

HARRIS DOWELL FISHER & YOUNG L.C.

Management Labor-Employment Law/
Workers Compensation Defense

What is a “Hazard” under the Missouri Workers Compensation Act?

By J. Bradley Young



WHO AM I ?

- **Contributing Writer for WorkersCompensation.com**
- **Defending Employers and Insurance Companies for 25 years**
- **Worked with the Missouri House of Representatives to draft and pass the overhaul of the Missouri Workers Compensation Act in 2005.**
- **KMOX Legal Analyst**



WORDS HAVE MEANING

- When one of our Ex-Presidents was famously deposed, he said this: *"It depends on what the meaning of the word 'is' is. If 'is' means is and never has been, that is one thing. If it means there is none, that was a completely true statement."*



- Before we can look at what “Hazard” means, we must understand how the courts interpret the meaning of words in the Workers Compensation Act.

“LIBERALLY CONSTRUED” PRE-2005 Workers Comp Statute

- **Prior to the 2005 Amendment, the words of the workers compensation act were to be “liberally construed”.**



“LIBERALLY CONSTRUED” – PRE 2005 Workers Comp Statute

- “[t]he purpose of 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 and, consequently, the law should be liberally construed so as to effectuate its purpose and humane design.’” Rogers v. Pacesetter Corp., 972 S.W.2d 540, 542-43 (Mo.App.1998).



“LIBERALLY CONSTRUED” – PRE 2005 Workers Comp Statute

- “Any question as to the right of an employee to compensation must be resolved in favor of the injured employee.” Jennings v. Station Casino St. Charles, 196 S.W.3d 552, 557 (Mo.App.2006) (quoting Rogers, 972 S.W.2d at 543).



STRICT CONSTRUCTION – POST- 2005 Workers Comp Statute

- In 2005, the Missouri Workers' Compensation Act was amended to require strict construction and to require the evidence to be weighed impartially, without giving any party the benefit of the doubt. Miller v. Missouri Highway and Transportation Commission, 287 S.W.3d 671, at 673.



STRICT CONSTRUCTION – POST- 2005 Workers Comp Statute

- **Section 287.800.1 mandates “administrative law judges, associate administrative law judges, legal advisors, the Labor and Industrial Relations Commission, the Division of Workers’ Compensation, and any reviewing courts shall construe the provisions of this chapter strictly.”**



STRICT CONSTRUCTION – POST- 2005 Workers Comp Statute

- Section 287.800. The legislature by this amendment has made it abundantly clear that previous cases which have applied a liberal construction of the law to resolve questions in favor of coverage for the employee should no longer be followed.” Allcorn v. Tap Enterprises, Inc., 277 S.W.3d 823 (Mo.App. 2009)



STRICT CONSTRUCTION – POST- 2005 Workers Comp Statute

- **Strict construction means that a “statute can be given no broader application than is warranted by its plain and unambiguous terms.”**
Harness v. S. Copyroll, Inc., 291 S.W.3d 299, 303 (Mo.App.2009).
- **“The operation of the statute must be confined to “matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter.”**
Allcorn v. Tap Enters., Inc., 277 S.W.3d 823, 828 (Mo.App.2009)



STRICT CONSTRUCTION – POST- 2005 Workers Comp Statute

- “A strict construction of a statute presumes nothing that is not expressed.” Allcorn v. Tap Enters., Inc., 277 S.W.3d 823, 828 (Mo.App.2009)

- What do you think “Strict Construction” means?

