In the Missouri Court of Appeals
Eastern District
DIVISION THREE

MARK LYNCH,	)	No. ED109502
	)	
Claimant/Appellant,	)	Appeal from the Labor and Industrial Relations Commission
	)	
vs.	)	Injury Nos. 09-101188 and 09-039485
	)	
TREASURER OF THE STATE OF MISSOURI, CUSTODIAN OF THE SECOND INJURY FUND,	)	Filed: October 19, 2021
	)	
Respondent.	)	

The claimant, Mark Lynch, appeals from the final award of the Labor and Industrial Relations Commission denying his claim against the Second Injury Fund ("the Fund") for permanent total disability benefits. We find the Commission ignored the uncontradicted and unimpeached evidence, including the only qualified expert medical opinion in the record, without explanation and without a reasonable basis for finding the witnesses not credible, and instead substituted its own theory of the cause of Claimant's permanent total disability. We find the Commission's award concluding the Fund is not liable for Claimant's permanent and total disability is not supported by sufficient competent evidence and is against the overwhelming weight of the evidence. We reverse and remand the decision of the Commission.

Factual and Procedural Background

Claimant worked for Anheuser-Busch Companies, Inc. ("the employer") as a brewery worker from 1974 until his retirement in January 2009. During his 35 years with the employer,

Claimant worked in the draft beer and kettle departments, performing physically demanding and often repetitive tasks such as driving a forklift to move and stack pallets and barrels; cleaning kettles measuring 15 to 20 feet high; carrying 10-gallon buckets of ingredients from another floor to the kettles and dumping the buckets into the kettles at least 50 times per day; breaking up large bales of compressed hops so the hops could be crumbled and weighed; dumping 100-pound containers of hops into kettles 13 times per day; and pushing 1,000-pound containers filled with used beechwood chips through the brewery. Claimant estimated that when he worked as a brewer with the kettles, he had to pull open and push closed the kettles' vacuum-sealed doors, which weigh about 100 pounds, as many as 100 times per day. He filled and sealed kegs of beer, which required using a mallet to pound a stopper into the keg opening some 1,200 times a day. Claimant also had to regularly hand-loosen and hand-tighten large hinges on the doors of the mash cookers, and he had to repeatedly adjust steam valves, often by using a heavy mallet to strike a stuck valve handle.

Claimant sustained numerous injuries over the course of his career. He injured his neck and low back in a boating accident in 1990, and experienced ongoing pain thereafter, obtaining treatment from Dr. Al Vellinga both before and after retirement. Claimant later sustained two work-related injuries to his low back, the claims for which he settled with his employer. He underwent surgery on his left shoulder in 1991, and later settled a claim with the Fund. He sustained a work-related injury to his right shoulder in 1995, and underwent his first right shoulder surgery. Claimant settled the claim for his right shoulder injury with his employer. Claimant sought treatment for pain in his right shoulder shortly before his retirement, and underwent a second surgery on his right shoulder immediately after his January 2009 retirement. In 2003, Claimant sought treatment for increasing pain and stiffness in his hips, and underwent

total replacement of both hips. Claimant was diagnosed with osteoarthritis in both knees the year before he retired, and x-rays also revealed progression of arthritis around his right hip.

Claimant sought treatment from Dr. Vellinga with primary complaints of neck and low back pain one month after his retirement and right shoulder surgery. Although not acknowledged in the Commission's decision, Dr. Vellinga's records dated February 11, 2009 report Claimant also complained of weakness of the right upper extremity along with numbness and paresthesia of his right hand.[1] Throughout the spring of 2009, Claimant continued to report numbness and paresthesia in his right hand. Dr. Vellinga found Claimant's right hand grasp was weak, and referred him to neurologist Dr. Robert Margolis. Claimant consulted Dr. Margolis five months after retiring for numbness and tingling in his hands and feet, underwent EMGs and nerve conduction studies ordered by Dr. Margolis, and received a diagnosis of carpal tunnel syndrome. Claimant sought treatment for his carpal tunnel syndrome from Dr. Vic Glogovac in September 2009, and filed workers' compensation claims for injury to his hands and ears in December 2009. In the fall of 2010, Claimant underwent a carpal tunnel release on each wrist performed by Dr. Glogovac. In 2011, Claimant was examined by Dr. Mitchell Rotman, a physician hired by the employer. Claimant reported to Dr. Rotman that the surgery had not alleviated the symptoms in his hands. Claimant settled with the employer in 2015 for 20% permanent partial disability of each wrist with a 10% loading factor. He continued with his claim for permanent total disability benefits against the Fund. Claimant alleged he is permanently and totally disabled as a result of a combination of his carpal tunnel syndrome and his preexisting conditions.

