



**APPLICATION OF BECKY J.W. BORTHWICK
FOR CIRCUIT OR ASSOCIATE CIRCUIT JUDGE
31st CIRCUIT JUDICIAL COMMISSION
GREENE COUNTY, MISSOURI (as adopted June 8, 2009)**

***RESPONSES TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE
APPLICANT IS NOMINATED.***

NOTE – Please submit seven (7) paper copies with attachments.

1. Present principal occupation and title: Municipal Judge

2. What is your age? 44

3. (a) How many years have you been a citizen of the United States? 44

(b) How long have you been a Greene County resident? 10 years

(c) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri? 10 years

4. State the date you were admitted to The Missouri Bar and whether your license is in good standing. If not, explain in detail.

October 16, 2001, and my license has always been in good standing.

5. List any other states, courts, or agencies in which you are licensed as an attorney.

The Supreme Court of the State of Oklahoma, September 1995
The Supreme Court of the State of Nebraska, November 1995
Admitted to the U.S. Federal District Court of Nebraska, 8th Circuit, 1997
The Supreme Court of the State of Louisiana, October 1999
Admitted to the U.S. Eastern District Court of Louisiana, 10th Circuit, 2000
The Supreme Court of the State of Missouri, 2001
Admitted to the U.S. Eastern District Court of Missouri, 8th Circuit, 2001
Admitted to the U.S. Western District Court of Missouri, 8th Circuit, 2012

6. (a) State the name and address of all colleges and universities attended, other than law school, together with the dates and degrees received.

University of Missouri, Bachelor of Arts, August 1987 - May 1991

(b) List/describe any college or university activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

I was very active with the Baptist Student Union all four years of college and engaged in numerous fundraising and volunteer projects. I was the chairperson for five campus-wide blood drives at the University of Missouri. I also worked at the Get Out the Vote booths encouraging students to register to vote during election season each year.

(c) Attach a certified copy of college, university and law school transcripts here, or have the institutions send transcripts direct to the contact person.

7. (a) State the name and address of all law schools attended together with the dates and degrees received.

University of Oklahoma College of Law, Juris Doctor, August 1992 - May 1995

(b) List/describe any law school activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

I was on the Dean's List the fall semester of 1994, which was the semester my first child was born three weeks before finals. I also was a member of Phi Delta Phi, which is a legal society, which seeks to foster scholarship, civility, and ethical conduct among the profession. Finally, I was selected to the Board of Advocates at the University of Oklahoma in 1993, based upon my oral advocacy performance.

8. State, in chronological order (starting with the earliest employment) (a) significant non-law-related employment prior to law school and (b) all employment from the beginning of law school to the present. To the extent reasonably available to you, include the name and address of each employer and the dates of employment, and, for legal employment, describe the positions you have held, e.g., associate, partner, law clerk, general counsel.

- (a). I grew up and worked on my family's hog farm in Cedar County, Missouri. When I was 15 years old I also began waiting tables at Johnny's Restaurant in Stockton, Missouri, and worked there until I left for college.

I was a work-study student in the Political Science department at the University of Missouri – Columbia my Freshman and Sophomore years. My Junior and Senior years I was a live-in nanny for Jim and Jill Scott in Columbia, Missouri. The

summer following my Junior year in college I worked for Citizens Memorial Hospital located at 1500 N. Oakland Avenue, Bolivar, Missouri in the human resources department as a summer intern. My supervisor was Deni McColm. After college I got married and worked as a medical assistant/office manager for my husband's medical office.

- (b). After graduating from law school in 1995, I supported my former husband's career by relocating as his practice changed and each time I reestablished my full-time legal employment, which is detailed below:

DIAS LAW OFFICE
Bassett, Nebraska
November 1995 - November 1996

Engaged in private practice in a remote, small town as one of two attorneys in the county. Practiced in the areas of criminal defense, family law, real estate and agriculture law.

EDSTROM, BROMM, LINDAHL & SOHL
551 Linden Street
Wahoo, Nebraska 68066
May 1997 - January 2000

Started as an associate on a litigation team researching and drafting legal memoranda, management of documents at trial, conducting witness interviews, attending depositions and attending motion hearings. Second-chaired a federal jury trial. Was advanced in 1998 to the role of lead litigator. Filed and tried cases to conclusion, argued motions, prepared appellate briefs and appeared before both the Court of Appeals and the Supreme Court of Nebraska to argue. Practiced in the areas of general litigation, criminal defense, personal injury litigation, commercial litigation, insurance defense, Workers' Compensation, Americans with Disabilities Act, Social Security disability and family law. Successfully led prominent natural gas condemnation litigation and performed in a consulting role to other litigators with similar cases.

STEEG AND O'CONNOR, L.L.C.
201 St. Charles, Suite 3201
New Orleans, Louisiana 70170
February 2000 - July 2001

Member of a litigation team that defended several large corporate clients in the areas of real estate, general litigation and title insurance defense matters. Prepared and argued motions regarding insurance coverage issues. Prepared extensive research briefs. Successfully filed and tried cases to conclusion in the areas of title

insurance litigation, insurance coverage disputes and construction defects.

DIAS LAW OFFICE
21 Vine Street
Dexter, Missouri 63841
November 2001 - January 2004

Engaged in a busy general practice as a solo practitioner. Practice areas included Criminal Defense, Personal Injury Litigation, General Litigation, Real Estate (Transactional and Litigation), Bankruptcy, Family Law, Juvenile Law, Business Law, Wills, Trusts, and Probate. Managed all aspects of the practice including legal duties, marketing, staff, payroll and accounting.

MISSOURI ATTORNEY GENERAL
149 Park Central Square, Suite 1017
Springfield, Missouri 65806
January 2004 - July 2005

Defended the interests of the Missouri Second Injury Fund. Successfully negotiated numerous settlement agreements and defended the Second Injury Fund at many hearings. Drafted effective briefs and argued to the Missouri Labor and Industrial Relations Commission and the Missouri Southern District Court of Appeals.

MORRISON, WEBSTER & CARLTON
1736 E. Sunshine, Suite 104
Springfield, Missouri 65804
August 2005 - April 2009

Successfully managed a high-volume caseload of claimants' Workers' Compensation matters, Social Security Disability appeals and plaintiffs' tort matters. Conducted all aspects of litigation to achieve the most favorable result for the client. Legal duties included client intake; provided advice on legal rights and obligations; researched and drafted court documents; took and defended depositions; engaged in settlement negotiations; conducted first-chair trials and administrative hearings; and wrote appellate briefs. Frequently argued before the Missouri Labor and Industrial Relations Commission in Jefferson City, Missouri and the Southern District Court of Appeals. Office management duties included training and supervising legal assistants and paralegals, as well as participating in firm marketing media.

FRANKE SCHULTZ & MULLEN
5000 Highland Springs Blvd.
Springfield, Missouri 65809
June 2009 - June 2013

Managing Partner • Springfield

Management Role. Supervised a staff of three associate attorneys and five staff members. Also, operated as a liaison between the Springfield and Kansas City offices providing mentorship to younger attorneys in the Kansas City office, as well. Was responsible for the overall direction and control of training, work, performance, evaluations, conflicts and disputes, terminations and other matters related to the attorneys and staff of the firm. Oversaw efforts to strengthen client relationships and improve client satisfaction. Worked directly with decision makers at national insurance carriers to attract assignments of new matters.

Practicing Attorney Role. Provided representation to clients regarding tort claims, breach of contract claims, and construction claims. Received assignments from major national insurance carriers, as well as several small Missouri mutual insurance carriers. Represented insurance companies directly on all aspects of insurance law and bad faith issues. Assisted carriers in developing policies and procedures regarding claims handling. Tried several jury trials each year. Instructed younger attorneys on motion practice and trial practice skills. Engaged in approximately 50 mediations each year.

JUDGE, MUNICIPAL DIVISION
31st Circuit Court of Missouri
625 N. Benton
Springfield, Missouri 65806
July 1, 2013 - Present

Currently serve as a full-time judge for the Springfield Municipal Court. Duties include conducting bench and jury trials, ruling on admissibility of evidence and testimony, rendering judgments and assessing sentences. Also, set bonds and issue summons and warrants. Enforce the City's and Court's personnel policies and procedures along with direct supervision of court bailiff. Enforce Municipal Court policies and procedures as part of the unified court system in Missouri under general administrative authority of the Presiding Judge of the Greene County Circuit Court. Perform weddings. Have married 65 couples to-date.

9. If you were a student at any school from which you were suspended, placed on probation, or expelled by school authorities, for any reason, describe the circumstances.

None.

10. Describe the nature of your experience in trial and appellate courts and explain how they demonstrate the quality of your legal work. (*You either may take as much space as you need here or attach your response on separate sheets*). Include in your response:

- a) **Appellate Experience:** Please include a representative list of cases you have briefed and/or argued (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court and, if published, the citation; identify the client(s) you represented and opposing counsel; give a one-paragraph description of the case and your role.

Garber v. Jaroonwanichkul, 283 S.W. 3d 268 (Mo.App. S.D. 2009). I represented Rebecca Garber, a nurse, in a workers' compensation claim filed against her employer Dr. Jaroonwanichkul, who was represented by Eric Farris. Dr. Jaroonwanichkul was not covered by workers' compensation insurance at the time of her injury. The treating physician and the expert physician both testified her injuries were caused by the work-place accident. The matter was heard by the Administrative Law Judge ("ALJ") who found Ms. Garber had suffered compensable injuries and awarded her benefits accordingly. Dr. Jaroonwanichkul appealed the matter to the Labor and Industrial Relations Commission (the "Commission"), which affirmed the ALJ unanimously. Dr. Jaroonwanichkul then filed an appeal to the Southern District. I tried the case at the ALJ level and briefed and argued the case to the Commission. I also briefed and argued the case to the Southern District Court of Appeals. The Court ultimately found competent and substantial evidence supported the finding that her injuries were caused by the work-related accident and upheld the ALJ and Commission's Award.

Heiskell v. Golden City Foundry, Inc., 260 S.W.3d 443 (Mo.App. S.D. 2008). I represented the family of Mr. Heiskell who brought a workers' compensation claim alleging his death was work-related. Katherine Collins represented Golden City. The matter was tried to the ALJ on May 2, 2007, who found in favor of Mr. Heiskell's family. Golden City appealed and the matter was briefed and argued to the Commission, which reversed the ALJ's findings. Mr. Heiskell's family appealed, but the Southern District held the Commission's reversal was supported by substantial and competent evidence and affirmed the final Award. I tried the matter to the ALJ, prepared the briefs and argued at the Commission and the Southern District Court of Appeals.

Birdsong v. Waste Management, 147 S.W.3d 132 (Mo.App. S.D. 2004). Mr. Birdsong, who was represented by Michael Korte, was injured while working for Waste Management, who was represented by Mark Cordes. Mr. Birdsong filed a

Claim for Compensation against the employer and the Second Injury Fund, who was represented at the time by Assistant Attorney General Michael Bloom. At the hearing before the ALJ, the employee presented expert testimony he was permanently and totally disabled due to a combination of his work-related injury and his pre-existing injury. The ALJ agreed and awarded Mr. Birdsong benefits from the Employer and the Second Injury Fund. The Fund appealed the matter to the Commission, who held the Fund was not liable to pay permanent total disability benefits to Mr. Birdsong because it was the last injury alone that left him permanently and totally disabled. Both Mr. Birdsong and Waste Management appealed to the Southern District Court of Appeals. The Southern District affirmed the Commission's Award that the Employer was liable for Mr. Birdsong's permanent and total disability because he was disabled by his last injury alone and thus upheld the finding that the Second Injury Fund had no liability for his total disability. I briefed and argued the matter to the Commission and the Southern District Court of Appeals on behalf of the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund.