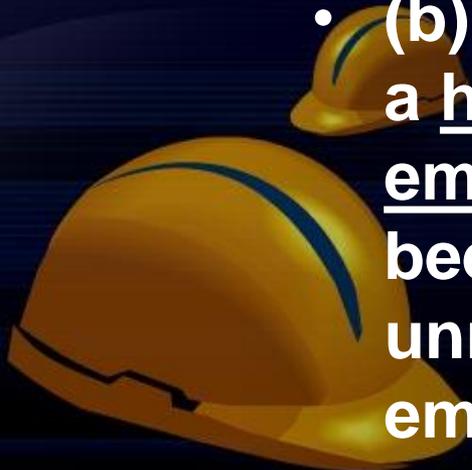


“HAZARD” IS IMPORTANT TO DEFINE

- Section 287.020.3 states:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life



“HAZARD” IS IMPORTANT TO DEFINE

- **The first step is to determine whether the hazard or risk is related or unrelated to the employment.**
- **Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury.**



“HAZARD” IS IMPORTANT TO DEFINE

- **Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life.**
- **Injury from work hazard = compensable.**



“HAZARD” IS IMPORTANT TO DEFINE

- **Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply.**
- **In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.**



“No Greater Risk” Defense

- In 2012, the Missouri Supreme Court issued a new decision in the case of Johme v. St. John’s, 366 S.W.3d 504 (Mo.banc May 29, 2012).
- Ms. Johme was took the last cup of coffee at work and made another pot of coffee. As she turned to through the coffee grounds in the trash can her heal slipped off the back of her sandals and she fell, fracturing her hip. She later underwent hip surgery to repair the fracture.



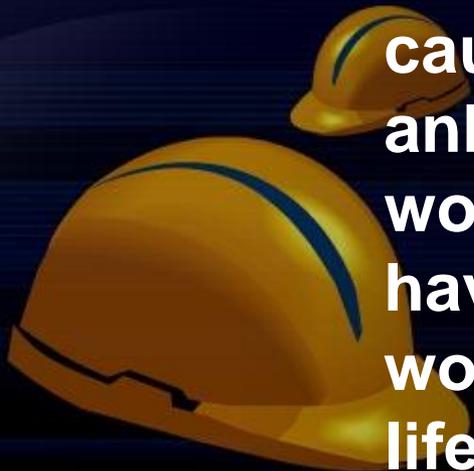
“No Greater Risk” Defense

- **The Court again applied the “No Greater Risk” theory, which states that an injury is compensable only if “it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.” §287.020.2(2)(b)**



“No Greater Risk” Defense

- **The MO Supreme Court held that the injury was NOT compensable, stating: “The assessment of Johme's case necessitated consideration of whether her risk of injury from turning, twisting her ankle, and falling off her shoe was a risk to which she would have been equally exposed in her “normal non-employment life.” No evidence showed that she was not equally exposed to the cause of her injury—turning, twisting her ankle, or falling off her shoe—while in her workplace making coffee than she would have been when she was outside of her workplace in her “normal non-employment life.”**



“No Greater Risk” Defense

- **MO Supreme Court determined that the “Hazard” which injured Johme was NOT a work hazard, but was a hazard to which she was equally exposed when compared to her non-employment life (twisting and falling off of her shoe).**
- **Since 2012 - - Appellate Courts have been backing away from this analysis**



IS SQUATTING AN EMPLOYMENT “HAZARD”?

- Cotner v. Southern Personnel (Mo Industrial Commission August 20, 2015).
- Claimant was 67 years old. Squatted down to inspect a bus. When he stood up he fractured his right hip, causing him to fall backwards injuring his right hip, low back, and right arm.



IS SQUATTING AN EMPLOYMENT “HAZARD”?

- **Question for the Industrial Commission:** Is “squatting” a hazard or risk of employment or is “squatting” a risk to which the employee was equally exposed in his non-employment life?
- **Commission Opinion:** “Employee’s work activity of squatting down on a significant incline itself exposed him to the risk or hazard of stumbling or falling upon returning to a standing position.”



IS SQUATTING AN EMPLOYMENT “HAZARD”?

- From the viewpoint of a safety manager or safety engineer, how can an employer ever prevent an injury that occurs as a result of a normal activity of life?
- Claimant was 67 years old...what issues are raised by trying to prevent such an injury in similar claimant?



IS SQUATTING AN EMPLOYMENT “HAZARD”?

