

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No. 09-006127

Employee: Janet Anhalt
Employer: Penmac Personnel Services, Inc.
Insurer: Ace American Insurance Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) medical causation; (2) injury arising out of and in the course of employment; (3) nature and extent of permanent disability; (4) temporary total disability; and (5) past medical expenses.

The administrative law judge determined that employee's injury did not arise out of and in the course of employment, and found all other issues to be moot.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in finding that her injury did not arise out of and in the course of employment.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

Findings of Fact

Employee worked for employer as a field associate performing temporary or seasonal services for employer's clients. Employee worked for one of these clients, Reckitt-Benckiser, on a number of occasions. Reckitt-Benckiser operated a food plant. Employee's typical work duty for Reckitt-Benckiser was inspecting french-fried onions.

Employer and Reckitt-Benckiser jointly developed a training/orientation program for the field associates who would be working on Reckitt-Benckiser's premises. The goal in jointly developing this training was to fully incorporate Reckitt-Benckiser's needs and expectations into the program, so that the field associates could seamlessly integrate into Reckitt-Benckiser's workplace. Employer administered the orientation program before the field associates went to work for Reckitt-Benckiser.

Employees of employer who worked on Reckitt-Benckiser's premises were required to check in at a guard station before proceeding into the plant. There was a separate time clock installed on Reckitt-Benckiser's premises for the use of employer's employees. While working on Reckitt-Benckiser's premises, the field associates (including employee) were subject to the supervision of Preston White, an employee of employer. Mr. White coordinated when the field associates would work, what tasks they would perform, and also took any calls related to attendance. In addition, all Reckitt-Benckiser employees had the

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authority to direct the work of the field associates if they saw them doing something unsafe or inappropriate.

Reckitt-Benckiser did not pay the field associates directly. Instead, the contract between employer and Reckitt-Benckiser provided that Reckitt-Benckiser paid an hourly rate plus a premium to employer for every hour of work the field associates performed. Employer kept the premium while disbursing the remainder of the payment from Reckitt-Benckiser to the field associates. In addition, Reckitt-Benckiser paid employer a one-time fee for the costs involved in the interview/screening of each field associate.

The agreement between employer and Reckitt-Benckiser provided that there would be no charge to Reckitt-Benckiser for unsatisfactory work on the part of a field associate, provided Reckitt-Benckiser timely notified employer of the unsatisfactory performance.

The accident

In the early morning hours of January 30, 2009, employee finished her shift and clocked out, and was traversing Reckitt-Benckiser's parking lot¹ on her way to her personal vehicle when she slipped on a patch of ice and fell. Employee landed on her outstretched right hand and experienced immediate pain.

Employee received emergency care at St. John's Hospital, where physicians diagnosed a right distal radius fracture with dorsal angulation and displacement, and an ulnar styloid fracture with displacement. Treating physicians provided employee with a wrist splint and pain medications, and discharged her with orders to follow-up with Dr. William Goodman for a surgical consultation. Later that same day, Dr. Goodman performed a closed reduction of the right distal radius fracture, with application of an external wrist fixator.

On March 12, 2009, Dr. Goodman removed the external fixator from employee's right wrist, and recommended employee undergo physical therapy. Following removal of the external fixator, employee was left with some scarring of the right forearm. Specifically, employee has four small round scars corresponding to the pins of the external fixator.

During the course of physical therapy, employee noticed she was having problems performing internal rotation of her right shoulder. Dr. Goodman recommended a right shoulder MRI, which revealed mild tendinopathy of the tendons on the greater tuberosity without a full-thickness tear of the rotator cuff or labral pathology; mild to moderate subacromial/subdeltoid bursitis; and thickening and mild signal abnormality about the axillary recess. Dr. Goodman recommended corticosteroid injections, and instructed employee to continue with physical therapy.