Billups v. Lyons et al., 821 So.2d 499 (La.App. 4 Cir. 5/29/02). This matter involved a condominium (the "Property") located in New Orleans, Louisiana that was purchased by the plaintiff, Geraldine Billups, from defendants Oliver and Kathleen Lyons. Billups arranged financing for the Property through a state-sponsored program for first-time homebuyers operated by the Louisiana Housing Finance Agency (the "Program"). Gilyot Mortgage Corporation ("Gilyot") was the originator of the loan. Gilyot assigned the Billups mortgage to The Leader Mortgage Company, ("Leader"), who was the servicer for the Program. The Lyons retained Couhig Southern Environmental Services of New Orleans, Inc. ("Couhig") to inspect the property for wood destroying insects and Couhig issued a report stating there was no evidence of wood destroying insects at the Property. Soon after the closing, Billups discovered that the Property was infested with active Formosan termites. Subsequently, Billups defaulted on her loan obligation and Leader filed a foreclosure action. Billups filed suit against the Lyons, Couhig, Rayond Vrazel and Barbara Snead Tedrow, who sold the Property to the Lyons. When Leader learned of the Billups' action against the seller and Couhig, Leader filed its own action against Couhig, who was represented by Irwin Fritchie, for negligence, asserting essentially the same claim as Billups. Leader also sued Gilyot for repurchase of the loan based upon breach of contract. Finally, Leader also intervened in Billups' action against the sellers and Couhig in order to preserve its security interest in the Property and its right to receive the proceeds of any award to Billups. All actions were consolidated and the matter was tried to the District Court in New Orleans. I represented Leader and tried the Circuit Court case, which was a bench trial. The District Court entered Judgment in favor of Billups, against Mr. and Mrs. Lyons and Couhig, *in solido*, rescinded the sale, awarded general and special damages and attorneys fees. The matters regarding Leader were omitted in the final Judgment. I filed a Motion for New Trial and

argued that the Court did not rule on several of Leader's claims. The Court granted my Motion and entered an Amended Judgment in which it rescinded the sale of the property and the note. Couhig, Bilups, and Leader appealed to the Fourth Circuit Court of Appeals. The Court found the Judgment of the District Court rescinded the sale, but failed to address how Billups would satisfy her debt to Leader, especially given the fact Billups and the Lyons filed for bankruptcy. The Court of Appeals found Couhig to be 100% liable to Leader. I co-wrote the brief and Charles Stern argued the matter to the Court of Appeals after I had re-located to Missouri.

Parks v. Uni-Copy, 812 So.2d 151 (Table La.App. 1 Cir. 2/15/02). John Parks was a sales representative for Uni-Copy. After Mr. Parks left the employ of Uni-Copy he demanded Uni-Copy pay him certain commissions, which Uni-Copy disputed. Mr. Parks, who was represented by Robert Harrison, filed suit for payment of those commissions, which were in excess of \$100,000.00, in the Civil District Court for the Parish of East Baton Rouge and the matter proceeded to trial on June 1, 2000. I was co-counsel at trial along with Randy Opotowsky, who was lead counsel. The trial court awarded the plaintiff commission for three small bids and penalties totaling approximately \$10,500.00. Mr. Parks appealed to the First Circuit Court of Appeals, which upheld the lower court's judgment. I prepared the brief and argued the matter before the Court of Appeals.

Harders v. Odvody, 261 Neb. 887, 626 N.W. 2d 568 (2001). The Bauers transferred real estate to Roger Harders, which included a lane that allowed access to the property. Later the Bauers conveyed additional land on the east side of the lane to Mr. Harders, which he later sold to Michael Brecka. In the sale, Mr. Harders included half of his lane so Mr. Brecka could have access to his newly purchased property. Mr. Brecka then sold the property to Marilyn and Milton Odvody. Sometime later, Mr. Harders gated his half of the lane ("Harders' lane"). Following the installation of the gate, the Odvodys torn it down. Mr. Harders filed an action for a Permanent Injunction restraining the Odvodys from entering Harders' lane or destroying any fencing. The Odvody's filed a counter-claim alleging a prescriptive easement, public use easement and an easement of necessity. I represented Mr. Harders and tried the case to the District Court. The trial court entered Judgment in favor of Mr. Harders and entered a permanent injunction preventing the Odvodys from using the Harders' lane. The Odvodys, represented by James Haszard, appealed. I wrote the Brief of Appellee on behalf of Mr. Harders and the Supreme Court affirmed.

R.J. Miller, Inc. v. Harrington, 260 Neb. 471, 618 N.W.2d 460 (2000). The Millers purchased a three story commercial building from the Harringtons. The Millers alleged they incurred damages as a result of undisclosed major structural defects to an outside wall and that the Harringtons had not provided them with a disclosure statement. The Harringtons filed a Third-Party Petition against the real

estate agent, Sam Cortese, for failing to provide them with the proper disclosure form. I was co-counsel for the Harringtons. Cortese was represented by J. Malachy Sullivan and the Millers were represented by Robert Sullivan. After the evidence was presented at the bench trial, the Court dismissed the Millers' action and the Millers appealed. I wrote the appellate brief and argued the matter to the Supreme Court of Nebraska, which affirmed the trial court's ruling in favor of the Harringtons.

Thomas Lakes Owners Ass'n v. Riley et al., 9 Neb.App. 359, 612 N.W.2d 529 (2000). Thomas Lake Owners Association (the "Association") filed a County Court action against several members of the Association who refused to pay an assessment levied by the Association pursuant to their bylaws for the dredging of the lake and road repairs. The defendants, represented by Trev Peterson, alleged the bylaws were invalid. The County Court ruled in favor of the Association holding the defendants were collaterally estopped from litigating the bylaws due to earlier litigation and that the Association was entitled to collect the assessment along with prejudgment interest as a matter of law. The defendants appealed and the Circuit Court reversed the collateral estoppel ruling and remanded. The Association appealed to the Nebraska Court of Appeals, which affirmed the District Court. I wrote the appeal brief and argued to the Court of Appeals.

Cross v. Perreten, 257 Neb. 776, 600 N.W.2d 780 (1999). Ms. Cross and Mr. Perreten had lived together 18 years and had two children, but had never married. Ms. Cross filed suit requesting an equitable division of the couple's property, custody of the children and child support. Mr. Perreten admitted paternity and asked the court to enter an equitable child support order, but demurred to the division of property and debts arguing the court did not have jurisdiction over those matters. The District Court found Mr. Perreten to be the father of the minor children, awarded Ms. Cross custody of the children and assessed child support against Mr. Perreten. The court also divided the property and debts of the parties and ordered Mr. Perreten to pay \$1,000.00 of Ms. Cross' attorney fees. I filed the appeal on behalf of Mr. Perreten, wrote the brief and argued the matter to the Nebraska Court of Appeals alleging the trial court lacked jurisdiction to hear and rule on the issue of the property and debts and the court erred in assessing payment of attorney fees. The Court of Appeals agreed and reversed the order of the trial court regarding the division of property and debts, but affirmed the award of attorney fees.

Kellner v. Kellner, 8 Neb.App. 316, 593 N.W.2d 1 (1999). Mr. and Mrs. Kellner, who were seeking a divorce, had been married 22 years and had accumulated significant assets including large tracts of land and farm equipment. John Sohl represented Ms. Kellner at trial and John Ballew represented Mr. Kellner. Despite the fact that neither party requested a total liquidation of the property, the Circuit Judge ordered all property to be sold and divided equally, except for their personal

effects and automobiles. Also, Ms. Kellner was awarded \$200.00 per month in alimony for 121 months. Mr. Kellner appealed. The Nebraska Court of Appeals held that although the facts justified an equal division of property there was an abuse of discretion by the trial court when it ordered a complete liquidation and the matter was reversed and remanded. I briefed the matter on appeal and argued before the Court of Appeals on behalf of Ms. Kellner.

Bartek v. Bartek, Nebraska Court of Appeals, Case No. A-97-1234. (July 1998). This matter was not reported. The appeal arose from an Application to Modify Alimony. The trial court found no unanticipated change of circumstances, which would have permitted it to change the alimony and thus the Motion to Modify was denied. Florence Bartek, who was represented by Karin O'Connell, appealed alleging an abuse of discretion. I represented appellee Albert Bartek. I brief the matter and the Court of Appeals summarily affirmed the trial court.

- b) **Trial-Level Experience:** Please include a representative list of cases and/or administrative hearings you have handled (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court; identify who you represented and opposing counsel; state whether the case was disposed of following a jury trial, bench trial or at what other stage; give a one-paragraph description of the case and your role.

Roy Combs v. Jeanne Welch d/b/a Automotive Central, Case No. 10PO-CC0005. I represented Jeanne Welch who was operating Automotive Central along with her husband, in a rural area in Polk County, Missouri. Roy Combs, represented by Nathan Duncan, was a customer who had left his vehicle at the shop for repair. On the day in question, the shop was closed due to a large ice storm, but Mr. Combs called and asked to pick up his vehicle. The Welch's, who lived next to the shop, agreed to walk over to meet Mr. Combs. After paying for the work done to his truck, Mr. Combs exited the building and slipped on ice in the gravel parking lot and sustained a closed head injury. I tried the jury trial, which began March 20, 2013, in Polk County and the jury found for the defendant.

Rosemarie Wood v. Progressive Preferred Insurance Company, Case No. 1031-CV18487, Consolidated Case No. 1031-CV09765. I represented Progressive Preferred in a bench trial before Judge Cordonnier September 17, 2012. Matt Corbett and Daniel Malloy represented Wood. Ms. Wood's son was killed as a result from falling from the bed of an uninsured motor vehicle, which was driven by either Jessica Majors or Bobby Potts, both of whom denied driving the vehicle. Ms. Wood's son was moving furniture from the residence he shared with Ms. Majors in Monett to a residence they planned to share in Pierce City, Missouri. Ms. Wood claimed uninsured motorist benefits under the terms of the Progressive Preferred policy. The Court's judgment stated, "In a fine example of careful trial

preparation and lawyerly cooperation, the parties entered a Stipulation of Fact removing from the case many issues over which there was no genuine issue of dispute.” The Court found Mr. Wood was not a relative residing in the same household as the uncle for the purpose of providing coverage under the uninsured motorist section of the policy and entered Judgment in favor of Progressive Preferred on October 19, 2012.

Alan Herman v. Ronald Daugherty, Case No. 31107-CC5179. This was a personal injury suit wherein Mr. Herman alleged he was injured as a result of an automobile accident involving Mr. Daugherty. Jim Corbett represented Mr. Herman and I represented Mr. Daugherty before a Greene County, Missouri jury beginning on June 20, 2011, with Judge Dan Conklin presiding.

Megan Skinner (Hoskins) v. Amy Grace, Case No. 0931-CV05880. This was a personal injury suit wherein Ms. Skinner alleged she was injured as a result of an automobile accident with Ms. Grace. Bill Beadle represented Ms. Skinner and I represented Ms. Grace. The matter was tried to a Greene County, Missouri jury beginning on May 10, 2011, before Judge Michael Cordonnier.

Christine Dittmer v. Connie Cox, Case No. 0831-CV02300, Christine Dittmer, who was represented by Jim Corbett, alleged she was entitled to damages as a result of an automobile accident, which occurred with my client, Connie Cox. The matter was tried to a jury beginning on May 10, 2010, before Judge Dan Conklin.

Kerns v. Couch, Case No. 1131-CV11910; Steve Kerns, who was represented by Ann Littell Mills, alleged he was entitled to damages as a result of an automobile accident, which occurred with my client, Robert Couch. Mrs. Kerns also alleged loss of consortium. The matter was tried to a jury beginning on June 20, 2012, before Judge Michael Cordonnier.

Sturgell v. Paulsen, Case No. 10BR-CC00016; Mr. Sturgell, who was represented by John Cowherd and Scott Pettit, alleged he was injured as a result of a motor vehicle accident caused by Ms. Paulsen. John Franke and I represented Ms. Paulsen. The matter was tried to a jury beginning on September 22, 2011, in Barry County before Judge Carr Woods.

Norton v. Higdon, Case No. 08NW-CV00375; Allan Wilcox and Deryl Edwards Jr. represented Mr. Norton, who was hired by Mr. Higdon to repair his residential roof. Mr. Norton fell off the ladder as he was descending from the roof. After the fall Mr. Norton drove himself home, but it was later determined that he had broken his hip. John Franke and I represented Mr. Higdon. The matter was tried to a jury beginning April 13, 2010, before Judge Timothy Perigo.

Annette Schoemel v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund. Mr. Schoemel injured his knee in a work-related accident and had pre-existing disabilities. Mr. Schoemel died about a month after his original workers' compensation benefits began, but his death was unrelated to the accident. Ms. Schoemel sought permanent total disability benefits for the remainder of her lifetime following his death. I represented the Second Injury Fund at the hearing before the ALJ, who found the Fund was liable to Ms. Schoemel for Mr. Schoemel's permanent total disability benefits until the date of his death; however, the ALJ denied Ms. Schoemel's claim for permanent total disability benefits for the remainder of her lifetime following his death. The Commission affirmed the ALJ's ruling. The matter was later appealed and reversed in *Schoemel v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007). The Supreme Court's ruling was then overturned by legislation.

