*MISSOURI COURT OF APPEALS*
*WESTERN DISTRICT*

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| **THOMAS DUBUC,** | ) | |
| | ) | **WD84171** |
| **Appellant,** | ) | |
| **v.** | ) | **OPINION FILED:** |
| | ) | |
| **TREASURER OF THE STATE OF MISSOURI CUSTODIAN OF THE SECOND INJURY FUND,** | ) | **March 8, 2022** |
| | ) | |
| **Respondent.** | ) | |

**APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION**

**Before Division Two:**
**Alok Ahuja, P.J., Edward R. Ardini, Jr. and Janet Sutton, JJ.**

Mr. Thomas Dubuc appeals a Labor and Industrial Relations Commission (Commission) determination, on remand from this Court, that he did not prove his qualifying preexisting disabilities aggravated or accelerated a subsequent work-related injury, thus reversing a prior award of permanent total disability benefits under the Second Injury Fund. Mr. Dubuc claims that the Commission abused its discretion in denying a motion to conduct additional discovery and submit additional evidence, because our remand did not require new factual findings solely on the existing record. He also asserts Commission error in finding that Mr. Dubuc did not establish a qualifying "medically documented" preexisting disability under section

287.220.3[1] and failing to find him permanently and totally disabled (PTD) in that the Commission misinterpreted and misapplied the applicable statutory requirements. We reverse and remand.

Mr. Dubuc was a fiber cable installer when he fell off a ladder in October 2015 injuring a wrist, kidneys, and low back, and was no longer able to work. An administrative law judge (ALJ) heard Mr. Dubuc's workers' compensation claim in June 2018 and, applying section 287.220.2, denied Second Injury Fund benefits after finding that he failed to sustain his burden of proving that he was PTD as the result of that work-related accident and injuries, combined with his preexisting disabilities. Rather, the ALJ found that the injuries sustained in October 2015 were alone sufficient to render him PTD. The Commission reversed in an April 2019 split decision that also applied the legal standard under section 287.220.2 and awarded Mr. Dubuc lifetime weekly PTD benefits of $879.03. The Second Injury Fund appealed the Commission award. We reversed and remanded, ruling that Mr. Dubuc was required instead, under a Missouri Supreme Court ruling filed about two months after the Final Award,[2] to meet the standards set forth in section 287.220.3 to prove his claim. *Dubuc v. Treasurer of State-Custodian of Second Injury Fund*, 597 S.W.3d 372, 374 (Mo. App. W.D. 2020) (*Dubuc I*). We recognized that section 287.220.3

[1] Statutory references are to RSMo (2000 & 2013 Supp.), unless otherwise indicated.

[2] *Cosby v. Treasurer of State-Custodian of Second Injury Fund*, 579 S.W.3d 202 (Mo. banc 2019). Note that *Cosby* has been characterized as the resolution of a "conflict between subsections 2 and 3 of section 287.220." *Coffer v. Treasurer of State-Custodian of Second Injury Fund*, 598 S.W.3d 909, 910 (Mo. App. S.D. 2020). We observed that *Cosby* and case law controlling before Mr. Dubuc's Second Injury Fund claim was heard and decided reached "diametrically opposed conclusions regarding the intended meaning of sections 287.220.2 and .3, and cannot be reconciled." *Dubuc v. Treasurer of State-Custodian of Second Injury Fund*, 597 S.W.3d 372, 380 (Mo. App. W.D. 2020) (*Dubuc I*).

imposed a more "strident standard" on Second Injury Fund claimants. *Id.* at 384. The Second Injury Fund alleged that the evidence of record failed to establish the requirements of section 287.220.3 in certain respects. *Id.* at 383.[3] We instructed the Commission to address the following matters:

> [W]hich (if any) of [Mr.] Dubuc's preexisting disabilities were medically documented preexisting disabilities equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation.
>
> * * *

[3] Section 287.220.3 states in relevant part:

> (1) All claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection.
> (2) No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund. Claims for permanent total disability under section 287.200 against the second injury fund shall be compensable only when the following conditions are met:
> (a) a. An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is:
> (i) A direct result of active military duty in any branch of the United States Armed Forces; or
> (ii) A direct result of a compensable injury as defined in section 287.020; or
> (iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or
> (iv) A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear; and
> b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a. of this paragraph, results in a permanent total disability as defined under this chapter; . . .