[1] "Paresthesia refers to a burning or prickling sensation that is usually felt in the hands, arms, legs, or feet, but can also occur in other parts of the body." National Institutes of Health, National Institute of Neurological Disorders and Stroke, Paresthesia Information Page, available at https://www.ninds.nih.gov/ Disorders/All-Disorders/Paresthesia-Information-Page (last visited Sept. 23, 2021).

The claim against the Fund was heard before an administrative law judge ("ALJ"). The Fund contested the date of injury and notice to the employer, which are not at issue in this appeal. The parties stipulated that Claimant suffered an occupational disease in the course and scope of his employment with the employer; that his permanent total disability rate was $772.53 per week; and that his permanent partial disability rate was $404.56 per week. The Fund did not contest the amount of permanent partial disability previously reached via settlement with the employer. The parties further stipulated that the only other issue for determination at the hearing was the nature and extent, if any, of the Fund's liability. The ALJ issued an award in favor of the Fund. Claimant appealed to the Commission. In adopting and affirming the ALJ's award, the Commission accordingly found that Claimant developed an occupational disease arising out of and in the course of his employment by performing repetitive motion tasks.

At the hearing before the ALJ, Claimant testified he experienced pain, tingling, and numbness in his hands for over 20 years while working for the employer, including at the time of his retirement. He described how employees were instructed to do a "swimmer's shake" to relieve pain and numbness in their hands. Claimant testified he needed help from other workers to complete his job duties, relied on the advancement of technology, and struggled with the heavy lifting required to perform his job. He stated he was no longer physically able to perform his job duties because of the combination of the ringing in his ears, his carpal tunnel syndrome, and all of his prior injuries.

Claimant submitted the complete medical report of board-certified orthopedic surgeon Dr. Dwight Woiteshek, pursuant to section 287.210 RSMo. (2016), and the report and deposition testimony of vocational consultant Terry Cordray.[2] Dr. Woiteshek evaluated Claimant in 2011,

[2] All statutory references are to RSMo. (2016) except as otherwise indicated. Section 287.210 provides in relevant part:

and found Claimant permanently and totally disabled. Dr. Woiteshek opined that Claimant's "pre-existing disabilities discussed above [low back, neck, both shoulders, and both hips] synergistically combines with the primary work related repetitious traumatic injuries leading up to and including 1/15/09, also discussed above, to create a substantially greater overall disability than the independent sum of the disabilities." Dr. Woiteshek further articulated several permanent work restrictions for Claimant, namely to minimize repetitive tasks, adopt proper ergonomic use of the upper extremities, avoid impact and vibratory trauma, use appropriate braces and support devices, avoid lifting more than three to five pounds with one hand with arms extended, avoid lifting more than 10 pounds "with the arms dependent," and performance of daily hand exercises. Dr. Woiteshek concluded that Claimant was unable to return to any employment as a result of the combination of his primary repetitious traumatic injuries and his preexisting conditions. Dr. Woiteshek did not rate Claimant's hearing loss.

Mr. Cordray, the vocational consultant, evaluated Claimant, reviewed his education and work history, and reviewed his medical records. He found Claimant "has significant physical limitations that preclude all jobs in the competitive labor market," and "is totally vocationally disabled."[3] Mr. Cordray reviewed medical records from nine doctors, including examining

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> 3. The testimony of any physician who treated or examined the injured employee shall be admissible in evidence in any proceedings for compensation under this chapter, but only if the medical report of the physician has been made available to all parties as in this section provided. …
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> 5. As used in this chapter the terms **"physician's report"** and **"medical report"** mean the report of any physician made on any printed form authorized by the division or the commission or any complete medical report. As used in this chapter the term **"complete medical report"** means the report of a physician giving the physician's qualifications and the patient's history, complaints, details of the findings of any and all laboratory, X-ray and all other technical examinations, diagnosis, prognosis, nature of disability, if any, and an estimate of the percentage of permanent partial disability, if any. An element or elements of a complete medical report may be met by the physician's records.
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> 7. The testimony of a treating or examining physician may be submitted in evidence on the issues in controversy by a complete medical report ….