I also tried numerous cases for injured workers, such as Kim Maxwell, Betty Pendergrass, William James, James Theobald, William James, Nick Adams and Linda Lafie, from 2005 - 2009. In all of those cases I presented expert witness testimony regarding the nature and extent of their injuries and the percentage of the resulting disability. I would aggressively cross-examine defense experts and witnesses. Shari Lockhart, Laurel Stevenson, Jerry Harmison, Patrick Platter, and Mary Thompson would frequently defend the employers and Assistant Attorneys General Cara Harris and Susan Colburn would defend the Second Injury Fund. I also argued many Social Security Disability cases during that time, as well.

Frequently the cases heard before the ALJ would be appealed to the Labor and Industrial Relations Commission. *Linda Moore v. Nevada Regional Medical Center, the Missouri Property and Casualty Guarantee Fund and the Treasurer of Missouri as Custodian of the Second Injury Fund.* Inj. No. 01-054103 (April 16, 2007) was a representative case. Ms. Moore filed a Claim for Compensation after a fall at work. The ALJ found her to be permanently and totally disabled as a result of her last injury alone. I tried the matter along with Tom Carlton on behalf of Ms. Moore. The employer appealed to the Commission. I argued the appeal to the Commission and the ALJ's decision was affirmed. Mathew Hogan represented the employer and Christy Pitman represented the Second Injury Fund.

I also tried many family law matters such as, *Stephanie Jones v. Christopher Jones*, Case No. 35V049600457-01. I represented Petitioner Stephanie Jones in a contested Motion to Modify Child Custody, which was filed by Respondent Christopher Jones, who was represented by Rance Bulter. Judge Steve Mitchell heard the matter on August 14, 2002.

In The Matter of The Condemnation of The Gas Distribution System of People's Natural Gas Company, A Division of Utilicorp United, Inc. On November 5, 1996, the City of Wahoo, Nebraska voted in favor of acquiring the gas distribution

system that was owned and operated by People's Natural Gas Company by its statutory right of eminent domain. The Supreme Court appointed a Court of Commendation. Doug Law with Blackwell Sanders, Omaha, Nebraska, represented People's Natural Gas. The Court of Condemnation heard evidence the week of January 12, 1998, in order to determine the value of the system and the value of lost future profits. I was co-counsel at trial on behalf of the City of Wahoo, Nebraska, wrote the closing briefs, and argued the matter at the summation hearing before the Court of Condemnation. The court valued the system in the range requested, denied attorneys fees and ordered each party to pay their own costs.

- c) **Judicial Experience:** If you are a judge, commissioner, or are serving or have served in other judicial capacity, please describe the nature and extent of your judicial responsibilities, including the dates you have served as a judge at each level, the types of dockets you have handled, and any special expertise you have developed that you believe is relevant to your qualifications for the position for which you are applying.

I am currently a full-time municipal judge for the City of Springfield. I was appointed by the City Manager and confirmed by the City Council. I took the bench July 1, 2013. My docket includes traffic offenses, alcohol related offenses, stealing, assaults, affrays, drugs, drug paraphernalia, trespassing, and various other ordinance violations. I preside over many bench trials and have authority to preside over jury trials. As a full-time judge, I also have administrative responsibilities regarding supervising employees. I run an efficient and effective courtroom. I have become very adept at quickly assessing the issues, dealing with any immediate threats to the public, and determining a fair and appropriate sentence. I have received extensive judicial training on sentencing techniques, which I implement each day. Many of these same matters are heard at the associate circuit level. I routinely sentence drug and alcohol related offenses including driving while intoxicated offenses. I consolidate cases when appropriate with the Greene County Mental Health Court and Greene County Drug Court. I also use the new Family Dependency Court, which is now Judge Carrier's docket, as a sentencing option for defendants.

Also, in my day-to-day duties I determine if early release or parole is appropriate as it relates to the jail population issues. I issue numerous warrants each day and set bond on defendants in person and during the video court sessions where the defendant appears in custody while at the Greene County Jail.

I have had extensive training at the National Judicial College in Reno, Nevada. This June I completed the Special Court Jurisdiction Advanced Course, which is a two-week course covering municipal and associate circuit court jurisdictions. I also completed Driving While Impaired Adjudication Essentials at the National

Judicial College in August of 2013. The National Judicial College trains judges from all states and some foreign countries. The training I have received applies to associate circuit level cases. Therefore, I believe my experience and training would allow me to make a smooth transition to the associate circuit docket. Also, I have received the Office of State Courts Administrator new judge's training and have participated in the Municipal and Associate Circuit Courts annual meetings, which include training. Furthermore, because of my interest in treatment courts, I attended the Missouri Association of Drug Court Professional's 16th Annual Conference and received specialized judicial drug court training. Furthermore, I work with Burrell Behavioral Health to insure I am effectively using the liaison services they provide for the court and have initiated their mental health services for over 10 defendants within the last 6 months. Finally, I am a member of a committee investigating the viability of a Homeless Court, which is special treatment court for homeless defendants.

11. (a) Describe any additional legal experience that you believe may be relevant to the commission's decision, including clients by category that you have represented.

As an attorney and litigator I have helped many people make difficult decisions in a wide range of contexts. One example would be early in my career I was appointed by the court to provide counsel to a mother who was unable to safely parent due to her co-occurring disorders of alcohol and substance abuse and mental health issues. I worked with the treatment team to secure all the services possible for the mother and when it was clear she could not be successful in parenting, provided her counsel as she reached the very difficult decision to relinquish her parental rights. I worked with the treatment team to allow her to create a memory book for the child, which contained photographs and a letter to the child. Helping her draft that letter was extremely difficult as I had a three-year-old child at that time as well, so I had an acute appreciation of the gravity of her decision. I represented many clients as a court appointed attorney while maintaining a full-time criminal and civil firm practice.

I did extensive work as Guardian ad Litem in Juvenile Court matters and Family Law matters while practicing in Dexter, Missouri. I frequently authored lengthy Guardian ad Litem reports after conducting home and school visits, interviewing the teachers and all interested parties. I testified and made recommendations to the court in abuse and neglect cases. My experience in this area is directly applicable to the Associate Circuit Court, as any new Associate Circuit Court judge may be tasked with hearing juvenile matters. I have the experience that will be necessary to work with treatment teams that include juvenile officers, family support workers, law enforcement and the Child Advocacy Center. I have handled many misdemeanor and felony cases including rapes, assaults and an attempted murder.

As my career changed and progressed I began representing civil plaintiffs and defendants exclusively. My practice ranged from trying small auto accident cases to advising large corporations on multi-million dollar title insurance claims. As managing partner of the Springfield office of Franke, Schultz and Mullen I hired and managed all the local staff and attorneys. I am very even-tempered and patient. I believe my personality makes me exceptionally suitable for the Associate Circuit Court bench.

Moreover, as managing partner of a law firm I have had an opportunity to influence many young attorneys. I have hired new attorneys and helped them make that transition from law school to a practice. I also have served as a mentor for other young attorneys in the community, as well. I believe these are all skills needed by an Associate Circuit Judge, as they have a direct and immediate impact over the young attorneys' development that appear in his or her courtroom.

All of my currently job duties require me to be a fair and consistent leader. I believe my love of this role is evident when someone is observing in my courtroom. I use my skills now to challenge some defendants to change their behavior and be accountable for their actions. I do this in an approachable but firm manner. These interactions vary from working with youth in their first contact with the court system to working with people who are returning from the Department of Corrections and are reintegrating with our community. I believe by being an accessible judge who not only punishes offenses, but also celebrates successes I can make a difference.

(b) Describe any non-legal experience that you believe may be relevant to the commission's decision.

I am also the mother of a former special needs child, who is now a young adult that is thriving in college. That experience has given me a framework and background that I use to challenge people not to accept labels that are placed upon them. This is especially helpful in my current work with the community.

12. List all bar associations and other professional societies of which you are a member, with any offices held and dates.

American Judges Association, 2013 to Present
Missouri Association of Associate Circuit and Municipal Judges, 2013 to Present
Missouri State Bar Association, 2001 to Present
Louisiana State Bar Association, 1999 to Present
Nebraska State Bar Association, 1995 to Present
Oklahoma State Bar Association, 1995 to Present
Missouri Association of Trial Attorneys, 2006 to 2010
Springfield Metropolitan Bar Association, 2005 to Present

Nebraska Attorneys Trial Association, 1997 to 2000
American Trial Lawyers Association, 1997 to 2009
American Bar Association, 1995 to 2013
Nebraska Criminal Defense Attorneys Association, 1997

13. (a) List any professional articles or books authored by you that have been published or any special recognition or award of a professional nature you have received.

On August 18, 2014, I was selected as one of Springfield's Most Influential Women of 2014, which is an award that is chosen by an independent panel. It recognizes the leadership, influence and civic involvement of women across Southwest Missouri. The award will be presented at a luncheon on October 10, 2014 hosted by the Springfield Business Journal.

Birdsong v. Waste Management, 147 S.W.3d 132 (Mo.App. S.D. 2004), which was summarized above, was selected one of the top 25 cases of the year as reported by Missouri Lawyers Weekly in 2004.

I presided over a group wedding, along with Judge Thornhill, on Valentine's Day 2014 at the Municipal Court where 14 couples were married on February 14, 2014, which was featured on the front page of the Springfield News-Leader on February 15, 2014.

I was a presenter and teacher at the University of Missouri School of Law Trial Practice Intersession 2013 in Columbia, Missouri.

Also, I was a presenter at Trial Preparation From Start to Finish for Paralegals in May of 2012. I prepared course materials, which were published by the Institute for Paralegal Education.

- (b) List any other articles, reports, letters to the editor, editorial pieces, or other material authored by you that have been published within the last five (5) years.

None.

14. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations in which you have significantly participated. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

St. Elizabeth Ann Seaton parishioner since 2003.

I currently serve as a judge for Teen Court. In this program, Greene County high school students who have plead guilty to misdemeanor charges are sentenced by a jury of their peers. The cases are prosecuted and defended by high school students serving in the role of attorneys.

Springfield Claims Association, 2009 to 2013, Past-President

Order of the Eastern Star. I have been a member since 1991. I am a Past-Worthy Matron.

Because I work daily with the homeless and drug dependent, I am currently participating with the Mayor's Commission on Employment of Offenders. I am also on the committee for the development of a Homeless Court.

15. Do you now hold or have you ever held an elective or an appointive public office or position? If yes, provide details.

Yes. I currently hold an appointed full-time Judgeship with the City of Springfield, Missouri, as discussed above.

16. Please list any client(s) or organization(s) for which you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organization(s).

None.

17. Provide the branches and dates of (a) military service or (b) other public service not otherwise disclosed in this application. If discharged from the military, state whether the discharge was other than honorable.

None.

18. State whether you are able, with or without a reasonable accommodation, to perform the essential functions of being a trial judge.

Yes. I currently preside over municipal violations each day and preside over many trials. Furthermore, I have the experience, desire and work ethic necessary to advance to the next level.

19. Were you ever refused admission to the bar of Missouri or the bar of another state or the federal courts? If yes, provide details.

No.

20. Have you ever been disciplined, admonished or cited for breach of ethics or professional conduct by the Supreme Court of Missouri or by any court or bar association or committee thereof? If yes, provide details.

No.

21. If you are or were a member of the judiciary of the State of Missouri, please state:

- a) Whether an order of discipline ever has been entered against you by the Supreme Court of Missouri for breach of the Code of Judicial Conduct or the Canons of Judicial Conduct. If yes, provide details.

No.

- b) Whether a reprimand or admonition ever has been entered against you by the Commission on Retirement, Removal and Discipline for any of the causes specified in Supreme Court Rule 12.07. If yes, provide details.

None.

22. Have you have ever been held in contempt of court? If yes, provide details.

No.

23. Have you ever been sued by a client or been a party to any other litigation, other than as guardian ad litem, plaintiff ad litem, or defendant ad litem?

No.

If your answer is yes, state the style of the case, where it was filed, and explain in detail. If you are a judge and you have been sued in your judicial capacity, list only those cases where you are or were other than a nominal party.

23. Have you ever been convicted or received a suspended imposition of sentence for a felony or misdemeanor in state, federal or military court? *(Note that this question does not require that traffic offenses or other infractions be listed.)*

If your answer is yes, state the style of the case, where it was filed, and explain in detail.