§ 287.220.3(1) – (2). As noted in *Dubuc I*, while the Second Injury Fund was established to encourage employers to hire workers with preexisting disabilities by not making them fully responsible for all the consequences of a primary workplace injury, the Legislature amended it when the Fund was insolvent to limit those workers eligible for benefits. *Dubuc I*, 597 S.W.3d at 379 n.7.

> [W]hether [Mr.] Dubuc's qualifying preexisting disabilities (if any) "directly and significantly aggravate[d] and accelerate[d] the subsequent work-related injury" [Mr.] Dubuc suffered on October 30, 2015, a more strident standard of eligibility than the standard described in section 287.220.2.
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> * * *
>
> [W]hether [Mr.] Dubuc's qualifying preexisting disabilities (if any) were "unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury."

*Id.* at 384.

Noting that this Court cannot make factual findings in reviewing a Commission determination, we stated, "These determinations will require the Commission to consider all the evidence and to make additional factual findings before applying the correct legal standard to the facts." *Id.* In conclusion, we remanded the matter "to the Commission with instructions to apply the proper legal standards described in section 287.220.3 to the evidence to determine whether [Mr.] Dubuc has sustained his burden to establish the right to an award of permanent total disability benefits from the Fund." *Id.* We did not call for the Commission to base its findings on the existing record.

Mr. Dubuc filed a motion to conduct additional discovery, submit additional evidence, and submit supplemental briefs. Mr. Dubuc actually submitted the new expert report and a request to depose the vocational expert to identify what additional fact findings would entitle him to prevail on the Second Injury Fund claim under the requirements of section 287.220.3. The Commission cited a rule[4] that allows the hearing of additional evidence only "upon the ground of newly discovered evidence

[4] MO. CODE REGS. ANN., tit. 8 § 20-3.030 (2019).

which with reasonable diligence could not have been produced at the hearing before the administrative law judge," and a divided Commission denied the requested additional discovery and additional evidence. The Commission expressly based the ruling, however, on its interpretation of this Court's remand order "as specifically instructing the Commission to make additional factual findings . . . *based on the evidence in the record.*" In this regard, the Commission stated, "Because employee's request to conduct additional discovery and submit additional evidence is contrary to the court's expressed instructions and mandate, we deny this part of employee's Motion." Still, the Commission permitted the parties to file supplemental briefs.

On the merits, a divided Commission found no Second Injury Fund liability. The Commission determined that Mr. Dubuc's "only alleged preexisting disabilities that arguably reached the fifty-week minimum outlined in § 287.220.3 consisted of multiple alleged hernia repairs and Factor V Leiden mutation combined with anticoagulation."[5] According to the Commission, record evidence about Mr. Dubuc's hernias, the last of which was repaired in the mid-1990s, consisted of medical records and experts whose inconsistencies reflected a reliance on self-reports. It stated, "The absence of any direct evidence of employee's alleged hernia repairs fails to satisfy the requirement of § 287.220.3 that an employee's preexisting disability be 'medically documented.'" Thus, the Commission excluded the hernia repairs from consideration in determining Second Injury Fund liability.

[5] This mutation affects a clotting factor in the blood. Both parties agreed that Mr. Dubuc's expert had rated the preexisting hernias and blood condition at 92 and 100 weeks, respectively, thus rendering them the only preexisting disabilities in evidence that could qualify as preexisting disabilities under subsection 287.220.3. *See Dubuc I*, 597 S.W.3d at 383 n.11.

As to the Factor V Leiden mutation and chronic anticoagulation, evaluated by Mr. Dubuc's expert, Dr. Mitchell Mullins, at 25% of the body as a whole and calculated at 100 weeks, the Commission did not find sufficient evidence that this disorder aggravated and accelerated Mr. Dubuc's subsequent work injury.[6] The Commission concluded, therefore, "as a factual matter," that Mr. Dubuc had failed to establish any medically documented disability equaling a minimum of 50 weeks "permanent partial disability according to medical standards used in determining compensation and which directly and significantly aggravated and accelerated" the October 2015 primary injury. Mr. Dubuc timely filed this appeal, which was briefly stayed in light of a similar case pending before the Missouri Supreme Court.