[3] Mr. Cordray's report states he "do[es] not provide opinions regarding causation."

physicians Drs. Woiteshek and Rotman. Mr. Cordray included extensive excerpts from Dr. Woiteshek's report, and relied on the significant restrictions recommended therein to reach his conclusion. Mr. Cordray also quoted Dr. Rotman's report wherein Dr. Rotman opined:

> He also has quite a bit of health issues which caused him to take early retirement from (sic) mainly his heart. He has issues with chronic problems from his right shoulder as well. … Considering he had no relief from his carpal tunnel releases and the fact that his nerve studies were fairly normal would suggest that his continued complaints are not related to carpal tunnel at all but are related to more of a peripheral neuropathy that he had been treated for in the past. Presently, at this time, I do not see any evidence of a work-related injury.

No records, report, or testimony from Dr. Rotman were submitted into evidence pursuant to section 287.210. Mr. Cordray neither testified to nor relied on Dr. Rotman's report. The Fund acknowledged at oral argument that Dr. Rotman's report was not in the record. The Commission's decision states "Dr. Rotman noted Claimant retired due to a heart condition, along with problems with his right shoulder." The Fund did not submit any evidence.

The Commission made no credibility findings regarding the testimony of either Claimant or Dr. Woiteshek. The Commission accepted Dr. Woiteshek's report and findings with no contradictory evidence, and Dr. Woiteshek was not impeached. Likewise, Claimant was not impeached. The Commission explicitly found Mr. Cordray's opinion regarding Claimant's total vocational disability neither credible nor persuasive because Mr. Cordray stated he did not consider Claimant's subjective complaints, yet his report included a list of such complaints. The Commission found Claimant admitted he retired before seeking treatment for his upper extremities and was diagnosed with carpal tunnel syndrome only after his retirement.

Citing Claimant's lack of diagnosis of and treatment for carpal tunnel syndrome prior to retirement, and bolstered by a purported quote of Dr. Rotman included in Mr. Cordray's report, the Commission found "[Claimant]'s primary injury does not contribute to his overall permanent

and total disability." Rather, the Commission found Claimant retired and removed himself from the open labor market because of his preexisting disabilities:

> The evidence of this case demonstrates Claimant's permanent and total disability is not a result of a combination of the primary injury and the preexisting disabilities. The evidence suggests that Claimant chose to retire due to the limitations of his preexisting low back, neck, bilateral shoulder, and bilateral hip disabilities. Claimant, thus, fails to meet his burden of proof and is not entitled to benefits from the Fund.

The Commission concluded, "Claimant has not met his burden of proving his permanent total disability results from a combination of his primary injury and preexisting disabilities."[4] In a 2-1 decision, the Commission adopted the amended award of the ALJ denying Claimant benefits from the Fund. Claimant appeals.

Standard of Review

We review all final decisions, findings, rules, and orders of the Commission to determine "whether the same are supported by competent and substantial evidence upon the whole record." Mo. Const. art. V, sec. 18; *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 338 (Mo. Mo. banc 2017). We will affirm the Commission's decision unless: "(1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award." Section 287.495.1; *Annayeva v. Special Admin. Bd. of the Transitional Sch. Dist. of St. Louis*, 597 S.W.3d 196, 198 (Mo. banc 2020); *Williams v. City of Jennings*, 605 S.W.3d 152, 157 (Mo. App. E.D. 2020).

"The Commission's finding of causation is a question of fact." *Schlereth v. Aramark Unif. Services, Inc.*, 589 S.W.3d 645, 650 (Mo. App. E.D. 2019). In addition to findings of fact,

[4] Whether Claimant was permanently and totally disabled was not identified as an issue at the hearing, and the Commission made no explicit finding of permanent total disability. However, the Commission's decision three times implicitly acknowledges Claimant's permanent and total disability as we have quoted.

we defer to the Commission's determinations of witness credibility and the weight given to conflicting evidence. *Annayeva*, 597 S.W.3d at 198. Where, as here, the Commission affirms and incorporates the ALJ's decision in its award, we review the ALJ's findings as adopted by the Commission. *Schlereth*, 589 S.W.3d at 651.

