Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-010408

Employee: Gary Ahern

Employer: P & H, LLC

Insurer: American Family Mutual Insurance Company

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Date of Accident: February 14, 2006

Place and County of Accident: Cape Girardeau, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 16, 2007, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued April 16, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of September 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers'

Compensation Law, I believe the decision of the administrative law judge should be reversed.

Preliminaries

This case is submitted on agreed facts. The parties stipulated that the main issue to be decided is whether or not employee's "fall arose out of the [employee]'s employment due to the idiopathic fall provision of Section 287.020 of the Missouri Workers' Compensation Act." The administrative law judge concluded employee's seizure was an "idiopathic cause." The administrative law judge denied compensation on the ground that § 287.020.3(3) RSMo (2005)[1] precludes compensation for injuries resulting directly or indirectly from idiopathic causes.

As will be seen, I believe the parties have mischaracterized the real issue in this case. I believe the stipulated facts establish that employee's accident arose out of and in the course of employment as defined by § 287.020.3(2). The real question to be decided is whether the idiopathic cause exclusion of § 287.020.3(3) applies to render non-compensable these injuries which so clearly arose out of and in the course of employment.

2005 Amendments to the Workers Compensation Act

Section 287.800.1 RSMo provides that,"[a]dministrative 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 mandates that a court give a statutory provision no broader application than is warranted by its plain and ordinary meaning." *State ex rel. Dresser Industries, Inc. v. Ruddy*, 592 S.W.2d 789, 794 (Mo. 1980).

Section 287.020.10 RSMo provides that, "[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases."

"The language in section 287.020.10…serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020…[I]t appears from the plain language of the statute, the legislature …intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. 2007).

Blank Slate

As to the phrases appearing in § 287.020.10, the legislature created a blank slate effective August 28, 2005.

> The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.

Abrams v. Ohio Pacific Express, 819 S.W.2d 338 (Mo. banc 1991)(citations omitted).

In light of the directives of § 287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Workers' Compensation Act giving the words and phrases of § 287.020 their ordinary and usual meaning.

Compensability

Section 287.120.1 provides:

> Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers' compensation benefits if employee sustained personal injury by

accident arising out of and in the course of his employment. Further, 287.020.3 provides that, "[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

Finally, § 287.020.3(3) provides that, "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable."

Injury

Section 287.020.3(5) defines "personal injury" as "violence to the physical structure of the body." The parties stipulated that employee suffered "shoulder and other traumatic injuries."

Accident

Section 287.020.2 defines "accident:"

> The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

The parties stipulated that "[o]n February 14, 2006, at approximately 10:30AM, Gary Ahern fell from a roof as he was working for P & H, LLC at an approximate height of 30 feet." There can be no doubt that the fall described fits squarely in the statutory definition of accident.

Arising Out of and In the Course of Employment

The next question is whether the personal injury arose out of and in the course of employee's employment. The legislature enacted a two-part test for determining if an injury arises out of and in the course of employment. Section 287.020.3 provides that:

> (2) 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 nonemployment life.

The parties stipulated that "the condition of [employee]'s workplace contributed to make the [employee]'s injuries more significant than they would have otherwise been. Specifically, the fall from the roof caused the shoulder and other traumatic injuries and the resulting medical expenses as set forth in paragraph 5."

Applying dictionary definitions to the above stipulation, it is clear the accident is the most important influence in causing the physical violence to employee's body.[2] Employee has established the first prong of the arising out of and in the course of employment test.

I now consider the second prong of the test. One of the hazards posed by employee's job is working high above the ground. The violence to the physical structure of employee's body clearly did not come from a hazard or risk unrelated to employee's employment as a carpenter to which workers are equally exposed in their normal nonemployment life. The hazards of performing carpenter work at great heights are not normally encountered by workers in nonemployment life.

The employee's accident arose out of and in the course of employment as defined by § 287.020.3(2). So, absent statutory provisions to the contrary, the employer is liable to "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person." See § 287.120.1.

Idiopathic Cause Exclusion

§ 287.020.3(3) provides that, "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable." Thus, the next question we must answer is, *notwithstanding that employee's accident arose out of and in the course of employment, did employee's injuries result directly or indirectly from idiopathic causes such that they are not encompassed with the purview of the Missouri Workers' Compensation Act?*

"Idiopathic," means alternately: "1: peculiar to the individual: INNATE. 2: arising spontaneously or from an obscure or unknown cause: PRIMARY <~ epilepsy>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1123 (3d ed. 1971). In *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993), the Missouri Supreme Court adopted the first definition of idiopathic. Because the *Alexander* court reached this conclusion in order to interpret the phrase "arising out of," the legislature has expressly abrogated the holding in *Alexander*. Because the second definition is specifically exemplified with a medical reference (coincidentally, to a seizure disorder), I believe the second definition is the most appropriate definition to be applied for purposes of § 287.020.3(3).

"Cause," means, "something that produces an effect or result <the cause of the accident>." BLACK'S LAW DICTIONARY 234 (8th ed. 2004).

