

# Supreme Court of Missouri Dismisses Appeal for Briefing Deficiencies

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## *Background*

Lexow sustained work-related carpal tunnel syndrome and, after settling his primary injury claim against his employer/insurer, he filed a claim against the Second Injury Fund seeking permanent total disability benefits due to the combination of his primary injury and numerous preexisting conditions. The Administrative Law Judge determined the Fund was liable. The Fund sought review with the Labor and Industrial Relations Commission, which denied Lexow's claim, holding in part that Lexow did not meet the conditions of § 287.220.3(2)(a)a(ii) RSMo 2016. Lexow appealed. Though specifically noting that Lexow's brief violated Rule 84.04 requirements, the Court of Appeals exercised its discretion to review *ex gratia* ("by favour"). The Court of Appeals held the Commission erred in concluding Lexow's injury was not a compensable injury under the statute and remanded for a factual determination regarding Lexow's preexisting conditions. The Fund sought transfer to the Supreme Court, which was granted. Lexow filed a substitute brief with the Court, the Fund filed its opposition, and the case was argued and submitted.

## *The Supreme Court's Dismissal*

Noting the mandatory requirements of Rule 84.04, the Supreme Court declined to exercise its discretion to review *ex gratia* due, in part, due to Lexow's failure to adhere to Rule 84.04(d)(2) governing the requirements for appellate points relied on "[w]here the appellate court reviews the decision of an administrative agency[.]" Specifically, Lexow's points relied on identified the decision of the Court of Appeals and improperly argued the Court of Appeals "correctly reversed" the decision of the Commission. In its opinion, the Supreme Court provided both the deficient point, and an example of a compliant point:

Lexow's deficient first point relied on:

The court of appeals correctly reversed the decision of the Industrial Commission denying benefits to claimant since the Commission erroneously applied the wrong legal standard by only taking each qualifying pre-existing disability standing alone to determine if it combined with the disability from the primary injury to render the claimant permanently and totally disabled instead of considering all of claimant's qualifying disabilities together in combination with the primary injury.

Supreme Court's example of compliant point:

The Labor and Industrial Relations Commission erred in finding Lexow is not permanently and totally disabled, **because** Lexow's evidence satisfied the standard set forth in section 287.220.3(2), appellate review of which is authorized by section 287.495, in that the Commission required a *single* qualifying preexisting disability combine with the primary injury to result in permanent total disability in direct contravention of *Treasurer of State v. Parker*, 622 S.W.3d 178, 182 (Mo. banc 2021), which permits Lexow's *multiple* qualifying preexisting disabilities to combine with the primary injury to result in permanent total disability.

Lexow's point directly contradicts the Rule 84.04(d)(2) requirement that each point shall "(A) identify the administrative ruling or action the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." Though the difference between Lexow's approach and that denominated in Rule 84.04 may seem trivial, when considering the Supreme Court's transfer process, the difference is vast.

After the Court of Appeals issues a decision, if a party wishes to appeal the decision to the Supreme Court, the party files an Application for Transfer. Absent several specifically delineated exceptions, parties do not have a right to appeal to the Supreme Court, and the Court instead exercises discretionary review, meaning it grants transfer on those cases it chooses to hear. If the Supreme Court grants transfer on a Court of Appeals decision, the Court of Appeals decision is *functus officio* ("of no further authority or effect"), meaning the decision loses any precedential value. See *State v. Norman*, 380 S.W.2d 406, 407 (Mo. banc 1964). The case is then treated as an original appeal before the Supreme Court. See Mo. Const. art. V, sec. 10; Rule 83.09.

Lexow's points never identified any claimed error in the Commission's decision. As a result, Lexow's points relied on preserved nothing for appeal. See *Macke v. Patton*, 591 S.W.3d 865, 869 (Mo. banc 2019). Though the Court would typically exercise its discretion to review *ex gratia* (See *Macke*, 591 S.W.2d at 870), it chose not to do so here, noting the mandatory requirements of Rule 84.04 and emphasizing that the Court of Appeals had already warned Lexow of his briefing deficiencies.

### *The Takeaway*

Though Missouri's points relied on requirements are unique to the state, they are mandatory. Failure to abide by Rule 84.04's requirements can be fatal to an appeal, and *Lexow v. Boeing* serves as a stark, albeit unusual, reminder. More broadly, no matter the jurisdiction or court, it is important to strictly adhere to the relevant procedural rules and requirements to avoid potentially losing your bite at the appellate apple completely. If you have a need for an experienced and knowledgeable appellate attorney, do not hesitate to reach out to a member of Sandberg Phoenix's Appellate and Complex Litigation Team for guidance.