"The Commission's factual findings are binding and conclusive only to the extent they are supported by sufficient competent evidence and were reached in the absence of fraud." *Harris v. Ralls County*, 588 S.W.3d 579, 594 (Mo. App. E.D. 2019). Sufficient competent evidence is evidence that has probative force on the issues, and from which the trier of fact can reasonably decide the case. *Schlereth*, 589 S.W.3d at 650-51. When reviewing the Commission's decision, we view the evidence objectively, and we are not required to view the evidence and reasonable inferences in the light most favorable to the award. *Harris*, 588 S.W.3d at 594. Instead, we examine the evidence in the context of the whole record, and an award contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence. *Id*. In short, we must determine whether the Commission reasonably could have made its findings and reached its result based on all the evidence before it. *Id*.

Discussion

Claimant challenges the Commission's decision that he is not permanently and totally disabled due to a combination of his carpal tunnel syndrome and his preexisting conditions.[5] The parties have fundamentally different perspectives about the nature of the award in this case. Claimant contends the Commission ignored the only expert medical opinion in the record, which

[5] Claimant also filed a claim alleging hearing loss and tinnitus caused by his work. However, Claimant submitted no medical evidence of hearing loss or tinnitus. His point on appeal refers to only one "work-related injury," and the argument section of his brief addresses only his carpal tunnel syndrome. Allegations of error not briefed shall not be considered in any civil appeal. Rule 84.13(a). As a result, Claimant has abandoned his appeal of the Commission's denial of Fund liability for his tinnitus claim, and we do not consider it.

the Commission did not find lacked credibility, and substituted its own personal opinion regarding the medical causation of Claimant's permanent total disability. The Fund contends the award hinges on credibility determinations, which are the exclusive province of the Commission, and thus Claimant failed to meet his burden of persuasion. We agree with Claimant. The Fund's argument falls short because here the Commission neither made credibility findings nor offered any explanation or rationale for rejecting Claimant's testimony and for rejecting the only expert medical opinion in the record.

The Fund compensates workers who become permanently and totally disabled as a result of a combination of past disabilities and a later primary work injury. Section 287.220 RSMo. (2000); *Williams*, 605 S.W.3d at 158. Fund liability arises when a claimant has a preexisting permanent partial disability constituting a hindrance or obstacle to employment or re-employment at the time he or she sustains the primary work injury. *Id.* A preexisting disability constitutes a hindrance or an obstacle to employment when there is potential for "the pre-existing injury [to] combine with a future work[-]related injury to result in a greater degree of disability than would have resulted if there was no such prior condition." *Id*.

Here, the Commission determined that Claimant's permanent and total disability did not result from a combination of his primary injury—carpal tunnel syndrome—and his preexisting disabilities involving his low back, neck, shoulders, and hips. The Commission instead determined that Claimant's permanent and total disability resulted from his preexisting disabilities only, without consideration of his carpal tunnel syndrome. Claimant contends the synergistic effect of his preexisting disabilities when combined with his primary injury of carpal tunnel syndrome left him unable to work on the open labor market and resulted in his permanent and total disability. He argues the Commission's denial of permanent total disability benefits

from the Fund is not supported by substantial and competent evidence and is contrary to the substantial weight of the evidence.

When a claimant challenges the Commission's findings on this basis, the claimant must: (1) marshal all record evidence favorable to the award; (2) marshal all unfavorable evidence, subject to the Commission's explicit or implicit credibility determinations; and (3) show, in the context of the whole record, how the unfavorable evidence so overwhelms the favorable evidence and its reasonable inferences that the award is, in context, not supported by competent and substantial evidence. *Schlereth*, 589 S.W.3d at 652. Adherence to this analytical framework is mandatory because it reflects the underlying criteria necessary for a successful challenge. *Id*. A challenge cannot succeed absent any of the criteria. *Id*.

Claimant first identifies the evidence favorable to the Commission's award. It was undisputed that Claimant suffered from numerous preexisting injuries resulting in disabilities to his low back, neck, both shoulders, and both hips that rendered it difficult for him to perform his job duties. The Commission based its award on Claimant's testimony that he did not seek treatment for carpal tunnel syndrome before he retired, and indeed, he retired before receiving a diagnosis of carpal tunnel syndrome. The Commission further found that, "[t]wo years after retirement, Claimant sought additional treatment for carpal tunnel syndrome, and indicated to Dr. Rotman his retirement was not induced by symptoms of carpal tunnel syndrome." This finding, however, misstates the record as we discuss below.