As of March 24, 2009, Dr. Goodman believed employee could return to light duty work provided employer would accommodate the restriction that employee not use her right upper extremity; but if employer could not accommodate that restriction, employee should remain off work. Employee testified that she ultimately returned to work on May 8, 2009, but did not indicate that employer was unable to accommodate Dr. Goodman's restrictions of March 24, 2009, or that she otherwise felt unable to work until May 8, 2009. Rather, from employee's testimony that she expected to be temporarily laid off from her assignment

¹ The parties stipulated that Reckitt-Benckiser owned and controlled this parking lot.

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with Reckitt-Benckiser during this time period, it appears that May 8, 2009, may have simply been the date that Reckitt-Benckiser asked her to return to work.

Because the evidence is lacking as to this point, we find that employee returned to work on May 8, 2009, but we decline to make any finding that employee was medically restricted from returning to work between March 24, 2009, and May 8, 2009.

Medical causation

Employee presented the expert medical opinion of Dr. Robert Paul, who examined employee, reviewed medical records, and authored a report dated January 2, 2012. Dr. Paul believes the prevailing factor causing employee's right arm fracture and disability was the fall of January 30, 2009. Dr. Paul also believes employee developed right shoulder impingement and adhesive capsulitis syndrome as a result of the subsequent surgery and immobilization of the right upper extremity.

Dr. Paul reviewed employee's medical records and bills and opined that the treatment and charges employee incurred in connection with the January 30, 2009, injury were reasonable and necessary. With regard to employee's ability to work following the injury, Dr. Paul believes employee was temporarily and totally disabled from January 30, 2009, until April 28, 2009, unless employer was able to provide her with modified duty consistent with Dr. Goodman's restriction of no working with the right upper extremity.

Dr. Paul assigned permanent restrictions resulting from the work injury as follows: no overhead work with the right shoulder, no lifting over 10 pounds with the right arm from waist to shoulder height, no repetitive use of the right arm for tasks away from the body or in extended position, and no repetitive work with the right wrist/hand. With regard to permanent partial disability, Dr. Paul rated employee's right wrist injury at 25% of the 175-week level, and the right shoulder injury at 10% of the 232-week level.

There is no competing expert medical opinion on this record. We find the opinions from Dr. Paul to be persuasive, with the following caveats.

First, as we have noted above, employee did not provide any testimony to clarify whether employer permitted her to return to work for any period of light or restricted duty, and testified only that she ultimately returned to work on May 8, 2009. Where Dr. Paul provided a conditional temporary total disability opinion that essentially deferred to the restrictions from Dr. Goodman, and where Dr. Goodman opined that employee could return to light duty work as of March 24, 2009, with the restriction that she not use her right upper extremity, this leaves us with a gap in the evidence regarding employee's inability to work following the work injury. While it strikes us as rather unlikely that employer would be able to provide an assignment for employee that would permit her to honor Dr. Goodman's restriction that she not use her right upper extremity at all, where there is no evidence whatsoever on the question, we would be forced to speculate in employee's favor to reach such a finding. Accordingly, we find that employee's inability to work ended on March 24, 2009, when Dr. Goodman opined employee could return to light duty work.

Second, we note that employee persuasively testified that her right shoulder complaints completely resolved. As a result, we do not find persuasive Dr. Paul's rating of permanent

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disability in connection with the right shoulder conditions employee developed as a result of the immobilization of her right upper extremity following Dr. Goodman's surgery.

Finally, we note that employee also downplayed the effects of her right wrist fracture and testified that the surgery gave her a good result and that she has no problems performing her job. In light of this testimony, Dr. Paul's 25% rating of the right wrist strikes us as somewhat excessive. On the other hand, the mere fact that employee does not experience any problems performing her current job does not preclude the possibility that other types of work may prove difficult. Accordingly, we credit Dr. Paul's uncontested expert opinion that employee sustained permanent disability as a result of her right wrist fracture. We find that the extent of this disability is 15% permanent partial disability of the right wrist.

Conclusions of Law

Medical causation

Section 287.020.3(1) RSMo sets forth the standard of medical causation applicable to this claim, and provides, in relevant part, as follows:

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.