No.

24. Are you delinquent in the payment of any federal, state, county or city taxes? If yes, provide details.

No.

24. You must attach to this application one writing sample of your choice. The only rule, limitation or instruction is that you must indicate whether it was edited by anyone else, and if so, to what degree.

I wrote each of my writing samples without contribution or editing from any other person. My brief in *Birdsong v. Waste Management* was approved by Assistant Attorney General Layton before submission to the Court of Appeals, but was not edited by him.

25. List/describe any additional honors or awards you have received, activities you have performed, or any other information not set out above that demonstrates the quality of your work as an attorney or that you otherwise believe is relevant to the commission's decision.

Please list the names of *five* persons whom you will ask to provide letters of reference for you with respect to your judicial qualifications. Do **not** list as a reference a judge of the court involved. As to each of the (5) references, **please provide name, title, mailing address, telephone and e-mail address. Please note that it is your responsibility to contact your references** and to see that they send the requested letters in a timely manner and in accordance with the Guidelines for References.

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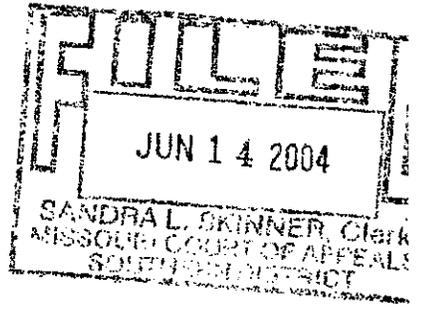
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**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

APPEAL NUMBER SD~~25976~~ 25996

**PAUL BIRDSONG
Employee-Respondent**

vs.

**WASTE MANAGEMENT
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
Employer/Insurer-Appellants**

and

**Treasurer of the State of Missouri as
Custodian of the SECOND INJURY FUND
Additional Party-Respondent**

**BRIEF OF ADDITIONAL PARTY/RESPONDENT
SECOND INJURY FUND**

**JEREMIAH W. (JAY) NIXON
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STATEMENT OF FACTS

The Employee, who was 33 years old at the time of the hearing, testified throughout the hearing he had very physically demanding jobs. He did not finish high school, nor had a GED. (Tr. 33-34) He has sold used cars, driven forklifts and performed landscaping work. (Tr. 29-33) His last employment was for Employer/Appellant, Waste Management, hereinafter referred to as "Employer/Appellant," where he drove and loaded a trash truck. (Tr. 10-11)

The Employee claims to have injured his low back on several occasions. First, he missed approximately one week of work after being hit by another vehicle while working as a tree trimmer. (Tr. 28-29) There was conflicting testimony as to how much this injury bothered him. (Tr. 29, 520) He then testified that he "re-injured" his low back when some pallets fell on him at an employment at a pet food manufacturing plant. (Tr. 30, 56) Regarding his low back, the Employee testified in a pre-hearing deposition that his back did not bother him. (Tr. 60, 782)

Employee's last injury occurred while loading trash for the Employer/Appellant on November, 18, 1998, while he was loading a dumpster containing concrete blocks. (Tr. 10-12) When the truck's hydraulic arm did not load it properly, he attempted to steady the dumpster with his left arm. (Tr. 12) He testified he felt pain from his left ear to his toes. (Tr. 13) He attempted to complete his route, but returned to the Employer/Appellant's base

because he was unable to work. (Tr. 15) The Employee was provided medical treatment. (Tr.17) A December 2, 1998, MRI showed a large central and slightly to the left C6-7 herniated disk and a small central and slightly to the left C7-T1 herniated disc. (Tr. 17, 276) The Employee had an anterior discectomy and fusion at C6-7 and C7-T1 with allograft bone followed by physical therapy. (Tr. 302, 325) The Employee suffered nerve trauma from the accident, which has left him with bladder and sexual dysfunction problems. (Tr. 22,51) He was diagnosed with urodynamics (incomplete bladder emptying with some relative urinary retention and occasional urge incontinence) due to a hypotonic and neurogenic bladder. (Tr.457, 462)

At the hearing, the Employee and his wife testified. (Tr. 9-81) He also presented the medical opinions of Dr. Raymond Cohen (Tr. 132, *et seq.*), Dr. Jeffrey Woodward (Tr. 450, *et. seq.*) and a vocational opinion from Timothy Lalk.(Tr. 200, *et. seq.*) The Employer/Appellant did not present any witnesses, but did offer the medical records of Dr. David Meyers. (Tr. 641, *et. seq.*) The Treasurer of the State of Missouri as Custodian of the Second Injury Fund, hereinafter referred to alternatively as "Respondent" or the "Second Injury Fund," offered the testimony of Rob Mossman, a previous employer of the Employee, (Tr.82, *et. seq*) and the prior deposition testimony of the Employee. (Tr. 666, *et seq.*)

ARGUMENT

Standard of Review

This Court's review is governed by Section 287.495, RSMo. (2000). The decision of the Labor and Industrial Relations Commission, hereinafter referred to as the "Commission," should be affirmed unless it acted in excess of its powers, the award was procured by fraud, the facts do not support the award, or there was not sufficient evidence in the record to warrant the making of the award. Section 287.495.1, RSMo. (2000).

As this appeal involves factual issues, this Court's review is limited to a single determination of whether, considering the whole record, there is sufficient competent and substantial evidence to support the Award. *Hampton v. Big Boy Steel Erection, et al.*, 121 S.W.3d 220 (Mo. banc 2003).

I. THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT THE SECOND INJURY FUND IS NOT LIABLE FOR PAYMENT OF PERMANENT TOTAL DISABILITY BENEFITS BECAUSE EMPLOYEE'S PERMANENT DISABILITY AROSE SOLELY FROM HIS LAST INJURY. (RESPONDS TO EMPLOYER/APPELLANT'S POINT L)

A. The Commission correctly looked first at the last injury.

In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability as a result of the last

compensable injury, and that disability has combined with a prior permanent partial disability to result in total disability. Section 287.220.1, RSMo. (2000); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990); *Anderson v. Emerson Elec. Co*, 698 S.W.2d 574, 576 (Mo. App. 1985). This standard was most simply set forth when the Missouri Court of Appeals held:

Where a preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work-related injury.

Reiner v. Treasurer of State of Missouri, 837 S.W.2d 363, 366 (Mo. App. 1992)
(emphasis added).

In determining the extent of disability attributable to the employer and the Second Injury Fund, the Commission must first determine the extent of the compensable injury. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is therefore necessary that Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

B. The Commission was presented with two medical opinions from the rating physician.

To make the aforementioned determination, the Commission had several medical opinions before it regarding the nature and extent of the Employee's injuries. Specifically, the deposition testimony of Dr. Cohen, a board certified physician who provided a rating at the request of the Employee, was offered and received. (Tr. 141-197) Dr. Cohen first testified that the Employee's permanent disability was caused by a combination of his injuries. (Tr. 162-163) But when asked on cross-examination about whether, given the Employee's level of injury at his last job, he would still be permanently disabled if he did not have any pre-existing injuries, Dr. Cohen responded affirmatively. (Tr. 190-191) As such, Dr. Cohen testified that the Employee's permanent total disability was a result of his last injury.

After reviewing the expert opinion rendered by Dr. Cohen in its entirety, the Commission found that he was the only expert to offer an opinion on the issue of whether it was the last injury alone or a combination of Employee's injuries that rendered him permanently and totally disabled. (L.F. 32-54) The Commission accepted one of Dr. Cohen's opinions and rejected the other:

Dr. Cohen offered two different opinions on this issue. We are persuaded by

Dr. Cohen's opinion in the following exchange because it is the only opinion

in accord with the analysis provided by the Supreme Court.

Q. Okay. Given all of that, doctor, and given the quite high percentage of permanent partial disability that you rate at this cervical spine, what would be your opinion if Mr. Birdsong had not earlier suffered that lumbar spine, you think you would still qualify him as permanently totally disabled?

A. Assuming he didn't have the back condition?

Q. The lumbar condition, right.

A. Sure, lumbar.

Q. I'm just trying to be specific.

A. Assuming that condition didn't exist, my answer would be yes.

Q. That he would be permanently totally disabled?

A. Yes.

Based upon the above testimony of Dr. Cohen, we find that claimant's last injury, in and of itself, rendered the claimant permanently and totally disabled.

Therefore, we conclude that the Second Injury Fund has no liability and the employer is responsible for the entire amount of permanent total disability.

(L.F. 32-54)

C. It is within the Commission's province alone to determine which opinion it finds credible.

Deciding which one of two conflicting medical theories it should accept is a determination particularly for the Commission. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W. 3d 427, 439 (Mo.App. 2001) That choice can be characterized as a credibility decision (one opinion is credible, the other is not), or as a decision with regard to weight (one opinion is given greater weight than the other). But both are choices for the Commission as fact finder; they are binding on this Court. *Id.* at 438. In addition, a determination of what weight it will accord expert testimony on matters relating to medical causation lies within the Commission's sole discretion and cannot be reviewed by this Court. *Id.* And as such, the Commission in the instant case chose which opinion they accepted and specifically addressed it in their award.

This is not the first case where two differing opinions of Dr. Cohen have been considered. *Maas v. Treasurer of the State of Missouri*, 964 S.W. 2d 541 (Mo.App.E.D. 1998), is almost factually identical to the instant case. In *Maas*, the Court was also determining whether the claimant was totally disabled from his last injury. The Court stated and held as follows:

As previously stated, Dr. Cohen examined claimant on April 2, 1992 and determined that claimant was permanently and totally disabled due to his significant spinal cord injury on September 5, 1991. On February 28, 1995 Dr. Cohen reevaluated claimant to address Second Injury Fund liability. After

review of claimant's medical history, Dr. Cohen concluded that claimant was permanently and totally disabled due to the combination of the primary work injury and his preexisting conditions.

The Commission found that [t]his new opinion amounts to nothing more than stating that claimant's permanent and total disability also results from the combination of the primary work injury and his preexisting conditions. It is clear from Dr. Cohen's testimony that Mr. Maas was permanently and totally disabled as a result of the disabilities caused by [the] fall.

We defer to the Commission on issues concerning credibility and weight to be given to conflicting evidence and testimony. *Smith v. Climate Engineering*, 939 S.W.2d 429, 431 (Mo.App.1996). The Commission is free to disregard testimony of a witness even if no contradictory or impeaching evidence is introduced. *Id.* It is in the Commission's sole discretion to determine the weight to be given expert opinions. *Id.*

The Commission was free to believe Dr. Cohen's 1992 opinion that the September 5, 1991 fall was the sole cause of the permanent total disability and disregard Dr. Cohen's later opinion that claimant was permanently and totally disabled due to the combination of the primary work injury and his preexisting conditions. (*emphasis added*) It is clear

from the Commission's findings that it considered all of the evidence, including the voluminous collection of medical records, along with Dr. Cohen's testimony in order to arrive at its finding that the primary injury of September 5, 1991 was the sole cause of claimant's permanent total disability.

Accordingly, the Commission's finding that the September 5, 1991 fall was the sole cause of claimant's permanent total disability is supported by competent and substantial evidence and is not against the overwhelming weight of the evidence.

Maas at 545.

Just as in *Maas*, the Commission here, after considering all the evidence before it, including but not limited to Dr. Cohen's testimony, found that the Employee's claim for benefits from the Second Injury Fund should be denied, as the last injury was the sole cause of Employee's permanent total disability. The Commission's finding, again as in *Maas*, is supported by competent and substantial evidence and is not against the overwhelming weight of the evidence. Therefore, the Commission did not err and thus its award should be affirmed.

II. EVEN IF THE COMMISSION HAD NOT FOUND THAT THE LAST INJURY ALONE PERMANENTLY TOTALLY DISABLED THE EMPLOYEE, THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE SECOND INJURY FUND IS NOT LIABLE FOR PAYMENT OF BENEFITS. (RESPONDS TO EMPLOYER/APPELLANT'S POINT I.)

It is not enough for Employee to show that he had previous injuries. He must prove those injuries resulted in disabilities that caused a hindrance or obstacle to his employment. He must also prove that he is permanently totally disabled because of an enhanced combination created by his previous and last injuries in order to be entitled to benefits from the Second Injury Fund. Employee failed to prove both of these elements, either through his own testimony or by expert opinions. If evidence as to one element of his claim is lacking, Employee's claim must fail. *Lawrence v. Joplin R-VIII School District*, 834 S.W.2d 789, 793 (Mo. App. S.D. 1992).