**Legal Analysis**

*Commission's Interpretation of the Remand Order*

In the first point, Mr. Dubuc claims that the Commission erred in not granting his motion to conduct additional discovery and submit additional evidence. He argues that our remand did not limit the Commission's factual determinations to the existing record, and it has the authority to grant additional discovery. Contending that the motion complied with regulatory requirements, Mr. Dubuc states that it

[6] Reviewing the record evidence, the Commission stated:

> T[]here is no evidence in the record that this disorder aggravated and accelerated employee's subsequent work injury other than Dr. Mullins'[s] generic deposition testimony, elicited by employee's attorney, that *all* of employee's preexisting conditions significantly aggravated his October 10, 2015 [sic], work injury. Dr. Mullins'[s] deposition testimony is inconsistent with his September 1, 2016, report, addressing "second injury fund concerns." Dr. Mullins'[s] September 1, 2016, report specifically *omits* reference to employee's Factor V Leiden deficiency and chronic anticoagulation in discussing synergism between employee's October 30, 2015, primary injury and his preexisting disabilities.

(footnote omitted).

should have been granted, and the Commission's failure to do so "when the burden of proof had changed constitutes a denial of due process and an abuse of the Commission's discretion."[7]

> Section 287.490.1 controls our review of the Final Award:
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> 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:
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> (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.
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> While we defer to the Commission's factual findings, "'we review issues of law, including the Commission's interpretation and application of the law, *de novo*.'" *Nivens v. Interstate Brands Corp.*, 585 S.W.3d 825, 831 (Mo. App. W.D. 2019) (quoting *Lawrence v. Treasurer of State-Custodian Second Injury Fund*, 470 S.W.3d 6, 12 (Mo. App. W.D. 2015)).

*Dubuc I*, 597 S.W.3d at 377. "Article V, section 18 of the Missouri constitution provides for judicial review of the [C]ommission's award to determine whether the award is 'supported by competent and substantial evidence upon the whole record.'" *Jackson Cnty. v. Earnest*, 540 S.W.3d 464, 469 (Mo. App. W.D. 2018) (quoting *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222 (Mo. banc 2003). We do not, however, "'substitute our judgment on issues of fact where the Commission was

[7] The Second Injury Fund argues that point one is multifarious as it contains more than one allegation of Commission error. We do not interpret the point as multifarious, but would have considered it on the merits in any event in light of our preference to address each claim on the merits. *See Cityview Real Est. Servs., LLC v. K.C. Auto Panel, Inc.*, 576 S.W.3d 187, 191 (Mo. App. W.D. 2019).

within its powers, even if we would arrive at a different initial conclusion.'" *Id.* (quoting *Hampton*, 121 S.W.3d at 223). Still, an award is not supported by competent and substantial evidence "in the rare case when [it] is contrary to the overwhelming weight of the evidence." *Id.* (quoting *Hampton*).

We did not specify when remanding the case that the new factual findings be based on the existing record. We simply ordered the Commission to consider "all of the evidence."[8] *Dubuc I*, 597 S.W.3d at 384. The premise therefore of the Commission's ruling on the motion to conduct additional discovery and submit additional evidence was erroneous and contrary to our mandate. Its ruling therefore was not undertaken within its powers.

In light of the Commission's regulatory authority to grant a motion to submit additional evidence, we must therefore determine whether it "acted arbitrarily or abused its discretion" when denying the motion. *Gander v. Shelby Cnty.*, 933 S.W.2d 892, 895 (Mo. App. E.D. 1996), *overruled on other grounds by Hampton*. A commission ruling constitutes an abuse of discretion "if it is shown that the ruling is clearly against the logic of the circumstances, so arbitrary and unreasonable as to shock the sense of justice, and lacking careful consideration." *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 745 (Mo. App. S.D. 2006) (citation omitted).

Under our code of state regulations, the submission and hearing of additional evidence is limited to "the ground of newly discovered evidence which with reasonable diligence could not have been produced at the hearing before the

[8] Compare our remand instruction with that of the Missouri Supreme Court in *Treasurer of State-Custodian of Second Injury Fund v. Parker,* 622 S.W.3d 178, 183 (Mo. banc 2021) (remanding for new factual findings "on the record already made before the ALJ."). We note that this was not a holding in *Parker,* merely an instruction on remand.

administrative law judge." MO. CODE REGS. ANN., tit. 8 § 20-3.030(2)(A) (2019). The rule also states, "As a matter of policy, the commission is opposed to the submission of additional evidence except where it furthers the interests of justice." MO. CODE REGS. ANN., tit. 8 § 20-3.030(2)(B) (2019). In addition, Missouri courts have held that the Commission has the discretionary authority to hear further evidence on its own motion. *See Minies v. Meadowbrook Manor*, 105 S.W.3d 529, 534 (Mo. App. E.D. 2003), *overruled on other grounds by Hampton*.