- If we create policies to prohibit the hiring of older workers for any position that involves walking or squatting, aren't we now committing age discrimination or violating the ADA?



IS WALKING UP STAIRS A “HAZARD”?

- Pope v. Gateway to The West Harley Davidson (Eastern District COA October 2012)
- **Facts: Claimant worked at a Harley Davidson dealership. Part of claimant’s job duties included, at the end of the day, to drive motorcycles from the sales lot into both an upper and lower showroom for overnight storage. Pope was required by Employer and by law to wear a helmet while moving the motorcycles**



IS WALKING UP STAIRS A “HAZARD”?

- Pope walked down a small set of stairs after moving the motorcycles, wearing his work boots and carrying his motorcycle helmet. While descending the stairs, Pope lost his footing and fell, fracturing his ankle.

- The Administrative Law Judge found the injury to be compensable and awarded workers compensation benefits to the claimant.



IS WALKING UP STAIRS A “HAZARD”?

- The sole issue raised on appeal is whether Pope's injury resulting from walking on stairs - - whether walking on stairs is a “hazard of employment”?
- Employer argued that Pope was equally exposed to the risk of the injury he suffered at work in his normal, non-employment life, and therefore, under Miller and Johme, Pope's injury did not occur within the course and scope of employment.



IS WALKING UP STAIRS A “HAZARD”?

- COA Decision: “(Our decision) requires us to consider whether the risk source of Pope's injury—here, walking down steps while wearing work boots and carrying a work-required helmet—is a risk to which Pope is equally exposed in his non-employment life. If Pope is equally exposed to this risk outside of his employment, then the injury does not arise out of the employment, and is not compensable.”



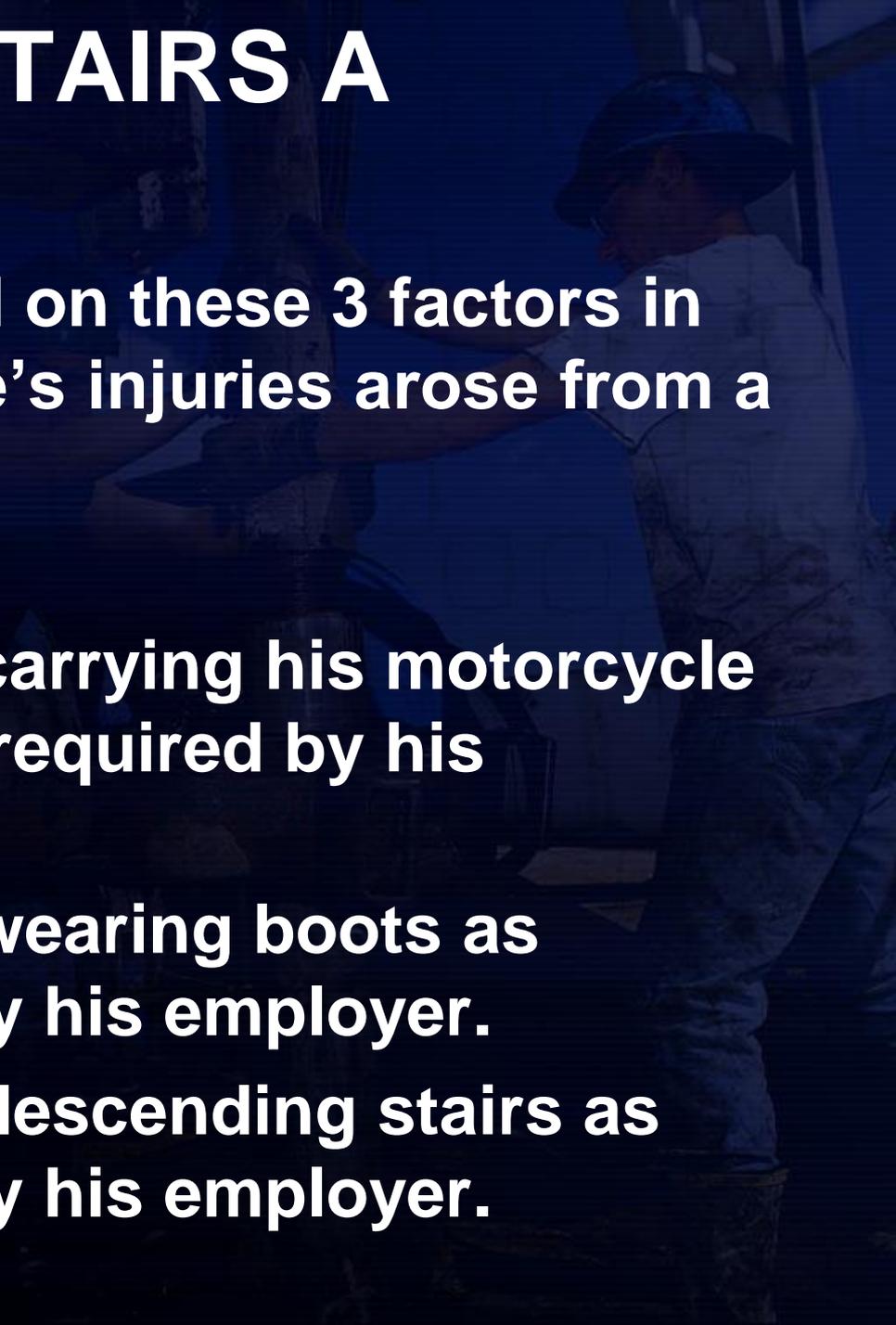
IS WALKING UP STAIRS A “HAZARD”?