The Employee's own testimony does not support his claim of a prior obstacle or hindrance to employment. In order to be entitled to benefits from the Second Injury Fund, the Employee must prove he had a hindrance or obstacle to employment prior to his last work-related injury. Section 287.220.1, RSMo. (2000); *Leutzinger v. Treasurer of Missouri*, 895 S.W. 2d 592, 593 (Mo. App. 1995). The Employee did not testify to any obstacle or

hindrance to employment that occurred as a result of his 1987 low back injury or his 1993 low back re-injury, both of which were treated only conservatively (Tr. 57-58) . At the time of his last injury with Employer/Appellant, the Employee ran a rear-loading trash truck. (Tr. 10). He testified that his duties included driving the route for the day, as well as walking to the rear and loading the rubbish into the back of the truck. (Tr. 10). He stated that he worked alone and dumped approximately ninety (90) percent of his stops by hand, while he loaded the rest of the stops, which were larger dumpsters, automatically with the truck's hydraulic arms. (Tr. 10-11). The Employee estimated that the trash bags that he loaded by hand weighed between five (5) and twenty-five (25) pounds. (Tr. 11).

Employee testified that there were occasions when he completed a twenty-two (22) or twenty-three (23) hour shift, went home for half an hour and then returned to work for the next shift. (Tr. 35). He testified that his job with the Employer/Insurer was a very physically demanding job. (Tr. 35) There is no way to reconcile this testimony with Employer/Appellant's position that at the time of his last injury he had a prior hindrance or obstacle to employment from his prior injuries.

In addition, when testifying regarding his 1987 low back injury, he stated that he only missed approximately one week of work. (Tr. 29). He reported to Dr. David F. Mendelson, MD, a neurologist, that his symptoms from the 1987 low back injury had "completely remitted". (Tr. 520). And in a deposition taken after the last injury on July 7, 2000, when Claimant was asked, "[D]o you still have back pain today, low back pain?" he answered "[I]t

doesn't bother me." (Tr. 60, 782). Furthermore, upon cross examination at hearing, Claimant agreed that he has never had surgery on his low back. (Tr. 57-58). Overall, the Employee presented no evidence that the prior low back injury interfered with his ability to work prior to December 4, 1998, or that it interfered with his ability to engage in leisure activities.

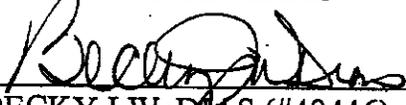
Finally, the Employer/Appellant argues that the Employee's settlement with the Second Injury Fund of his 1997 case is an admission by the Fund that the Employee did have a pre-existing disability to his low back that represented a hindrance to his ability to find employment in the open labor market. The Employer, however, has no basis for this statement, nor any legal citations to offer. A Stipulation is a compromise agreement and not an admission of liability. Furthermore, Employer/Appellant's position is directly controverted by the body of evidence adduced at trial. As stated above, the law is clear, if the last injury is the injury which creates the total disability, which it does in the instant case, no further inquiry of the Fund is made. Therefore, any prior settlements with the Fund in the instant case are irrelevant.

CONCLUSION

The Commission was presented a record with two medical opinions by Dr. Cohen. After considering the lengthy record, the Commission adopted the opinion that the Employee's permanent disability was caused by his last injury alone and apportioned liability

solely to the Employer/Appellant. Because the Award entered by the Commission is supported by the sufficient, competent and substantial weight of the evidence and the issue at bar is within its sole province, its Award should be affirmed.

Respectfully submitted,
JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL



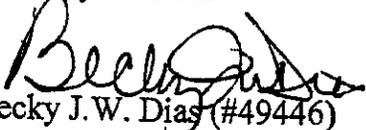
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies that Respondent's Brief contains the information required by rule 55.03, and that the Brief complies with the limitations contained in Rule 84.06(b), containing 3366 words, as counted by the word count of the word processing system used to prepare the brief.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned hereby certifies that the floppy disk containing Respondent's
Brief filed herewith has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing document were mailed to each of the below listed parties, postage prepaid, on this 14 day of June, 2004.

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Becky J.W. Dias

APPENDIX

Section 287.495.1, RSMo. (2000)A1

Section 287.220.1, RSMo. (2000)A2

(1980) A circuit court in reviewing the decision of the commission cannot simply agree with a dissenting member of the commission that the evidence was not believable. *Johnson v. General Motors Assembly Division G.M.C. (A.)*, 605 S.W.2d 511.

287.495. Final award conclusive unless an appeal is taken — grounds for setting aside — disputes governed by this section, claims arising on or after August 13, 1980. — 1. The final award of the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. The appellate court shall have jurisdiction to review all decisions of the commission pursuant to this chapter where the division has original jurisdiction over the case. Venue as established by subsection 2 of section 287.640 shall determine the appellate court which hears the appeal. Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall, under its certificate, return to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Upon appeal no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, 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.

2. The provisions of this section shall apply to all disputes based on claims arising on or after August 13, 1980.

(L. 1980 H.B. 1396, A.L. 1998 H.B. 1237, et al.)

287.500. Circuit court may act upon memorandum — procedure. — Any party in interest may file in the circuit court of the county in which the accident occurred, a certified copy of a memorandum of agreement approved by the division or by the commission or of an order or decision of the division or the commission, or of an award of the

division or of the commission from which an application for review or from which an appeal has not been taken, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment were a final judgment which had been rendered in a suit duly heard and determined by said court. Any such judgment of said circuit court unappealed from or affirmed on appeal or modified in obedience to the mandate of the appellate court, whenever modified on account of a changed condition under section 287.470, shall be modified to conform to any decision of the commission, ending, diminishing or increasing any weekly payment under the provisions of section 287.470 upon the presentation to it of a certified copy of such decision.

(RSMo 1939 § 3733, A.L. 1963 p. 410)

Prior revision: 1929 § 3343

287.510. Temporary or partial awards may be made. — In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made, and if the same be not complied with, the amount thereof may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award.

(RSMo 1939 § 3734)

Prior revision: 1929 § 3344

(1953) Contention that temporary award could be doubled on final award only where defense is found frivolous or vexatious denied. *Cebak v. John Nooter Boiler Works (A.)*, 258 S.W.2d 262.

(1953) The making of a temporary award was not res adjudicata, after the time for review thereof had expired, as to the adjudication of the question of medical expenses even though medical treatment began before referee's hearing and continued thereafter. *Finn v. Harrison (A.)*, 253 S.W.2d 93.

(1953) This section vests discretion in the commission to determine whether an award should be doubled, and its determination therein is not to be disturbed unless commission acted arbitrarily or abused discretion. *Powers v. Universal Atlas Cement Co. (A.)*, 261 S.W.2d 512.

(1975) Double penalty for failure to comply with award not a proper matter for original consideration in the court of appeals. *Todd v. Goostree (A.)*, 528 S.W.2d 470.

287.520. Notice — manner of serving. — Any notice required under this chapter shall be deemed to have been properly given and served when sent by registered or certified mail, properly stamped and addressed to the person or entity to

ts of a complete medical written objections to the grounds for the dispute, y party, the administrative on such objections upon the report meets the plete medical report and of the report or portions ns are filed the report is objections thereto are ring herein shall prevent ing to admit medical re- sment. The provisions of t apply to claims against

of the proceedings before inquest over the body of g an injury in the course of g in death shall be admis- proceedings for compen- r, and it shall be the duty otice of the inquest to the ndents of the deceased ave the right to cross-

e commission may in its ry cases order a postmor- or that purpose may also

557, A.L. 1965 p. 397, A.L. 1980 51, A.L. 1993 S.B. 251, A.L. 1998

mployee to be furnished, otherwise inadmissible a ment in writing made or loyee, whether taken and pper, signed or unsigned, or any statement which is cally recorded, or taken in 1, or otherwise preserved, dence, used or referred to ring or action to recover unless a copy thereof is ployee, or his dependent r attorney, within fifteen st for it by the injured s in case of death, or by st shall be directed to the / certified mail.

7, A.L. 1973 H.B. 215)

287.220. Compensation and payment of compensation for disability — second injury fund created, services covered, actuarial studies required — failure of employer to insure, penalty — records open to public, when — concurrent employers, effect. — 1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. If the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabili-

ties, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself, except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

2. In all cases in which a recovery against the second injury fund is sought for permanent partial disability, permanent total disability, or death, the state treasurer as custodian thereof shall be named as a party, and shall be entitled to defend against the claim. The state treasurer, with the advice and consent of the attorney general of Missouri, may enter into compromise settlements as contemplated by section 287.390, or agreed statements of fact that would affect the second injury fund. All awards for permanent partial disability, permanent total disability, or death affecting the second injury fund shall be subject to the provisions of this chapter governing review and appeal. For all claims filed against the second injury fund on or after July 1, 1994, the attorney general shall use assistant attorneys general except in circumstances where

**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

APPEAL NUMBER SD29250

REBECCA GARBER, Claimant/Respondent,

v.

**DR. JAROONWANICHKUL, d/b/a BRANSON ONCOLOGY,
Employer/Appellant,**

and

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

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This action is a Missouri Workers' Compensation Claim. The case was heard on November 8, 2007. Administrative Law Judge Wilson found in favor of the Claimant/Respondent. The Employer/Appellant filed an Application for Review before the Missouri Labor and Industrial Relations Commission, hereinafter referred to as the "LIRC." The parties argued the matter and the LIRC affirmed the Award of the Administrative Law Judge.

The Missouri Constitution, Article V, Section 18 provides for judicial review of the LIRC's Award to determine whether the award is "supported by competent and substantial evidence upon the whole record."

STATEMENT OF FACTS

Rebecca Garber, (hereinafter referred to as "Claimant/Respondent"), was 48 years of age at the time of the hearing. She is a high school graduate that had completed additional training as a certified nursing assistant and in phlebotomy. Most of her employments had been in the medical field. She began employment with Dr. Pairote Jaroonwanichkul, M.D., (hereinafter referred to as "Employer/Appellant") doing business as Branson Oncology in 2002 or 2003.

Employer/Appellant hired Claimant/Respondent to perform phlebotomy and various other medical duties in his oncology practice in Branson, Missouri. She was paid

Ten (10) dollars per hour. Employer/Appellant was her ultimate supervisor, but her immediate supervisor was Anjee Davis. (TR 104).

Prior to her employment at Branson Oncology Claimant/Respondent testified that she had never had any lasting injuries or illnesses that affected her ability to work in any way. (TR 105).

Claimant/Respondent was injured while working at Branson Oncology on May 28, 2004. (TR 105). On May 28, 2004, she had escorted a patient back to Employer/Appellant and was returning to attend to the next patient when she tripped on the carpet. (TR 105). Claimant/Respondent fell forward hitting the left side of her face and neck on the door jam. She fell back coming to rest with her feet in the hallway. (TR 106). In falling, it was the left side of her face that struck the door jam first. She did not have time to put her hands out. (TR 106). She stated it was a severe blow, and her body just kept going. (TR 106). She testified she did not state that she bounced immediately backward like a bouncing ball. (TR 107). She specifically testified that when she hit the door jam she kind of twisted back and fell into the break room with her feet sticking out into the hallway. (TR 107). She landed with her nose up. (TR 107).

At hearing Claimant/Respondent offered a photograph of the break room and the door jam where she fell as Exhibit A. (TR 107). A smaller version of the photo was offered and received as Exhibit Q. Claimant drew on Exhibit Q during her direct examination indicating the position of her body in relation to the door when she came to rest after the fall. (TR 109).

When her co-workers heard the fall, they ran to her aid. Melody Isaac, the first employee to reach her, helped her into a sitting position on the floor. (TR 109). In addition, a patient's wife came out of Employer/Appellant's office because she had heard the fall. (TR 110). Employer/Appellant also stepped out of his door, saw Claimant/Respondent lying on the floor and turned around and went back into his office. He did not come and check on her well-being. (TR 110).

Claimant/Respondent completed an Incident Report, which was signed by Employer/Appellant and Anjee Davis. The Incident Report was offered and received as Exhibit S. (TR 110-111).

Melody Isaac, the RN of the office, indicated to Claimant/Respondent she should get checked out. (TR 111). As such, the Claimant/Respondent saw Dr. Cross downstairs in the building in the urgent care clinic. (TR 112). She first saw an assistant and then described the incident to Dr. Cross. (TR 112). Dr. Cross ordered an X-ray of her shoulder and prescribed pain medication. (TR 113-114). She then returned to Employer/Appellant's office. (TR 114).

