight seeing and shopping within six months of the date of the hearing. (Tr. 36-37, 58-60). The

Administrative Law Judge correctly found the claimant's description of her subjective complaints was not credible. The trier of fact may also disbelieve the testimony of a witness, even if no contrary or impeaching testimony is given. *Matthews v Roadway Express, Inc*., 660 S.W. 2d 768,771 (Mo.App. 1983).

The Appellant argues that the Commission substituted its own judgment over that of expert medical witnesses. She cites *Wright v Sports Associated,* 887 S.W. 2d 596 (Mo. 1994) for the proposition that the Commission may not substitute its personal opinion on complex medical issues for the *uncontradicted* testimony of unqualified medical experts. However, the Commission, nor the Administrative Law Judge made any specific finding with respect to whether or not the claimant had somatic symptom disorder. Moreover, Dr. Harbit did not believe the incident of January 8, 2013 was the prevailing factor causing the somatic symptom disorder so the expert testimony in regard to medical causation was not uncontradicted. (Tr. 1226-1228) "Whether to accept conflicting medical opinions is a fact issue for the Commission and this Court defers to the Commissions decisions related to the credibility of witnesses and the weight given to testimony. *Hornbeck v Spectra Painting, Inc.,* 370 S.W. 3d 624,632 (Mo.banc 2012).

The Appellant argues that the Administrative Law Judge and later the

Commission, based their decision regarding medical causation solely on the discrepancy between the claimant's complaints and physical findings and thus used flawed reasoning in their finding that the claimant was not credible. The Appellant cites U.S. Supreme Court cases concerning involuntary commitment proceedings to argue the claimant is being negatively perceived by the judicial system due to her mental illness. However, this assumes the judge's determination of credibility was based *exclusively* on the discrepancy between her complaints and physical examination findings. The Administrative Law Judge made no such statement in his Award. He simply found the claimant to not be credible. Just because someone has been diagnosed with a mental health disorder by a one-time examiner in anticipation of litigation does not mean that the person is incapable of lying or exaggerating. The Administrative Law Judge listened to the claimant testify about her complaints, observed her mannerisms, saw her wearing a travel pillow around her neck and fur hat as well as her descriptions of her vacations and in the end decided she was not a credible witness. (Tr. 35-41, 58-60). The courts of this state have acknowledged that while the Administrative Law Judge's findings may not be conclusive or binding on either the Commission or the reviewing court, they are an important part of the whole record, carry considerable weight, especially when there

is a question as to the credibility of witnesses and should be given due consideration along with all the other factors and circumstances of the case *Davis v Research Medical Center* 903 S.W. 2d 557,569 (Mo. App. 1995) overruled in part by *Hampton v Big Boy Steel Erection*, 121 S.W. 3d 220,223 (Mo. banc 2003), *Banks v City of Hannibal,* 283 S.W. 2d 909, 913 (Mo.App. 1955). When the Commission adopts the Administrative Law Judge's findings, especially as to credibility, the resulting consistency is strong support for the court to affirm the Commission's Award. *Liberty v Treasurer for the State of Missouri as Custodian of the Second Injury Fund,* 218 S.W. 3d 7, 13 (Mo. App.2007).

If the claimant was not credible at trial it stands to reason that the medical expert opinions that would have relied on her credibility are also questionable as the Administrative Law Judge noted in his Award, which was adopted by the Commission. (Record on Appeal P.36). The reviewing Court defers to the Commission regarding expert credibility. *Durbin v Ford Motor Co.*, 370 S.W. 3d 305, 311 (Mo.App. 2012).

The Commission finding that the claimant failed to meet her burden with regard to medical causation is supported by the substantial and competent evidence in the record and the Commission acted within its powers in denying workers'

compensation benefits to the employee.

CONCLUSION

The Labor and Industrial Relations Commission did not err in finding the employee failed to prove that her accident occurred in the course and scope of her employment as her testimony regarding a hazardous condition on the floor was not credible, so she would have been equally exposed to the risk source of the injury, walking on an even surface, as she would have been in her normal non-employment life. The Commission did not act in excess of its powers in finding the claimant failed to meet her burden in regard to medical causation as her testimony was found to be not credible by the fact finder and thus medical opinions relying on her subjective descriptions of her condition are questionable and the Commission properly determined employee's medical experts were not credible. Respondent requests that the decision of the Labor and Industrial Relations Commission be affirmed and employee's request for a remand be denied as the Commission decision is supported by the substantial and competent evidence in the whole record.

Respectfully submitted
Early & Miranda, P.C.
s/s Matthew D. Leonard
Matthew D. Leonard # 50807
Attorney for Employer/Insurer
800 Market Street, Suite 351

St. Louis, MO 63101
P: 314-241-3030
F: 314-241-7455
mleonard@earlymiranda.com

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby states that on this 30th day of December 2019, a true and correct copy of the foregoing was filed electronically via Missouri Case Net.

The undersigned further certifies that this brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 10,329 words. Further, this brief complies with Rules 84.06(c), and 55.03.

/s/ Matthew D. Leonard
Matthew D. Leonard