- The Appellate Court concluded the injury IS compensable, stating: *“Pope was injured at work because he was performing work activities. Pope was required to wear a motorcycle helmet while moving the motorcycles (and) Pope was required to descend the stairs, which he did while carrying his motorcycle helmet. Pope had his helmet with him because of the work activity he had performed immediately prior to descending the stairs.”*



IS WALKING UP STAIRS A “HAZARD”?

- Court focused on these 3 factors in deciding Pope’s injuries arose from a work hazard:
 - 1. Pope was carrying his motorcycle helmet as required by his employer.
 - 2. Pope was wearing boots as required by his employer.
 - 3. Pope was descending stairs as required by his employer.



IS WALKING UP STAIRS A “HAZARD”?

- Did the employee ever go up and down stairs in his non-employment life? (at home, at the mall, in office buildings, etc.)
- Did the employee ever wear boots while going up or down stairs in his non-employment life?
- Did the employee ever carry his helmet while going up or down stairs in his non-employment life?



IS WALKING UP STAIRS A “HAZARD”?

- Walking up stairs, in of itself, may or may not be hazard. But the Court saw the addition of boots and carrying a helmet as “added hazards” that are specific to the employment.
- Remember - Injury from work hazard = compensable.



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- Missouri Department of Social Services v. Beem (MOCourt of Appeals Oct. 13, 2015)
- Claimant left work in the middle of her shift to go home to walk her dog. Claimant exited the building and walked across the parking lot toward her car. The parking lot had been plowed and the snow was piled on the sidewalks. Snow from a pile on the sidewalk had melted and refrozen on the parking lot.



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- Claimant slipped on this ice on the way to her car, suffered a broken ankle, and required surgery to repair the ankle.
- Claimant had clocked out and was not working. Does this defeat compensability?



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- The Court of Appeals found this claim to be compensable and awarded benefits.
- The COA rejected defenses under the “Extended Premises Doctrine” because the employer controlled (but did not own) the parking lot.



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- The Court of Appeals also rejected the “No Greater Risk” defense, stating:

“Even assuming arguendo that [claimant] was equally exposed to the hazard of slipping and falling on an icy parking lot in (her) non-employment life, (her) injury still arose out of her employment because there is nothing in the record to support a conclusion that (she) was equally exposed to the hazard of slipping on the icy parking lot at that particular work site in (her) non-employment life.”