Claimant/Respondent gave the paper work to Employer/Appellant's wife, Sarah Jaroon. (TR 114). Employer/Appellant did pay for the urgent care visit, as well as the pharmacy bill for the prescription. (TR 115). Her pain, however, started increasing. She testified, "I was sore for a while and then probably a couple of weeks and it was not like, you know, a grab you kind of burning, but I could feel the burning in my leg." (TR 115). The pain increased and caused her significant difficulty on a work-related trip to Texas. (TR 116).

Claimant/Respondent told Anjee Davis and Sarah Jaroon there was something wrong with her leg, and she needed to be seen by a doctor. She did not go back to Dr. Cross for a second visit because when she had come back from the first visit, she was made aware Employer/Appellant did not have workers' compensation insurance and was paying for the visits. (TR 116). She thought that she "would give it a little while" and her pain might resolve. (TR 117).

As her symptoms became worse, Claimant/Respondent sought treatment from her own doctor, Dr. Rittman. (TR 117). Prior to the fall of May 20, 2004, Claimant/Respondent had never had any symptoms of burning pain in her leg. In the time between May 20, 2004, and when she was seen by Dr. Rittman with complaints of back pain, she had not had any other fall, car accident, or injury of any other kind that was traumatic or could have been considered a forceful event. (TR 120).

Claimant/Respondent was sent for an MRI and was referred to Dr. Cornelison. (TR 118). Claimant/Respondent testified that she understood that her MRI showed a bulging disk. She returned to Employer/Appellant and Anjee Davis and told them that she had an appointment with Dr. Cornelison. The claimant testified that Employer/Appellant told her to go ahead and go to Dr. Cornelison and that he would pay for the co-pays. A discussion occurred at that time regarding whether it was right for him to just pay the co-pays and for her treatment to be billed to her health insurance. (TR 119).

Claimant/Respondent then saw Dr. Cornelison. When she arrived at Dr. Cornelison's office, she completed a Patient Information Sheet, a copy of which was offered and received as Exhibit G. (TR 120). On that sheet, Claimant/Respondent

indicated she was being seen for a "work comp" issue. (TR 121). She told the receptionist at Dr. Cornelison's office she had fallen at work. (TR 121). Furthermore, she listed the contact person on the form as Anjee Davis, the office manager. (TR 122).

At her initial visit with Dr. Cornelison, Claimant/Respondent weighed approximately 230 lbs, which was her usual weight over a period of many years. (TR 123). She was not under any doctors' care for any weight-related health consequence, and she was very physically active before May 28, 2004. (TR 124). She stated that although she was "a big girl," she always took her grandchildren camping and hiking every year. Also, Claimant/Respondent would go to her grandson's football games and ride in go-carts. (TR 124).

Claimant/Respondent continued to treat with Dr. Cornelison and had a series of nerve blocks. She last treated with Dr. Cornelison in December 2004. (TR 126). Because of the conflict that had arisen between Employer/Appellant and Dr. Cornelison regarding her care, Claimant/Respondent "did not want to put Dr. Cornelison through that anymore" so she stopped going. (TR 126).

Furthermore, her injury had become such an issue at her work place that it was discussed openly in front of other staff members. (TR 126). Employer/Appellant changed his mind several times as to whether he was going to pay for her medical bills. In addition, Employer/Appellant brought Claimant/Respondent a complaint form against Dr. Cornelison that he wanted her to sign, but she refused. (TR 127). This was done in front of her co-workers, and Employer/Appellant was visibly angry with her when she did not sign the document. (TR 128). Employer/Appellant filed the complaint against her

wishes and signed it himself. (TR 129). Subsequently, she was contacted by a State of Missouri Board of Healing Arts Investigator with questions regarding her treatment. (TR 129).

Claimant/Respondent filed a formal Claim for Compensation with the Division of Workers' Compensation on November 2, 2004, and she was discharged from employment thereafter. (TR 130).

Because she had continued to work and attend physical therapy throughout her employment at Branson Oncology after her injury, she was not claiming temporary or total disability benefits. (TR 131). The outstanding medical bills were submitted and received by the Court as Exhibit J. Claimant/Respondent testified she was seeking payment of those medical bills. (TR 130). In addition, the Claimant/Respondent is in need of additional treatment for her pain caused by her May 28, 2004, injury. (TR 132).

Regarding her current physical condition, Claimant/Respondent still has burning going down her right leg on a daily basis. The pain limits her activities such as shopping, getting groceries and maintaining her home. She was careful to tell the Court she is not claiming that she is permanently and totally disabled by her injury, but that she has been significantly hindered by the nagging pain she has as a result of the May 28, 2004 injury. (TR 133).

At the time of hearing, Dr. Dianne Cornelison testified pursuant to a subpoena. Dr. Cornelison testified she was employed at Skaggs Hospital, Branson Neurology and Pain Center as a neurologist. (TR 7). Her Curriculum Vitae was offered and received as Exhibit R. (TR 8). Dr. Cornelison is currently Board Certified in Neurology and

Psychiatry and is licensed in the states of Missouri and Kansas. Those licenses are in good standing and have never been placed on probation. (TR 9).

Dr. Cornelison testified that during her practice she treated Claimant/Respondent. She was Claimant/Respondent's treating physician and had not been paid to do an Independent Medical Examination or records review. (TR 10). She was not being paid at the time of hearing for her testimony, nor had she ever been paid in any way for testimony regarding Claimant/Respondent. (TR 11).

A copy of Dr. Cornelison's medical chart regarding Rebecca Garber was offered and received by the Court as Exhibit J. (TR 12). Dr. Cornelison testified her Nurse Practitioner, a new graduate whom she was training, took the history and physical of Rebecca Garber. (TR 13). After the history and physical was taken, Dr. Cornelison then personally examined Rebecca Garber. She felt Claimant/Respondent needed a specific type of flexion, extension and oblique set of X-rays. (TR 13). Her diagnosis at the time she saw Rebecca Garber on September 15, 2004, was lumbar radiculitis strain, sprain. She developed a treatment plan including epidural injections, physical therapy and medications. (TR 14). A series of injections were given. (TR 14).

Dr. Cornelison testified that in general for her treatment of patients with back pain, she first determines what the "pain generator" is. (TR 15). Claimant/Respondent did have evident degenerative disc disease, but because of the response Claimant/Respondent had to specific types of injections, Dr. Cornelison opined, "that the degenerative disc disease was probably not, to the best of my knowledge, and that's as close as we can be on this earth, not the pain generator." (TR 16).

Claimant/Respondent again was seen by Dr. Cornelison on October 15, 2004, and was given a differential diagnosis. Dr. Cornelison was concerned about an L4 pathology, which is an overlap with lateral femoral cutaneous neuropathy. (TR 16). Dr. Cornelison then used several models and books to explain why she gave a differential diagnosis and educated the Court regarding L4 group pathology. (TR 17-20). She also explained some physicians refer to lateral femoral cutaneous neuropathy as meralgia paresthetica, but meralgia paresthetica means there is a pathology of the lateral femoral cutaneous nerve itself. (TR 21).

Dr. Cornelison testified she explained her differential diagnosis to Rebecca Garber, and her treatment plan was to proceed with the transforaminal block in order to help delineate L4 pathology. (TR 22).

As of the last date that she saw Claimant/Respondent, which was December 27, 2004, Dr. Cornelison's diagnosis had been narrowed down to facet pain, medial branch facet pain or the actual L4 nerve root with radiculitis. (TR 25). It was her medical opinion that it was reasonably apparent upon consideration of all the circumstances that Claimant/Respondent's injury on May 28, 2004, during her employment at Branson Oncology, was the substantial factor in causing the injury to her back for which she was treating Claimant/Respondent. (TR 26-27). Furthermore, the treatment and therapy that Claimant/Respondent received was medically reasonable and necessary and arose out of the injury of May 28, 2004. (TR 27).

Also, Dr. Cornelison testified there was nothing special about Claimant/Respondent in her practice. She does not know Claimant/Respondent

personally or socially. She had never done any work for Morrison, Webster and Carlton and specifically testified, "I am not a hired gun, period." (TR 28). Dr. Cornelison was a salaried employee of the hospital and did not receive any portion of the payment for patient care as part of her compensation package. (TR30). Dr. Cornelison then testified regarding conversations that she had with Employer/Appellant regarding the payment of the medical expenses for Claimant/Respondent and the resulting conflicts. (TR 32-40). Dr. Cornelison testified none of those conversations or actions changed her treatment plan or caused her to alter her medical opinions in any way regarding Claimant/Respondent. (TR 41). Specifically, at the time of her first contact with Employer/Appellant, Dr. Cornelison had already made her diagnoses of Claimant/Respondent. (TR 41).

The issue of Claimant/Respondent's weight was raised as an issue. When asked about Claimant/Respondent's weight, Dr. Cornelison testified Claimant/Respondent's weight was not a substantial factor in causing her problems. It could be a contributing factor, but it was not a substantial factor. (TR 94).

Regarding the issue of whether Claimant/Respondent had described her fall in different ways, Dr. Cornelison testified that a physician paraphrases what the patient says to them to the best of their ability. A patient is not going to use the exact same words to each physician nor would a physician recite her words exactly in dictation. More particularly, Dr. Cornelison testified that if a patient tells her that they fell, it does denote to her that they actually fell down. (TR 96).

Also, regarding Claimant/Respondent's failure to state she had back pain on the day of the accident, Dr. Cornelison pointed Claimant/Respondent had a hematoma on her face and that the body does an actual triage of pain. (TR 97). She stated specifically:

The patient comes into the emergency room and they have a heart attack and an arm cut off. They don't even realize that the arm is cut off until we remove the elephant from their chest. So if her main pain was around the mandible and the hematoma that was already coming up very close to the fall, that would be your main complaint. That would be her focus. That is what hurts me the most now. I need it taken care of now and then when we removed the elephant off their chest then it's- Oh, my gosh my arm's cut off and wow now I'm in pain on my arm. It's a triage on how the brain works. It's a hierarchy so you--- it's survival. You worry about the most painful thing first, you don't question, that's survival. (TR 98).

Dr. Cornelison finally testified she had spent many years working emergency rooms and treats trauma everyday; therefore, she sees triaging of pain every single day. (TR 98).

Two of Claimant/Respondent's co-workers, Anjelica Davis and Grace Catron, testified via deposition. Ms. Davis testified she shared the title of office manager with Employer/Appellant's wife, Sarah Jaroon. (TR 288). Ms. Davis had worked with Claimant/Respondent the entire time she was employed by Branson Oncology and she did not recall Claimant/Respondent receiving any reprimands regarding her performance.

She further testified Claimant/Respondent was a responsive and responsible employee. (TR 290). Ms. Davis testified she heard someone fall, and she and her other co-workers went to the back of the office to make sure that it was not a patient who had fallen. (TR 291-292). She saw Claimant/Respondent on the floor. By the time she reached Claimant/Respondent she was almost in the seated position and the nurse, Melody Isaac, was trying to help her up. She thought Claimant/Respondent was embarrassed she had fallen. (TR 292). Ms. Davis did see a bruise on Rebecca's shoulder, and she had no doubt in her mind that Claimant/Respondent fell. (TR 293). At the time of her fall, Ms. Davis thought the employees were covered by workers' compensation insurance. (TR 294). She became aware that Employer/Appellant did not have workers' compensation when Claimant/Respondent's bill was rejected. (TR 295). Ms. Davis had several conversations with Employer/Appellant regarding the care and treatment of Claimant/Respondent's injuries. (TR 299). Also, several contemporaneous memos were made and are contained within her deposition in the legal file regarding the payment of the bills.

Grace Catron, another co-worker, also testified via deposition on May 2, 2007. She also heard the fall and ran to find Claimant/Respondent on the ground. When questioned regarding the fall, Ms. Catron testified, "I think she was lying on her back but I am not a hundred (100) percent sure. We were not the first ones to get to her. The RN was the first one to get to her." (TR 368). She also testified, as well as Claimant/Respondent, that Employer/Appellant just came out of his office and looked at Claimant/Respondent and then walked back into his office. (TR 369). Ms. Catron

testified that Claimant/Respondent was still on the ground when Employer/Appellant saw her. (TR 369).