Next, in marshalling the evidence contrary to the award, Claimant testified he experienced pain, tingling, and numbness in his hands for over 20 years while working for the employer, including at the time of his retirement. He described how employees were instructed to do a "swimmer's shake" to relieve pain and numbness in their hands. Claimant testified that

while he did not realize before he retired that he had carpal tunnel syndrome specifically, he nevertheless had problems with both wrists and hands leading up to his retirement. He needed help from other workers to complete his work, and struggled with the heavy lifting required to perform his job duties. He also testified his carpal tunnel syndrome, combined with his prior injuries, prompted him to retire and rendered him unable to work. Claimant's medical expert, Dr. Woiteshek, concluded that Claimant is permanently and totally disabled as a result of his carpal tunnel syndrome synergistically combining with his preexisting conditions. Dr. Woiteshek opined that Claimant's injuries and conditions, including carpal tunnel syndrome, combined to create overall greater disability than the simple sum of each separate injury or condition.

Although not acknowledged in the Commission's decision, Dr. Vellinga's records dated February 11, 2009 report Claimant complained of weakness of the right upper extremity along with numbness and paresthesia of his right hand. Throughout the months following his retirement, Claimant continued to report to Dr. Vellinga numbness and paresthesia in his right hand. Dr. Vellinga found Claimant's right-hand grasp was weak, and referred him to neurologist Dr. Robert Margolis. Claimant consulted Dr. Margolis in June 2009 for numbness and tingling in his hands and feet, underwent EMGs and nerve conduction studies ordered by Dr. Margolis, and received a diagnosis of carpal tunnel syndrome. Claimant sought treatment for his carpal tunnel syndrome from Dr. Vic Glogovac in September 2009, which again the Commission's decision does not acknowledge. In the fall of 2010, Dr. Glogovac performed a carpal tunnel release on each of Claimant's wrists.

In its findings, the Commission correctly notes that Claimant consulted neurologist Dr. Margolis for numbness and tingling in his hands in June 2009, five months after retiring. The Commission does not mention, however, that Claimant reported problems with his hands to Dr.

Vellinga beginning in February 2009, or that he sought treatment from Dr. Glogovac beginning in September 2009. Rather, in concluding that Claimant did not consider his primary hand and wrist injury in his retirement plans, the Commission focused on the fall of 2010 when Claimant underwent carpal tunnel release surgery on each wrist. The Commission further states, "[t]wo years after retirement, Claimant sought additional treatment for carpal tunnel syndrome, and indicated to Dr. Rotman his retirement was not induced by symptoms of carpal tunnel syndrome."

In addition to ignoring competent and substantial medical evidence of Claimant's complaints and treatment, the Commission's decision misstates the record. Dr. Rotman did not *treat* Claimant for problems with his hands and wrists. Dr. Rotman was a physician hired by the employer to examine Claimant in 2011 for purposes of his worker's compensation claims. However, no certified medical records, complete medical reports, or deposition or live testimony from Dr. Rotman were submitted into evidence in accord with the provisions of sections 287.140.7 and 287.210.[6] The Fund acknowledged at oral argument that Dr. Rotman's report is not in the record. The provisions of the Workers' Compensation Law are to be strictly construed. Section 287.800.1. Therefore, the ALJ, the Commission, and this Court cannot accept as substantial and competent evidence a purported excerpt from an examining physician's report, quoted in the report of a non-medical witness, about what Claimant allegedly told the physician. Such an excerpt does not qualify as a certified medical record under section 287.140.7. It does

[6] Section 287.140.7 states:

> Every hospital or other person furnishing the employee with medical aid shall permit its record to be copied by and shall furnish full information to the division or the commission, the employer, the employee or his dependents and any other party to any proceedings for compensation under this chapter, and *certified copies of the records shall be admissible* in evidence in any such proceedings.

(Emphasis added).

not qualify as a complete medical report under 287.210. It does not qualify as deposition or live testimony.

The Commission nevertheless relied on this purported excerpt from Dr. Rotman's report cited only by Mr. Cordray in his vocational report. The Commission relied on this information despite explicitly finding Mr. Cordray neither persuasive nor credible, and consequently finding the report of Mr. Cordray not persuasive and not credible. The quote on which the Commission relied is less than clear: "He also has quite a bit of health issues which caused him to take early retirement from mainly his heart. He has issues with chronic problems from his right shoulder as well." In short, the Commission then relied on this unclear quote to find Claimant "indicated to Dr. Rotman his retirement was not induced by symptoms of carpal tunnel syndrome." This finding is not supported by substantial competent evidence.