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- EDITORIAL COMMENT: In The Princess Bride, after Vizzini continues to use the word “inconceivable”, Inigo Montoya says: *“I don’t think that word means what you think it means.”*



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- EDITORIAL COMMENT: I don't think the phrase “No Greater Risk” means what the Court of Appeals thinks it means....

“there is nothing in the record to support a conclusion that (she) was equally exposed to the hazard of slipping on the icy parking lot at that particular work site in (her) non-employment life.”



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- **EDITORIAL COMMENT:** By limiting the analysis to whether, at the exact time of the injury, claimant was equally exposed to the hazard or risk, then the “No Greater Risk” defense can never be applied.

“there is nothing in the record to support a conclusion that (she) was equally exposed to the hazard of slipping on the icy parking lot at that particular work site in (her) non-employment life.”



WHAT “HAZARD” IS INVOLVED WITH LEAVING WORK TO WALK YOUR DOG?

- If the New York Post were covering this story, the headline would be: “Doggie Doo Dictates Division Dough”.
- Lesson: Don’t allow employees to leave work to walk their dogsor
- Employers are still responsible for hazards on property that is controlled by the Employer, even if the property is not owned by the Employer.



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- Bonnie Jensen-Price v. Encompass Medical Group (February 24, 2016).
- Claimant was a nurse. She left work (from an office building) and was in the building's common area by the elevator. Employer did NOT own or control the area where the accident occurred.



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- Claimant was bumped by a cleaning cart. She was carrying a laptop computer to do work at home. Nurse injured her back, underwent surgery, could not return to work, and alleged permanent total disability.



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- **The ALJ found that the claim was not compensable under the “Going to – Coming from” rule. Claimant had left work and was off of the property owned or controlled by the Employer at the time of the accident. ALJ determined that claimant’s work ended once she exited the Employer’s property.**



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- **Industrial Commission – UPHELD the defense award, but for different reasons. The Commission determined that there was no evidence of greater risk of injury to her than in claimant's normal non-employment life.**



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- **HOWEVER - The Commission disagreed with the ALJ's analysis that claimant's work ended when she left the suite and came to a common area and concluded that because claimant was going home to work and going from one work location to another, she was still 'on the job' for Workers Compensation purposes.**



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- The Commission stated: *“Because employee was carrying work materials and was going from one worksite to another (her home), and was thereby engaged in a work activity, we conclude that employee was still engaged in her “work shift” for employer when the maintenance worker's cart collided with her leg.”*



MO Industrial Commission – Even off-work Hazards may create compensable injuries

- Commission correctly determined that claimant faced “No Greater Risk” from the injury that occurred off premises and after leaving work.
- However, Commission believes that taking a laptop computer home negates the “Going to – Coming From” rule.



MO Industrial Commission – Even off-work Hazards may create compensable injuries

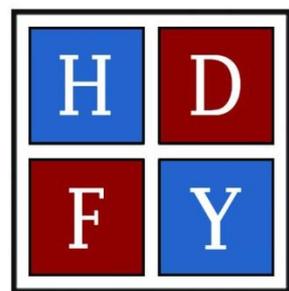
- **QUESTION** – If a claimant “intends” to review some emails on her smartphone at home, isn’t this the same concept as taking a laptop computer home and extending the workplace from the employers property to the claimant’s home?
- How can an Employer **EVER** manage or properly insure for this type of risk?



CONCLUSIONS REGARDING “WHAT IS A WORK HAZARD”?

- The 2005 Amendments to the Workers Comp Act were designed to STOP the Act from being “Liberally Construed” in favor of awarding compensation.
- However, since the MO Supreme Court ruling in Johme in 2012, most of the appellate decisions use strict construction to more or less negate the “No Greater Risk” defense.





HARRIS DOWELL FISHER & YOUNG L.C.

Management Labor-Employment Law/
Workers Compensation Defense

Questions?

J. Bradley Young

(636) 532-0300

Cell: (314) 406-3095

Byoung@harrisdowell.com