Claimant/Respondent was examined by Dr. Preston Brent Koprivica, M.D., who generated an Independent Medical Examination during the pendency of this action. His June 26, 2006, deposition was offered and received into evidence at the time of hearing. (TR 241-281). Dr. Koprivica did not find anything in her past medical history that could be related to her current complaints. (TR 244). Upon examination he found her to be appropriate in all areas and she had a positive validity criterion. He also found her effort level to be appropriate and her physical presentation was consistent with her impairment. (TR 244). Dr. Koprivica explained that the lateral femoral cutaneous nerve is a peripheral nerve that exits from the inguinal groin area. It supplies sensation to the lateral part of the thigh from the base of the hip down toward the knee. (TR 245). He explained that the nerve distribution from the lateral femoral cutaneous nerve begins basically from the groin to the lateral thigh.

Dr. Koprivica testified:

It was my opinion that the fall that she had described had produced injury in her low back and aggravating injury to the lateral femoral cutaneous nerve. I felt that she had a chronic lumbosacral strain with chronic mechanical back pain, that the strain injury likely involved the facet joint on the right at about the L4-L5 or L3-L4 level and that she also had an injury when she fell in the fashion in which she fell that it resulted in entrapment of the lateral femoral cutaneous nerve at the groin area. (TR 245).

When Dr. Koprivica was asked how the mechanics of the fall could strain the nerve, he answered:

The problem with the lateral femoral cutaneous nerve, is that it exits the groin and supplies sensation to the thigh. In your groin area that is an area where there is ----there tends to be some relative impairment on the nerve. Individuals that are heavier have ---- are predisposed to develop impingement on that nerve. What I am relying on in terms of history is the history that Ms. Garber did not have symptoms suggesting meralgia paresthetica prior to the fall and that is certainly believable. She could be at her body weight and fall and then in the fall put--- fall in a fashion where in now--- because she is overweight, put pressure on that nerve and result in a compression of the nerve that results in her developing chronic symptoms of numbness and pain involving the nerve. Basically, she is at risk because of her size. It's not symptomatic until she fell and directly compressed the nerve. (TR 245).

Dr. Koprivica further opined the medical care Claimant/Respondent received was medically reasonable and a direct necessity of the work-related injury of May 28, 2004, and opined that future medical treatment would be needed. (TR 246). Dr. Koprivica assigned a 15% permanent partial disability to the body as a whole regarding the work-related injury of May 28, 2004. Dr. Koprivica further testified that he reviewed Claimant/Respondent's deposition of November 29, 2005, and the Independent Medical

Examination of Dr. Mauldin, dated September 15, 2005. He specifically reviewed the portion of her deposition discussing the mechanics of how she fell. He testified he did not find anything unusual regarding the mechanics of Claimant/Respondent's fall. (TR 246).

Dr. Koprivica testified the forces exerted on her body in the fall were in more than one plane. There was rotation and different planes of motion that were incorporated in the overall fall. (TR 247).

Dr. Charles Mauldin, who had previously examined Claimant/Respondent on behalf of the employer and authored an Independent Medical Examination, testified live at trial on behalf of the Employer. Dr. Mauldin also had previously given a deposition a month prior to the trial date. (TR 180). Dr. Mauldin disagreed with the other experts in the case regarding the extent of Claimant/Respondent's disability. It was his opinion Claimant/Respondent had some bruises from the May 28, 2004, fall and basically had a contusion on her face, neck and shoulder. (TR 189). He placed great weight in her usage of the word "bounce." (TR 190). Dr. Mauldin further testified that it did not really matter to him which way she fell. He did not believe that her meralgia paresthetica was caused by the May 28, 2004, fall. (TR 191).

Finally, Employer/Appellant testified on his own behalf. He testified he was the owner of Branson Oncology Clinic. (TR 210). He disagreed with Claimant/Respondent's diagnoses from Drs. Koprivica and Cornelison. He felt her care should have been provided by her health insurance. (TR 211). He testified he thought she was trying to commit a fraud. Employer/Appellant also stated Dr. Cornelison was treating her incorrectly because he did not agree with injecting medication into the spine. (TR 212).

Upon cross-examination, although three witnesses had previously testified that Employer/Appellant saw Claimant/Respondent on the ground after her fall, he denied that he saw her. He did, however, acknowledge that he heard the incident. (TR 217). Employer/Appellant admitted he sent the complaint against Dr. Cornelison to the State of Missouri Board of Healing Arts against Claimant/Respondent's will. (TR 217).

When questioned regarding his opinion of Claimant/Respondent, Employer/Appellant stated the following:

Q. And you think that she is trying to perpetrate a fraud, is that what you said?

A. That's correct.

Q. You think that she wants to get rich off of workers' compensation coverage?

A. That's correct.

Q. And you stated that you thought that she was going to retire with all the money that she made off of her workers' compensation claim?

A. That's correct.

(TR 218).

In addition to the live testimony, all of the Claimant's medical records and bills were offered and received into evidence.

STANDARD OF REVIEW

The Court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

- (1) That the commission acted without or in the 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.

Hampton v. Big Boy Steel Erection, 121 S.W. 3d 220, 223 (Mo. 2003). The record is to be examined as a whole and a determination be made whether there is “sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence.” *Id.*

The LIRC’s Award must be affirmed if the evidentiary record contains enough competent evidence of a substantial character to support the Award. *Id.* at 223.

ARGUMENT

- I. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION’S DECISION IS SUPPORTED BY SUFFICIENT COMPETENT AND SUBSTANTIAL EVIDENCE.

Section 287.495.1 RSMo.

Bock v. Broadway Ford Truck Sales, Inc., 55 S.W. 3d 427, 439 (Mo.App. 2001)

Hampton v. Big Boy Steel Erection, 121 S.W. 3d 220, 223 (Mo. 2003)

Totten v. Treasurer of the State, 116 S.W. 3d 624, 629 (Mo.App. E.D. 203)

Whether the LIRC's award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. *Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 223 (Mo. 2003). The LIRC's Award must be affirmed if the evidentiary record contains enough competent evidence of a substantial character to support the Award. *Id.* The record in this case is replete with evidence supporting the LIRC's award of benefits to the Claimant/Respondent.

As was noted in the Administrative Law Judge's Award, this is a pre-2005 law case, in that the claim is reviewed in the light most favorable to the claimant. The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. *Alexander v. Pin Oaks Nursing Home*, 625 S.W. 2d 192, 193 (Mo.App. 1981). The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. *Greer v. Liquor Control*, 592 S.W. 2d 188, 193 (Mo.App. 1979). These very basic principles are, in fact, the principles that apply most to Respondent's case. She is the one claimant -- a claimant whose employer did not provide her workers' compensation coverage and then refused to provide her treatment when it appeared that her treatment might be more significant than one visit to an urgent care -- that the statute was designed to protect.

There are so many cases that decide very complex causation scenarios. But in the case at bar we have neither a difficult, nor complex case in any fashion. Employer/Appellant has attempted to create a controversy that is not there, as evidenced by Employer/Appellant arguing on page 24 of Brief of Appellant that Claimant/Respondent reported to Dr. Mauldin that she fell flat on her back, not on her buttocks. Again, that argument is semantics only – no substance. Dr. Cornelison testified at the hearing that a layperson often interchanges the phrases “flat on my back” for “falling on my buttocks.” (LF 84).

The applicable statute at the time of the Claimant/Respondent’s accident was Section 287.020 (2) RSMo. 1986 which defines accident as an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. In the case at bar, Claimant/Respondent clearly had a sudden and violent happening. It is undisputed in the record that Claimant/Respondent hit the door jam with such force as to cause bruising and contusions to her face and shoulder. In fact, it is noted in the testimony and the medical records that the force of the blow caused immediate swelling. There was a definite accident, with witnesses (Catron and Davis) hearing the thud, and the claimant being seen on the floor. The thud was loud enough that a patient’s wife in the clinic even ran to Claimant/Respondent’s aid. (LF 369). The Claimant/Respondent, Catron and Davis all testified that Employer/Appellant saw her on the floor, yet he would even deny this small point. (LF 217).

Trying to argue about whether she actually hit the ground when she fell, because she simply stated that she “fell” and did not add the word “down,” is absurd. As the Administrative Law Judge saw, and it can be gleaned from the cold record to a limited extent, Claimant/Respondent is a very demonstrative person. She described the smack and fall that she took to the door as “hitting the door and bouncing off.” It is not hard to close your eyes and see exactly how this happened. Two physicians, Drs. Koprivica and Cornelison, both easily described how the forces Claimant/Respondent described were the substantial factor in producing her current complaints. (LF 17-23). Dr. Koprivica testified that forces are not exerted only in one plane. (LF 247).

The Employer/Appellant cites *Cruzan v. City of Paris*, 922 S.W. 2d 473, 475 (Mo.App. 1996) as defining “in the course of employment” to refer to the time, place and circumstances of the injury. The *Cruzan* court was considering whether an employee who fell from a ladder while changing a light bulb at night had an injury arising out of his employment. The court noted that the City knew he would be doing the work, and his supervisor knew he would be doing it one evening after work. There was also an issue of who was in control of the particular part of the building where he was working. *Cruzan* at 476. These are not issues in Claimant/Respondent’s case. She was working for Employer/Appellant at the time of the accident in her capacity as a phlebotomist.

Employer/Appellant argues the injury to Claimant/Respondent’s back did not occur at her place of employment. There was affirmative testimony that there were no intervening causes, nor pre-existing complaints or treatment for any back-related claims. Dr. Cornelison and Dr. Koprivica both testified she did have degenerative disc disease,

but from the location and presentation of her pain and the response she had to certain treatment, it was clear her pain was not related to her degenerative disc disease. (LF 15-16).

Even if her degenerative disc disease was the cause of her pain, it was asymptomatic before the injury of May 28, 2004. (LF 120). As a general rule, disability sustained by the aggravation of a preexisting non-disabling condition or disease caused by a work-related accident is compensable under Workers' Compensation Act. *Kelly v. Banta & Stude Const. Co. Inc.*, 1 S.W. 3d 43, 49 (Mo.App E.D. 1999), citing *Gennari v. Norwood Hills Corporation*, 322 S.W. 2d 718, 722-723 (Mo. 1959); *Weinbauer v. Grey Eagle Distributors*, 661 S.W. 2d 652, 654 (Mo.App. 1983); *Fogelsong v. Banquet Foods Corporation*, 526 S.W. 2d 886, 891 (Mo.App. 1975); and *Mashburn v. Chevrolet-Kansas City Div., G.M. Corp.*, 397 S.W. 2d 23, 29 (Mo.App. 1965).

The employee “bears the burden of proving that an accident occurred and that it resulted in injury.” *Goleman v. MCI Transporters*, 844 S.W. 2d 463, 465 (Mo.App. 1985); *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W. 2d 781, 784 (Mo.banc 1983). Again, Claimant/Respondent provided substantial proof that an accident did occur and that it resulted in injury. That proof is through the testimony of the Claimant/Respondent, Grace Catron, Angelica Davis, Dr. Diane Cornelison, Dr. Koprivica, and the medical records contained within the record.

The Employer/Appellant wishes to portray Claimant/Respondent as not being credible; however, all complaints that Claimant/Respondent cited throughout her workers' compensation case are supported in the trial record. The Claimant/Respondent

appeared and testified live at the hearing. The Administrative Law Judge heard and received her testimony into evidence. The LIRC agreed and affirmed Judge Wilson's Award when he found:

The evidence is supportive of a finding, and, I find and conclude, that, on or about May 28, 2004, while walking down the hallway of Branson Oncology Clinic, and while performing her duties as an employee of Branson Oncology Clinic, Claimant/Respondent tripped on a rug and fell to the ground. In the course of tripping on this rug, she fell forward, striking her left side of her face on the right side of the door jam. Further, the forward momentum of her body caused her to twist and fall into the break room, landing on her back with her face pointing upwards. (Award; pg 14).

This case is really not more complicated than that simple recitation of the facts. The absence of workers' compensation insurance and volatility of the employer, as seen in the record, has unnecessarily complicated this case and caused the claimant to have to wait this long for the much needed treatment.

The Missouri Supreme Court has held, "The credible testimony of a Claimant concerning work-related functioning and extent of disability can constitute competent and substantial evidence." *Hampton at 223-224*. "The Commission is authorized to base its findings and award solely on the testimony of a Claimant." *Davies v. Carter Carburetor, Division ACF Industries, Inc.*, 429 S.W. 2d 738, 748 (Mo. 1968). In the instant case, that was not necessary. Judge Wilson was afforded not only the testimony of the

Claimant/Respondent, but also that of several medical opinions, as well as witness testimony. Furthermore, Judge Wilson found:

Further, in resolving the issue of causation, I resolve the differences in testimony and medical opinion in favor of the testimonies and medical opinions of Drs. Cornelison and Koprivica, who I find to be more credible and persuasive than Dr. Mauldin. (Award, pg. 14).

