

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

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**COMPLETE TITLE OF CASE**

MARK TOMBAUGH,

Appellant,

v.

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

Respondent.

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**DOCKET NUMBER WD73171**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** August 30, 2011

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**APPEAL FROM**

The Labor and Industrial Relations Commission

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**JUDGES**

Division One: Howard, P.J., and Ahuja and Mitchell, JJ.

CONCURRING.

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**ATTORNEYS**

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Attorney for Appellant,

Chris Koster, Attorney General, Jefferson City, MO  
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Attorneys for Respondent.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

MARK TOMBAUGH, )  
 )  
 ) **Appellant,** )  
v. )  
 ) **OPINION FILED:**  
TREASURER OF THE STATE OF ) **August 30, 2011**  
MISSOURI AS CUSTODIAN OF THE )  
SECOND INJURY FUND, )  
 )  
 ) **Respondent.** )

**WD73171**

**Labor and Industrial Relations Commission**

**Before Division One Judges:** Victor C. Howard, Presiding Judge, and  
Alok Ahuja and Karen King Mitchell, Judges

This is a Second Injury Fund (“Fund”) case. The issue is whether the Labor and Industrial Relations Commission (“Commission”) erred in relying on medical reports and on medical expert testimony to determine the degree of the claimant’s disability when the medical expert later testified to a different, though not necessarily contradictory, conclusion. We find that the record is insufficiently clear to determine whether the Commission rejected the expert’s modified testimony as not credible or whether it simply overlooked the testimony. Further, the record is unclear as to whether the Commission, in denying the claimant total, permanent disability, relied on any non-medical considerations. Accordingly, we reverse and remand for proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

**Division One holds:**

In worker’s compensation cases, we have the discretion to remand for a clarification of the Commission’s findings. *Garibay v. Treasurer*, 930 S.W.2d 57, 61 (Mo. App. E.D. 1996).

Here, it is not clear whether the Commission rejected the findings of Dr. Koprivica, Tombaugh’s medical expert, as not credible or whether it simply disregarded Koprivica’s final

statement, in which he testified to a different, though not necessarily contradictory, medical conclusion.

Moreover, even absent contrary medical evidence, the Commission is not required to accept a medical expert's ultimate conclusion that a claimant is totally disabled. Such is the case because the question of disability is not solely a medical question; rather, the Commission is required to reach its decision based on *all* the evidence. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 239 (Mo. App. S.D. 2003).

We therefore find it inadvisable to decide the merits of this case without knowing: (1) whether the Commission found Koprivica's final statement to lack credibility; and (2) whether its denial of total, permanent disability was based on any non-medical considerations.

Accordingly, we reverse and remand with instructions for the Commission, should it again rely on Dr. Koprivica's testimony, to make a credibility determination with regard to Koprivica's final conclusion. Further the Commission should state whether its decision is based on any non-medical factors. Reversed and remanded.

**Opinion by: Karen King Mitchell, Judge**

August 30, 2011

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