The parties stipulated that employee suffered his seizure as a result of head trauma he sustained in a motorcycle accident in 2004. Employee's seizure did not arise spontaneously or from an obscure or unknown cause. Employee's seizure was not an "idiopathic cause" as that term is defined for medical purposes. The exclusion of § 287.020.3(3) does not apply in this case.

Conclusion

Based upon the foregoing, I conclude that employee has established that he suffered a personal injury by accident arising out of and in the course of employment; that the injury was not caused directly or indirectly by idiopathic cases. Pursuant to § 287.120.1, employee is entitled to compensation from employer. I would award to employee $37,384.78 in past medical expenses and $2,027.97 in permanent partial disability (2½% of the shoulder at the 232 week level).

_____

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Gary Ahern Injury No. 06-010408

Dependents: N/A

Employer: P & H, LLC

Additional Party: Second Injury Fund

Insurer: American Family Mutual Insurance Company

Hearing Date: February 13, 2007 Checked by: JK/kh

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No

3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease? February 14, 2006
5. State location where accident occurred or occupational disease contracted: Cape Girardeau, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was working as a carpenter on a roof approximately 30 feet above the ground. The employee had a seizure as a result of a prior head trauma and fell off of the roof injuring his right shoulder.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: Claim denied
15. Compensation paid to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer: Claim denied
17. Value necessary medical aid not furnished by employer-insurer: Claim denied
18. Employee's average weekly wage: $525.00
19. Weekly compensation rate: $349.65
20. Method wages computation: Claim denied

FINDINGS OF FACT AND RULINGS OF LAW

On February 13, 2007, the employee, Gary Ahern, appeared in person and by his attorney, Mr. Michael Moroni, for a hearing against the employer-insurer. The employer-insurer was represented at the hearing by its attorney, Mr. Matt Pelikan. By agreement, the Assistant Attorney General representing the Second Injury Fund did not appear at the hearing.

At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about February 14, 2006, P & H, LLC, was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by American Family Mutual Insurance Company.
2. On or about February 14, 2006, Gary Ahern was an employee of P & H, LLC, and was working under the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of the employee's accident.
4. The employee's claim for compensation was filed within the time allowed by law.
5. The employee's average weekly wage was $525.00 and his rate of compensation is $349.65.
6. The employee's injury to his right shoulder was medically causally related to his accident.
7. No medical aid was furnished by the employer-insurer.
8. No temporary total disability benefits were furnished by the employer-insurer.

ISSUES

1. Accident
2. Additional medical aid
3. Nature and extent of disability – permanent partial disability

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

A. Medical records of St. Francis Medical Center
B. Medical records from Cape Neurological Surgeon, PC.
C. Medical records from Anthony P. Knox, Neurologist

Employer-Insurer's Exhibits

1. Deposition of Gary Ahern
2. Stipulation of facts

FINDINGS OF FACT

Based on the testimony of the employee, the stipulation of facts admitted as employer-insurer's exhibit 2, and the other evidence admitted, I find as follows:

- On June 30, 2004, Gary Ahern ("employee") had a motorcycle accident and suffered a fractured skull on the right side of his temporal lobe. After a right temporal craniotomy, the employee had a good recovery and was able to return to work. The medical records indicate, however, that the employee had a "witnessed seizure" while on the job in July of 2005 (February 20, 2006 consultation record of Dr. Anthony P. Knox, Employee's exhibit B).
- On February 14, 2006, the employee was working for P & H, LLC, as a carpenter. The employee's job required him to work on a roof that was approximately 30 feet above ground level.
- The employee was using a nail gun to put plywood on the roof when he started losing focus and feeling dizzy. The employee set the nail gun down and was trying to sit down when he fell off the roof and landed on his back.
- The employee initially experienced pain in his right shoulder, back, chest, abdomen and pelvic areas. The employee also had a problem with headaches. By the date of the hearing, the employee's only complaints were related to a right shoulder sprain or strain. The parties stipulated to a permanent partial disability rating of 2 ½ % of the right shoulder (Employer-insurer's exhibit 2).
- The employee's treating physician determined that the employee's fall from the roof was caused by a seizure (Employee's exhibit A). The parties have stipulated that the seizure was caused by the employee's head trauma from the prior motorcycle accident (Employer-insurer's exhibit 2).
- Although the employee's seizure was the result of his prior head injury, the parties stipulated that the conditions of the employee's workplace contributed to make the employee's injuries more significant than if he had not been working as a carpenter on a roof that was 30 feet off the ground (Employer-insurer's exhibit 2).
- As a result of his fall, the employee incurred medical expenses totaling $37,384.78. The employer-insurer stipulated at the hearing that if the employee's accident arose out of and in the course of his employment, the employee is entitled to an award for medical expenses in the amount of $37,384.78.