In the context of the whole record, the unfavorable evidence so overwhelms the favorable evidence and its reasonable inferences that the award is, in context, not supported by competent and substantial evidence. The sole expert medical evidence presented—the qualified medical opinion of Dr. Woiteshek—was that Claimant is permanently and totally disabled because of a synergistic combination of his carpal tunnel syndrome and preexisting injuries. The Commission did not find Dr. Woiteshek lacked credibility or was not persuasive, and Dr. Woiteshek was not impeached. The Commission, however, ignored Dr. Woiteshek's uncontradicted opinion without explanation, and instead determined that Claimant retired because of his neck, back, shoulder, and hip problems, without consideration of his carpal tunnel syndrome. No medical expert opined that Claimant was permanently and totally disabled because of his preexisting disabilities without considering his hand and wrist problems. The Commission was not free to arbitrarily disregard and ignore Dr. Woiteshek's testimony regarding the cause of Claimant's disability, and

instead "base its finding 'upon conjecture or its own mere personal opinion unsupported by sufficient competent evidence.'" *Hazeltine v. Second Injury Fund*, 591 S.W.3d 45, 63 (Mo. App. E.D. 2019)(quoting *Lawrence v. Treasurer of State-Custodian of 2nd Injury Fund*, 470 S.W.3d 6, 16 (Mo. App. W.D. 2015)).

In addition, Claimant testified that he experienced problems with his hands and wrists for many years before his retirement. He explained how the employer instructed him to do a "swimmer's shake" to relieve numbness and pain in his hands. He consistently testified he was no longer physically able to perform his job duties because of the combination of the ringing in his ears, his carpal tunnel syndrome, and all of his prior injuries. The Commission did not find Claimant was not credible, nor was Claimant impeached. The Commission simply relied on Claimant's lack of treatment for and specific diagnosis of carpal tunnel syndrome before he retired. At the same time, the Commission ignored other portions of Claimant's testimony where he stated he had issues and problems with his hands and wrists, but did not know he had carpal tunnel syndrome specifically until diagnosed. And the Commission ignored the qualified medical opinion of Dr. Woiteshek entirely. Because neither Claimant nor Dr. Woiteshek were explicitly found not credible, contradicted, or impeached, we find the Commission erred in disregarding this evidence.

Only to the extent they are supported by sufficient competent evidence are the Commission's factual findings binding and conclusive. *Williams*, 605 S.W.3d at 159. The record must contain medical testimony or evidence supporting the Commission's finding of causation. *Id*. Absent medical testimony, any finding of causation would be based merely on conjecture and speculation rather than on substantial evidence. *Id*. The Commission may not substitute an ALJ's personal opinion regarding medical causation for the uncontradicted testimony of a qualified

medical expert. *Angus v. Second Injury Fund,* 328 S.W.3d 294, 300 (Mo. App. W.D. 2010). "When expert medical testimony is presented, an ALJ's personal views of [the evidence] cannot provide sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony." *Williams*. 605 S.W.3d at 159-60. Likewise, where the record is silent on the Commission's findings on the weight of witness credibility, and neither the claimant nor the testifying experts were contradicted or impeached, the Commission "may not arbitrarily disregard and ignore competent, substantial and undisputed evidence." *Id*. at 160 (quoting *Hazeltine*, 591 S.W.3d at 59).

Yet this is precisely what occurred here. In determining the Fund had no liability, the Commission ignored the parties' stipulation that Claimant suffered an occupational disease within the course and scope of his employment, medical records of Claimant's 2009 complaints of hand and wrist problems, and Claimant's testimony that the problems with his hands were a factor in his decision to retire. He just did not know the specific diagnosis for the problems with his hands. There was no evidence to contradict Claimant's 2015 settlement with the employer for 20% permanent partial disability of each wrist with a 10% loading factor. Instead, the Commission focused on Claimant's lack of a diagnosis for his hand and wrist problems prior to retirement. Further, the Commission relied on an excerpt from Mr. Cordray's report ostensibly quoting Dr. Rotman as to what Claimant allegedly told him to bolster its findings when Dr. Rotman's report was not entered into evidence and is not contained in the record. The Commission then mischaracterized the nature of the examination performed in 2011 by Dr. Rotman, the employer's examining physician, to state that Claimant sought additional *treatment* for carpal tunnel syndrome two years after he retired. Consequently, the Commission's reliance on an excerpt from a document outside the record cannot be credited to support a finding that

Claimant "indicated to Dr. Rotman his retirement was not induced by symptoms of carpal tunnel syndrome."