We find persuasive the dissenting Commissioner's analysis of the question, particularly in light of our recent decision in *Missouri Department of Transportation v. Labor & Industrial Relations Commission*, 600 S.W.3d 1, 3-4 (Mo. App. W.D. 2020), where we ruled that a Missouri Supreme Court mandate, returning a case to the Commission to apply the proper legal standard to the employee's claim, did not preclude the Commission from receiving additional evidence on remand. There, the employer argued that a remand "for a proper review of Employee's claim" did not contemplate reopening the record and taking additional evidence. *Id*. at 5. It bolstered the argument by pointing to the court's statement that "there was no evidence presented in this case that Employee's work-related stress was objectively 'extraordinary and unusual as statutorily required[']" under the standard announced in [the Missouri Supreme Court's remand opinion]." *Id.* at 5-6.[9]

[9] The posture of the case was the employer's appeal of a circuit court order quashing its preliminary writ of prohibition, which sought to stop the Commission from accepting or considering additional evidence after the Missouri Supreme Court remanded the matter for the application of a "now-clarified" legal standard. *Mo. Dep't of Transp. v. Lab. & Indus. Rel. Comm'n*, 600 S.W.3d 1, 2 (Mo. App. W.D. 2020). We found no error in the circuit court's decision.

Such evidence was missing there, as here, because the Missouri courts' interpretation of the law took an unforeseen direction, changing Mr. Dubuc's burden of proof *after* the Commission awarded him benefits. In the dissenting Commissioner's view, neither Mr. Dubuc nor the Second Injury Fund "had any notice that evidence satisfying or rebutting the requirements of § 287.220.3 was necessary in this case." Indeed, evidence pertaining to the burden of proof under section 287.220.3 would not have been relevant during the hearing that took place a year before *Cosby v. Treasurer of State-Custodian of Second Injury Fund*, 579 S.W.3d 202 (Mo. banc 2019), was decided. Accordingly, reasonable diligence would not have produced this evidence at the hearing.

We cannot emphasize enough how significantly *Cosby* changed the sole judicial interpretation of section 287.220.3 when the evidentiary hearing was conducted in this case. *Cosby* abrogated this Court's ruling in *Gattenby v. Treasurer of State-Custodian of Second Injury Fund*, 516 S.W.3d 859 (Mo. App. W.D. 2017). In *Gattenby*, decided before Mr. Dubuc's hearing, we concluded that section 287.220.3 applies only when all injuries occurred after January 1, 2014. The Missouri Supreme Court denied the application for transfer in that case. It was not until *Cosby* that interpretation flaws in *Gattenby* were addressed. In the interim, *Gattenby* was the only authoritative precedent on the issue. Justice requires that Mr. Dubuc be allowed to present evidence to satisfy the governing legal standard under *Cosby.* When the law changes "on a point that materially affect[s] [the] case" after it is tried and decided, it would be "improper and unfair" to deny the parties an opportunity to present evidence relevant to the newly announced legal standard. *Tharp. v. St. Luke's*

*Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 662 (Mo. banc 2019) (citations omitted). Simply stated, justice requires that Mr. Dubuc be allowed to present evidence to satisfy the governing legal standard as clarified after his case was heard and decided. A claimant "should not be punished for failing to introduce evidence when [he] did not have the benefit of this Court's guidance as to the evidence necessary to make a submissible case." *Id.* at 663. Evidence relating to section 287.220.3 was not relevant when Mr. Dubuc's claim was heard, and he therefore had no reason to present any such evidence at the hearing.

Under the circumstances, it is in the interest of justice to permit Mr. Dubuc to submit additional evidence.[10] This point is granted.