APPLICABLE LAW

- In *Alexander v D.L. Sitton Motor Lines*, 851 S.W. 2d 525 (Mo. banc 1993), the Missouri Supreme Court overruled the "idiopathic fall / greater hazard" doctrine established in *Collins v Combustion Engineering Co*., 490 SW. 3d 394 (Mo.App.1973). The Supreme Court noted "We believe the analysis of 'causal connections' should not stop with a determination of the precipitating cause of the accident." The Court stated that "the proper test of 'causal connection,' simply put, is whether the conditions of employment caused or contributed to cause the accident." *Alexander*, 851 S.W. 2d at 529. While recognizing that a wholly idiopathic incident or condition that precipitated an accident is not compensable, the Court concluded that "We hold that a causal connection is established if the conditions of the workplace contributed to cause the accident, even if the precipitating cause was idiopathic". *Alexander*, 851 S.W. 2d at 530.
- **287.020.2.** The word "accident" as used in this chapter shall mean an unexpected traumatic event or an unusual strain

identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

- **287.020.3(1).** In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
- **287.020.3(2).** An injury shall be deemed to arise out of and in the course of employment only if :
  (a) It is reasonably apparent, upon consideration of all of 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.
- **287.020.3(3).** An injury resulting directly or indirectly from idiopathic causes is not compensable.
- **287.020.10.** In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment", to include but not limited to holdings in: *Bennett v Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v Bristol Care, Inc*., 948 S.W.2d 852 (Mo. banc 1999); and *Drewes v TWA*, 984 S.W.2d 512 (Mo. banc 1999) and all cases citing, interpreting, applying, or following those cases.
- Definition of "idiopathic" from *The American Heritage Stedman's Medical Dictionary*: 1. of or relating to a disease having no known cause; agnogenic. 2. of or relating to a disease that is not the result of any other disease.
- Definition of "idiopathic" from *Webster's Third New International Dictionary*, 1123 (1986), as referenced by footnote 3 in *Alexander v D.L. Sitton Motor Lines*, Mo. 851 S.W.2d 525 (Mo. banc 1993): "Idiopathic" is defined as "peculiar to the individual; innate."

RULINGS OF LAW:

The attorney's representing the employee and the employer-insurer have purposely set up a "test case" on Section 287.020.3(3) and Section 287.020.10.

Under the *Alexander* decision, the employee's accident and resulting injury to his right shoulder would have been compensable. The Supreme Court adopted the broader definition of "idiopathic" ("peculiar to the individual; innate") rather than the narrower medical definition ("no known cause"). Since the employee's seizure was a pre-existing condition related to his 2004 motorcycle accident, his seizure, as the precipitating cause of his fall, was idiopathic. The parties have stipulated, however, that the conditions of the employee's workplace (working on a roof 30 feet above the ground) contributed to cause the employee's injuries and his resulting medical treatment. Thus, if the Supreme Court's holding in *Alexander* is still applicable, the employee's accident and resulting injury is compensable.

The employer-insurer asserts, however, that the subsequent enactment of 287.020.3(3) and 287.020.10 have changed the law, and the employee's claim must be denied. The employer-insurer first argues that since the employee's injuries resulted "directly or indirectly from idiopathic causes", the employee's accident is not compensable. The employer-insurer further argues that Section 287.020.10 rejects and abrogates earlier case law interpretations on the meaning of or definition of "accident", "arising out of" and "in the course of" employment. Since *Alexander* is an earlier case that interpreted the meaning or definition of whether idiopathic falls can be "accidents" that "arise out of" employment, the employer-insurer concludes that the Supreme Court holding in *Alexander* is no longer binding.

The employee's position is that 287.020.3(3) is unconstitutional as against due process and equal protection of the U.S. and the Missouri Constitution; that it violates the Americans with Disabilities Act; and that it further violates the open court provisions of the Missouri Constitution. The employee's positions on these arguments are outlined in claimant's trial brief. The employee has also argued at the hearing that the legislative branch does not have the constitutional authority to "abrogate" cases decided by the judicial branch.

After reviewing the relevant provisions of Chapter 287 and the citations provided by the attorneys in their briefs, I find that the holding of the Missouri Supreme Court in *Alexander v D.L. Sitton Motor Lines*, 851 S.W. 2d 525 (Mo. banc 1993) has been rejected and abrogated by the enactment of 287.020.10. I further find that the employee's injuries did result directly or indirectly from an idiopathic cause (the employee's seizure), and therefore, under Section 287.020.3(3) the employee's accident is not compensable. The employee's constitutional and other arguments have been reviewed and rejected. The employee's claim for compensation against the employer-insurer must therefore be denied.

Based on the denial of the employee's underlying claim against the employer-insurer, the employee's claim against the Second Injury Fund must also be denied.

Date: _____ Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Patricia “Pat” Secrest
Director
Division of Workers' Compensation

[1] All RSMo references are to the Revised Statutes of Missouri (2005) unless otherwise indicated.

[2] “Primary” means, “first in rank or importance.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1800 (3d ed. 1971). “Factor” means, “something (as an element, circumstance, or influence) that contributes to the production of a result.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 813 (3d ed. 1971).