Deciding which one of two conflicting medical theories it should accept is a determination particularly for the Commission. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W. 3d 427, 439 (Mo.App. 2001). That choice can be characterized as a credibility decision (one opinion is credible, the other is not), or as a decision with regard to weight (one opinion is given greater weight than the other). But both are choices for the Commission as fact finder; they are binding on this Court. *Id.* at 438. In addition, a determination of what weight it will accord expert testimony on matters relating to medical causation lies within the Commission's sole discretion and cannot be reviewed by this Court. *Id.* See also, *Totten v. Treasurer of the State*, 116 S. W. 3d 624, 629 (Mo. App. E.D. 203). Findings of fact made by the Commission within its powers shall be conclusive and binding. Section 287.495.1 RSMo. Therefore, when Judge Wilson's findings were adopted by the Commission, they became the Commission's own and cannot now be reviewed. *Totten* at 627.

Certainly, the LIRC's ruling is supported by competent evidence as shown above, and thus, must remain undisturbed.

II. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S DENIAL OF EMPLOYER'S APPLICATION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE WAS SUPPORTED BY SUFFICIENT COMPETENT AND SUBSTANTIAL EVIDENCE.

8 CSR 20-3.030

The Appellant filed a Request for Leave to Submit Additional Evidence with the LIRC at the time he filed his appeal to the LIRC. The LIRC received Employer/Appellant's brief on these issues. (LF35-71) After reviewing Appellant's Brief and Claimant/Respondent's response, the LIRC issued a very thorough ruling on that issue on April 9, 2008. (LF 85-87). Most importantly, the LIRC gave a very detailed ruling on its legal basis for the denial of the application. There is nothing in the record that even remotely points to error in its denial. Leave to Submit Additional Evidence is only proper when there is new evidence or evidence that could not have been discovered or produced at the hearing. 8 CSR 20-3.030.

There is more than substantial evidence to support the LIRC's ruling denying Appellant's request. There was nothing new or that could not have been discovered before the hearing. Judge Wilson did not prohibit the Appellant in any way from obtaining additional medical opinions. The LIRC in denying the request concluded:

First, we are not persuaded that the employer was prohibited from offering any medical testimony. Second, we are not persuaded that the evidence employer seeks to submit could not have been produced at the time of trial through the exercise of reasonable diligence. Finally, employer claims awareness of the administrative law judge's alleged order in

January 2007. Nonetheless, employer missed numerous opportunities to formally object or otherwise seek relief from the alleged order. In particular, employer did not formally object during the seven months between the alleged order and the trial, at trial, in the Application for Review or in its brief to the Commission. Employer has abandoned any objection it has with regard to the alleged administrative law judge ruling. (LF 85-87).

But, the Employer/Appellant yet again, seeks to revisit this issue by filing this appeal. The Claimant/Respondent now argues again that she should not now be penalized by having the evidence re-opened to allow the Appellant to develop additional evidence. We all would like to get a second bite at the apple. Once an unfavorable ruling is handed down, it would be a travesty of justice to allow a bevy of experts to then review the evidence and render opinions. If Appellant's Application for Leave to Submit Additional Evidence would have been granted, a case would never finally be closed at any stage. A reversal of the LIRC's ruling would have a wide-ranging effect on all cases heard before the Division of Workers' Compensation, as well as all civil matters.

In the instant case, a review of the time line of case development will show that Employer/Appellant had more than an adequate amount of time to develop his case; Claimant/Respondent's counsel repeatedly had to schedule telephone conferences with Administrative Law Judge Wilson and Administrative Law Judge Fisher to get this long-standing case moving; and none of the proposed "new evidence" is truly "new." As such, there was more than ample evidence to support the LIRC's ruling.

The time line begins when Claimant/Respondent filed her Claim for Compensation on November 2, 2004. (LF 1-2).

Next, Dr. Koprivica performed an Independent Medical Examination on March 17, 2005 on the Claimant/Respondent. The Employer/Appellant scheduled Claimant/Respondent to receive an Independent Medical Examination at Springfield Physical Medicine on September 15, 2005.

The Claimant/Respondent was then deposed by Employer/Appellant for two days. She was first deposed on November 29, 2005 for the entire day. At that time, Employer/Appellant was provided with a copy of Dr. Koprivica's Independent Medical Examination. Employer/Appellant re-convened the parties again on January 9, 2006, at which time Claimant/Respondent's deposition was completed. Most importantly, as of January 9, 2006, the Appellant had full knowledge of any and all of Claimant/Respondent's testimony.

Dr. Koprivica was sent a copy of Claimant/Respondent's deposition and issued an addendum report commenting on her testimony. That addendum report was transmitted to employer's counsel on March 17, 2006. It is significant that Dr. Koprivica did not need to personally see her to issue the report, as he has seen her previously.

On June 26, 2006, Employer/Appellant requested the Claimant/Respondent's counsel's available dates for July and August 2006, so he could schedule the depositions of Drs. Cross and Cornelison. (LF 78). Claimant/Respondent's counsel responded on June 29, 2006 with all available dates. (LF 79). However, the depositions of Dr. Cross and Dr. Cornelison were not scheduled by Employer/Appellant.

On July 12, 2006, the Claimant/Respondent again asked Employer/Appellant to schedule the depositions of Dr. Cross and Dr. Cornelison to get the case moving. It was also noted the deposition of Employer/Appellant's expert, Dr. Mauldin, had not been taken, and Claimant/Respondent inquired if he wished to schedule that at the same time. (LF 80). On September 1, 2006, the Claimant/Respondent again called Employer/Appellant requesting he get the depositions scheduled.

Finally, the Claimant/Respondent scheduled a telephone conference with Judge Wilson. The telephone conference took place on October 18, 2006. At all times relevant herein, the Claimant/Respondent was requesting that this case be moved forward, to no avail. A trial date was set, and the parties were ordered to develop a Scheduling Order by Judge Wilson.

Shortly before the scheduling conference with Judge Wilson, Employer/Appellant faxed a request to have the Claimant/Respondent re-examined for a follow-up IME. (LF 82). The parties participated in another phone conference with Judge Wilson on November 30, 2006. Employer/Appellant had had an extraordinary amount of time to get an addendum report from Dr. Mauldin. In addition, the employee already had been examined once. Her physical condition was not altered or changed in anyway. The only thing new was that Dr. Koprivica had authored an addendum report, **the year before**, which is frequently done in Workers' Compensation matters. Again, this was simply an addendum commenting on the deposition testimony, which ultimately Dr. Mauldin did as well. Judge Wilson correctly denied employers request to have her re-examined. That was the extent of his ruling.

Another telephone conference was scheduled with Judge Wilson on January 3, 2007, to obtain a new trial date, due to of the unavailability of the Second Injury Fund, as the Fund had inadvertently been omitted from the scheduling conference. Yet, during all of this time, Employer/Appellant never deposed his own expert, Dr. Mauldin. The Claimant/Respondent's hearing was finally scheduled for April 12, 2007.

Dr. Mauldin's deposition at one point had been scheduled for January 24, 2007. That deposition, however, was cancelled and Employer/Appellant stating Dr. Mauldin needed to cancel. Claimant/Respondent's counsel repeatedly contacted Employer/Appellant's counsel's office to re-schedule the deposition. Finally, on March 27, 2007, Claimant/Respondent's counsel sent a letter via U.S. mail, and facsimile to Employer/Appellant's counsel advising him that the undersigned had repeatedly requested that he get his depositions done and that he had failed to do so. The undersigned specifically stated, "We are now less than one month away from trial, and it appears that these depositions are not getting scheduled. I will not agree to any continuance in this matter. If this is going to be an issue, please schedule a phone conference with Judge Wilson, so that we may get a ruling first." (LF 83).

Nonetheless, even after these attempts to make Employer/Appellant get ready for hearing, on April 8, 2007, only days before the hearing, the Employer/Appellant requested to continue the hearing because Dr. Mauldin's deposition had not been taken. In a telephone conference on the issue, Judge Fisher, hearing the matter for Judge Wilson, denied the Employer/Appellant's request finding Employer/Appellant had had ample time to get his witness deposed. However, fearing an appeal, the next day

Claimant/Respondent's counsel called Judge Wilson and reversed her previous objection and agreed to the continuance. (LF 89).

And, in fact, the Claimant/Respondent even filed a Withdrawal of Request for Hearing to accommodate Employer/Appellant's self-created dilemma of not having his own expert ready for the hearing. Even though the additional time was given to depose this expert, it should be noted that Dr. Mauldin still testified live at the hearing. (TR. 179-199).

After all these difficulties the case finally went to Final Hearing August 15, 2007, almost three years after the original claim had been filed.

Then after all the evidence was in, matters briefed, and a thorough Award was rendered by Judge Wilson, the Employer/Appellant then requested the re-opening of this long standing matter to the LIRC. Employer/Appellant proposed several different medical opinions that were obtained after the hearing. (LF 35-71) Employer/Appellant's counsel failed to give any reason why an expert such as the Orthopedic Consultants from Scottsdale, Arizona could not be consulted at any time prior to the hearing. Again, Judge Wilson did not prohibit the Employer/Appellant from getting additional expert opinions before the hearing. Judge Wilson only limited the Employer/Appellant from having Dr. Mauldin physically examine Claimant/Respondent again, since all they were proposing to do was respond to Dr. Koprivica's report. Failure to produce your own evidence in a three-year time span should not be reason to re-open a case. As such, the LIRC had ample evidence to deny Employer's Application for Leave to Submit Additional Evidence.

III. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION'S DENIAL OF EMPLOYER'S MOTION TO RECONSIDER DENIAL OF APPLICATION FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE WAS IMPLIED WHEN THE FINAL AWARD WAS ISSUED AND ANY SUCH OMISION WOULD NOT BE REVERSIBLE ERROR.

Mo. Rev. Stat. §512.160.2

Arndt v. Beardsley, 102 S.W. 3d 572, 576 (Mo. App. S.D. 2003)

Neavill v. Klemp, 427 S.W. 2d 446, 448 (Mo.1968)

Even after its written denial, the LIRC allowed Employer/Appellant oral argument on the issue. In choosing to issue a finding adopting the ALJ's award, the LIRC clearly was overruling the Motion to Reconsider its original denial. Failure to make that notation in the Award is harmless error. That failure is neither material nor prejudicial. Reversal is only warranted when the alleged error is both material and prejudicial. Mo. Rev. Stat. §512.160.2. *Arndt v. Beardsley*, 102 S.W. 3d 572, 576 (Mo. App. S.D. 2003). It is elementary that error without prejudice is not grounds for reversal. *Neavill v. Klemp*, 427 S.W. 2d 446, 448 (Mo.1968). The LIRC had conclusively decided the case, which was a *de facto* ruling on the Appellant's Motion to Reconsider its earlier well-reasoned, sound denial of Appellant's Application For Leave To Submit Additional Evidence.

CONCLUSION

When the record is considered in its entirety, including the testimony of Drs. Cornelison and Koprivica, the hearing testimony of the Claimant/Respondent and witnesses, and the medical records, it is clear there was ample competent and substantial

evidence to support the finding that the Claimant/Respondent sustained an accident that arose out of and in the course of her employment with Pairote Jaronwanichkul, M.D. d/b/a Branson Oncology Clinic; sustained a permanent partial disability in the amount of 10% body as a whole, amounting to \$10,666.40; incurred medical bills in the amount of \$10,369.63; and was entitled to future medical care. Because the Award entered by the LIRC is supported by the sufficient, competent and substantial weight of the evidence and the issue at bar is within its sole province, the LIRC's Award should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies that:

- (1) This Brief is submitted in accordance with Rule 55.03, in that it is not based on any improper purpose or to cause unnecessary delay. The claims herein are warranted by existing law.
- (2) This Brief is in compliance with Rule 84.06(b) and contains 8,258 words.



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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)

The undersigned hereby certifies that the CD containing Brief of Respondent filed herein has been scanned for viruses and is virus free.



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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing document were mailed to the attorneys of record at the address listed below, U.S. Mail, First Class, postage pre-paid, on this 29th day of December, 2008.

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