*Commission's Interpretation of "Medically Documented"*

In the second point, Mr. Dubuc claims that the Commission misinterpreted and misapplied the evidentiary requirements under section 287.220.3 by finding that his preexisting hernias were not "medically documented"; he further asserts that the qualifying preexisting disabilities directly and significantly aggravated or accelerated his primary injury. According to the Commission, expert testimony about and numerous medical record references to Mr. Dubuc's hernias and hernia repairs were inconsistent, indicating that they were the product of self-reported medical history. In its view, the record therefore lacked "direct evidence" of this possibly qualifying preexisting disabling condition, and, as such, did not support a Second Injury Fund

[10] This Court discussed the 2020 *Dubuc I* opinion in *Treasurer of State-Custodian of Second Injury Fund v. Parker*, No. WD83030 (Mo. App. W.D. July 14, 2020), which was taken by the Missouri Supreme Court, vacated, and remanded to the Commission. We distinguished *Parker* from *Dubuc I* by observing that the record in *Dubuc I* was insufficient for us to address the issues before us. *Id.*, slip op. at 14. The supreme court evidently concurred that the record in *Parker* was sufficient and thus remanded to the Commission to re-analyze the issues under the correct statutory subsection on the existing record. *See Parker*, 622 S.W.3d at 183.

claim under section 287.220.3. Given that the last surgery occurred in the mid-1990s, it would have been stunning indeed had Mr. Dubuc submitted medical records some 20 years later from the providers who treated his hernias. The law does not require these providers to maintain medical records beyond seven years from the date of the last professional service. § 334.097.2, RSMo (2016). We would also observe that self-reports of the hernias were not the only record evidence of this preexisting disability. Veterans Administration (VA) records indicated that Mr. Dubuc complained of groin pain in May 2010 and noted a first surgery for bilateral inguinal hernia while Mr. Dubuc was in the Navy in the mid-1980s. And a September 2012 CT scan report stated "Ill-defined hypermetabolic soft tissue both inguinal canals is likely postoperative and related to previous Inguinal hernia repair." Another VA record indicates "abdominal pain in the region of his previous multiple hernia surgeries," and a "constant abdominal pain mainly in the lower right region over the area of his hernia incision. . . ."

The workers' compensation statute does not define the term "medically documented." "In the absence of any statutory definition, words used in statutes are to be given their plain and ordinary meaning." *Buttress v. Taylor,* 62 S.W.3d 672, 679 (Mo. App. W.D. 2001). "Medical records" are defined as those documents composing "a medical patient's healthcare history." *Medical Records,* BLACK'S LAW DICTIONARY (11th ed. 2019). "Document" is defined as "[s]omething tangible on which words, symbols, or marks are recorded. . . . Today the term also embraces any information stored on a computer, electronic memory device, or any other medium." *Document*, *id*. Something is medically documented then where information about it

is written on paper or stored electronically and it pertains to a patient's health care. The source of the information is of no particular import to the analysis of whether that information has been medically documented.

In the context of evidentiary standards, Missouri courts have long permitted the admission into evidence of self-reports appearing in medical records as an exception to the hearsay rule based on the rationale, equally applicable here, that self-reported medical history is reliable. *See Breeding v. Dodson Trailer Repair, Inc*., 679 S.W.2d 281, 285 (Mo. banc 1984) (citation omitted):

> People generally realize that for a physician to bring his skill to bear he must have accurate information on the patient's condition from the patient himself. McCormick, Evidence 2d Ed. (Hornbook Series) Ch. 29, Sec. 292. It would logically follow that if the patient can be presumed truthful in that circumstance (as to his present complaints and symptoms), he can equally reasonably be presumed to be truthful concerning that portion of his past medical history necessary for the physician to correctly diagnose and treat his present condition. There would appear therefore no logical reason to hold that reliability exists as to present symptoms and complaints but fails to exist for past medical or physical history.

Because the Commission erred in prohibiting the introduction of additional evidence, we cannot say whether such evidence would alter its finding as to whether a medically documented disability met the requirements of section 287.220.3. Thus, on remand, the Commission will have to reconsider this factual finding on the basis of the existing record and on whatever additional evidence is submitted.

As part of this point, Mr. Dubuc also argues that the existing evidence was sufficient to prove that the Factor V Leiden mutation and chronic anticoagulation, which, he observes, the Commission accepted as a preexisting disability despite the absence of documentation from the diagnosing physician, aggravated and accelerated

the primary October 2015 injury. Because we are remanding for the Commission to take additional evidence, we do not address this matter further as the record evidence may alter its factual finding as to this preexisting disability.