The Fund, however, characterizes the essential issue in this case as a question of credibility leading to Claimant's failure to meet his burden of persuasion. The Fund cites *Guinn v. Treasurer of Missouri*, 600 S.W.3d 874 (Mo. App. S.D. 2020), *Anttila v. Treasurer of Missouri*, No. SD36826, 2021 WL 4236974 (Mo. App. S.D. Sept. 17, 2021), and *Annayeva v. Special Administrative Board of the Transitional School District of St. Louis*, 597 S.W.3d 196, to support its contention. All three cases are readily distinguishable from the present case. None of the three cases involve an ALJ or the Commission disregarding uncontradicted and unimpeached medical evidence and substituting their own opinion of medical causation.

Guinn and *Anttila* involved conflicting expert medical opinions regarding the cause of the claimant's permanent and total disability, and the Commission believed the opposing expert over the claimant's expert. *Guinn*, 600 S.W.3d at 877-78; *Anttila*, 2021 WL 4236974, at *2. Such is not the case here. As the Southern District stated, "[t]his was a battle of experts." *Id*. at *7. Unlike the present case, *Annayeva* hinged on the claimant's credibility, and the Commission identified evidence in the record—such as the claimant's inconsistent testimony and her initial accident report—to support its explicit finding that the claimant's explanation of the cause of her fall was not credible. 597 S.W.3d at 200 n.8.

Generally, we defer to the Commission on issues involving the credibility of witnesses and the weight given to testimony, and we acknowledge the Commission may decide a case upon its disbelief of uncontradicted and unimpeached testimony. *Abt v. Mississippi Lime Co.*, 388 S.W.3d 571, 578 (Mo. App. E.D. 2012); *see also*, *Annayeva*, 597 S.W.3d at 200 n.8 (stating once expressed by the Commission, credibility determinations are binding on this Court).

Nevertheless, "where 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)). The 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. *Id*. Likewise, the Commission may not base its findings upon conjecture or its mere personal opinion unsupported by sufficient competent evidence. *Id*.

Here, there were no conflicting medical opinions in the record for the Commission to weigh. The parties stipulated Claimant suffered an occupational disease and had preexisting disabilities. It was undisputed that Claimant settled with the employer for 20% disability of each wrist with a 10% loading factor. The only issue before the ALJ was Fund liability. The ALJ implicitly found Claimant permanently and totally disabled, did not expressly find Dr. Woiteshek or Claimant not credible, and offered no reasonable basis for finding evidence of causation not credible. Thus, the Commission could not reasonably have made its findings and reached its result based on all the evidence in the record. The totality of the evidence in the record supports a finding of permanent and total disability due to a combination of Claimant's carpal tunnel syndrome and his preexisting conditions. Because we find the Commission arbitrarily disregarded and ignored the substantial and undisputed evidence offered by Claimant, its denial of his claim against the Fund is in error. *Hazeltine*, 591 S.W.3d at 65.

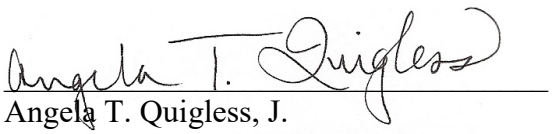
Conclusion

The Commission arbitrarily ignored the substantial, uncontradicted, and unimpeached evidence, including the only qualified expert medical opinion in the record, without explanation or a reasonable basis for finding the witnesses not credible. The Commission then substituted its

own theory of the medical cause of Claimant's permanent total disability. As a result, the Commission's decision contrary to the only expert medical opinion in the record is not supported by sufficient competent evidence and is against the overwhelming weight of the evidence.

On appeal, we review decisions by the Commission to ensure they are supported by competent and substantial evidence. Mo. Const. art. V, sec. 18; *White*, 535 S.W.3d at 338. Viewing the award objectively and examining the evidence in the whole record, we conclude Claimant met his burden of establishing, under section 287.220 RSMo. (2000), that he is permanently and totally disabled due to a combination of his preexisting permanent disabilities and his primary injury. We find the Fund is liable for the Claimant's permanent and total disability.

We reverse the Commission's decision that the Fund is not liable for Claimant's permanent and total disability, and we remand with instructions for the Commission to enter an award consistent with the findings in this opinion.



Angela T. Quigless, J.

Philip M. Hess, P.J. and
Colleen Dolan, J., concur.