We have credited, in part, the opinions from Dr. Paul with regard to the issue of medical causation. We conclude that the accident of January 30, 2009, was the prevailing factor causing employee to suffer the following medical conditions and disability: a right distal radius fracture with dorsal angulation and displacement, and ulnar styloid fracture with displacement requiring surgical correction and resulting in a 15% permanent partial disability of the right wrist; and a right shoulder impingement and adhesive capsulitis syndrome that resolved with no permanent disability.

Injury arising out of and in the course of employment

We turn now to the issue whether employee's injuries arose out of and in the course of her employment. At the outset, we must determine the nature of such "employment," where employee's work involved performing services under the simultaneous direction and control of both employer and its client Reckitt-Benckiser. Specifically, we must determine whether employee suffered her injuries while in the service of employer and/or Reckitt-Benckiser.²

² We note that employer's counsel, at oral argument in this matter, suggested that any issue of employment by Reckitt-Benckiser should be remanded for additional evidence. We are not persuaded. Although the parties did not specifically dispute the issue whether employee was in the service of Reckitt-Benckiser when she suffered the accident, in order to determine whether employee's injuries arose out of and in the course of *the employment*, the administrative law judge was necessarily required to address any sub-issue as to the proper characterization of such employment. The administrative law judge thoroughly discussed the issue in her award, and the parties have fully addressed it in their briefs. Accordingly, we conclude the question is appropriately before us. We also deem the existing record to be clear and unequivocal with regard to the issue, and therefore we do not believe a remand would further the interests of justice or administrative efficiency.

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Section 287.130 RSMo provides, as follows:

If the injury or death occurs while the employee is in the joint service of two or more employers, their liability shall be joint and several, and the employee may hold any or all of such employers. As between themselves such employers shall have contribution from each other in the proportion of their several liability for the wages of such employee but nothing in this chapter shall prevent such employers from making a different distribution of their proportionate contributions as between themselves.

“Joint employment occurs when a single employee, under contract with two employers, and under simultaneous control of both, performs services for both employers and the services provided are the same or closely related to that of the other.” *Shurvington v. Cavender Drywall*, 36 S.W.3d 432 (Mo. App. 2001). Applying the test as stated by the *Shurvington* court, we are convinced that employee was in the joint service of both employer and Reckitt-Benckiser at the time she suffered the accident of January 30, 2009.

Employee worked for employer at Reckitt-Benckiser’s premises, and the services she performed there for both employer and Reckitt-Benckiser were fundamentally identical: (1) in her role as a field associate for employer, employee inspected french-fried onions; and (2) in her role as a seasonal worker for Reckitt-Benckiser, employee inspected french-fried onions. Employer was not merely a passive recruiting agency, however, and maintained an active and direct interest in the manner and means whereby employee performed her work for Reckitt-Benckiser. This is apparent in the fact that employee was subject to daily supervision from an on-site representative of employer. Employee was also subject to daily direction and supervision from Reckitt-Benckiser’s employees. In this way, both employer and Reckitt-Benckiser shared in the simultaneous right to direct and control the manner and means whereby employee performed her services.

Although Reckitt-Benckiser did not pay employee directly, the contract between employer and Reckitt-Benckiser provided that Reckitt-Benckiser paid employer for the costs involved in employee’s interview/screening, and also paid a premium for every hour of work employee performed. See *Stone v. Heisten*, 777 S.W.2d 664 (Mo. App. 1989), pointing out that “[t]he statute has no provision which requires that the employer be the party who actually pays the employee for his services.” This is because the focus of § 287.130 is on the *joint service* performed by the employee, not upon the source of the employee’s wages.

In the case of *Leach v. Bd. of Police Comm’rs of Kan. City*, 118 S.W.3d 646, 650 (Mo. App. 2003), the court cautioned that “[t]he joint benefit—the worker’s merely doing something that benefits both employers—is not the key factor in determining whether or not the [employee] was jointly employed. Instead, it is that his employers enjoyed the benefit resulting from his ‘joint service’—that is, his doing both employers’ work.” We are convinced that such is the case here. Not only did employer and Reckitt-Benckiser both enjoy a benefit from employee’s service of inspecting french-fried onions, they each derived a special benefit from the fact of her joint service itself. Specifically, employer was able to further its unique business interest in providing temporary workers to its clients, while Reckitt-Benckiser was able to further its own interest of securing seasonal or temporary work in order to handle fluctuating demand for its products.