Mr. Dubuc further contends that an Eastern District case allows the Commission to consider other factors, both medical and non-medical, such as skills, education, training, and age, in determining whether a particular injury is permanently and totally disabling. *Klecka v. Treasurer of Mo.—Custodian of Second Injury Fund*, No. ED108721, 2021 WL 2546417 (Mo. App. E.D. June 22, 2021). He also argues that the Eastern District court found error in the Commission's refusal to award Second Injury Fund benefits due to the ALJ's reliance on more than one preexisting disabling condition and those other factors. The Missouri Supreme Court has taken transfer in *Klecka*, so it would be imprudent for us to rely on a case pending before it where the mandate has been recalled. As well, the Commission did not rely on this rationale to decide Mr. Dubuc's claim. We do not issue advisory opinions. *See Chesterfield Spine Ctr., LLC v. Best Buy Co., Inc.,* 617 S.W.3d 450, 463 (Mo. App. W.D. 2021). Thus, this point is granted only to the extent that the Commission misinterpreted "medically documented" when rejecting self-reports about the hernias in Mr. Dubuc's medical records as evidence of a qualifying preexisting injury.[11]

*Commission's Incidental Reference to* Bennett

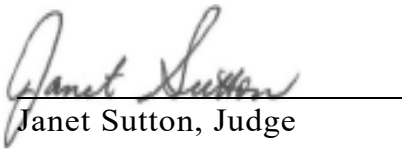
[11] Addressing the record evidence about the Factor V Leiden Mutation, the Second Injury Fund states, "Appellant presented no expert testimony that Appellant's Factor V Leiden mutation – or any other preexisting disability of fifty weeks permanent partial disability – aggravated and accelerated the work-related injury." This statement underscores our conclusion that the matter must be remanded for Mr. Dubuc to have the opportunity to question his experts about whether a preexisting disability of fifty weeks' permanent partial disability aggravated or accelerated the primary injury, because he did not have to meet that standard until after the hearing and award.

In the third and final point, Mr. Dubuc challenges, as a failure to follow this Court's instructions on remand and as too narrow an interpretation of section 287.220.3, the Commission's invocation of *Bennett v. Treasurer of State-Custodian of Second Injury Fund*, 607 S.W.3d 251 (Mo. App. E.D. 2020). The Commission cited the opinion for the principle that expert testimony about all preexisting disabilities combining with the primary injury to render a claimant PTD is insufficient to prove a Second Injury Fund claim because the law requires evidence that one qualifying preexisting disability combined with the disability from the primary work-related injury to result in PTD. The Commission did not rely on this rationale in deciding the case; it prefaced its footnote on the matter by stating, "Although not the basis of this award, . . ." Again, we will not issue an advisory opinion. Also, the Missouri Supreme Court has made clear in *Parker* that the Commission must consider all of a claimant's qualifying pre-existing disabilities, whether just one is established or several are. *Treasurer of State-Custodian of Second Injury Fund v. Parker*, 622 S.W.3d 178, 182 (Mo. banc 2021) (citing section 1.030 for the principle that the singular form, "preexisting disability," should be interpreted to include the plural form). This point is denied.

**Conclusion**

Finding that the Commission erred by misinterpreting our remand instructions and that the interest of justice will be served by remanding for the Commission to consider evidence relevant to section 287.220.3 and the factual findings we instructed the Commission to make, we reverse and remand for proceedings consistent with this

opinion.[12] We also find that the Commission erred by misinterpreting the term "medically documented" when it ruled out self-reported medical history as direct evidence of a preexisting disability. We take no position on whether Mr. Dubuc met his evidentiary burdens under section 287.220.3.



Janet Sutton, Judge

Ahuja, P.J. and Ardini, J. concur.

[12] In their briefing and argument, the parties expressed some confusion about whether, under this Court's *Dubuc I* remand, Mr. Dubuc was limited to the claim that his preexisting disabilities "directly and significantly aggravate[d] or accelerate[d]" his primary injury under section 287.220.3(2)(a)a(iii). This Court's prior remand essentially required the Commission to determine whether Mr. Dubuc's preexisting medical conditions satisfied the thresholds contained in section 287.220.3(2)(a)a—a determination the Commission did not make based on its initial application of section 287.220.2 to Mr. Dubuc's claim against the Second Injury Fund. Our prior opinion should not be read to limit the manner in which Mr. Dubuc may seek to satisfy section 287.220.3(2)(a)a (e.g., by presenting evidence that any of his preexisting disability arose out of military- or work-related injuries).