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We conclude that employee was in the joint service of employer and Reckitt-Benckiser when she suffered her injury, with the effect that the liability of employer and Reckitt-Benckiser is joint and several under § 287.130. We turn now to the question of such liability.

In the words of the Supreme Court of Missouri, “section 287.020.3(2) must control any determination of whether [employee’s] injury shall be deemed to have arisen out of and in the course of her employment.” *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. 2012). Section 287.020.3(2) provides, as follows:

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.

We have concluded that the accident was the prevailing factor causing employee to suffer the injuries at issue. As a result, subsection (a) above is satisfied. We turn now to subsection (b).

Employee fell as a result of slipping on ice in Reckitt-Benckiser’s parking lot. These facts are fundamentally identical to those at issue in the cases of *Scholastic, Inc. v. Viley*, 452 S.W.3d 680 (Mo. App. 2014) and *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012). In both *Scholastic* and *Duever*, the employee fell while traversing an icy parking lot as a condition of employment. *Scholastic*, 452 S.W.3d at 682; *Duever*, 371 S.W.3d at 865. In both cases, the courts held that the injuries arose out of and in the course of employment. *Scholastic*, 452 S.W.3d at 687-88; *Duever*, 371 S.W.3d at 868. The *Scholastic* court provided the following reasoning, which we deem instructive here:

Even assuming *arguendo* that [the employee] was equally exposed to the hazard of slipping and falling on *an* icy parking lot in his nonemployment life, his injury still arose out of his employment because there is nothing in the record to support a conclusion that he was equally exposed to the hazard of slipping on the icy parking lot at *that particular* work site in his nonemployment life.

Scholastic, 452 S.W.3d at 687 (emphasis in original).

Here, there is no evidence to suggest that employee was ever (let alone equally) exposed to the risk of traversing Reckitt-Benckiser’s icy parking lot in her normal, nonemployment life. The risk of traversing Reckitt-Benckiser’s parking lot, and of encountering any dangerous condition found there, was not only related to employee’s work for employer, it was a necessary condition of her work.

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[C]laimant is not required to prove both that the hazard from which her injury arose was related to her employment *and* that the hazard was one which she was not equally exposed to in her nonemployment life. Rather, the claimant has the burden of proving that her injury "was caused by [a] risk related to her employment activity *as opposed to* a risk to which she was equally exposed in her 'normal nonemployment life.'" *Johme*, 366 S.W.3d at 512 (emphasis added). Meaning, implicit in a finding that the claimant was exposed to the risk from which her injury arose *because of* her employment, is a finding that the claimant could have avoided the risk outside of her employment.

Young v. Boone Elec. Coop., 462 S.W.3d 783, 790 n.9 (Mo. App. 2015).

The evidence in this matter compels a conclusion that employee was exposed to the risk of traversing Reckitt-Benckiser's icy parking lot *because of* her employment. Accordingly, we are convinced that employee's injuries arose out of and in the course of her joint employment for employer and Reckitt-Benckiser.

We acknowledge employer's argument that because employee was not on employer's premises when she fell, it is necessary to consider whether the extension of premises doctrine affects the compensability of her claim. Section 287.020.5 RSMo provides, in relevant part, as follows:

The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not **owned or controlled by the employer** even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

(emphasis added).

As explained in the *Scholastic* case:

Before 2005, the Act provided that an injury did not "arise out of and in the course of employment" unless the injury occurred "while [the worker] was engaged in or about the premises where [his] duties are being performed, or where [his] services require [his] presence as a part of such service." § 287.020.5, RSMo 2000. Based on this provision, the courts ultimately developed the "extension of premises" or "extended premises" doctrine as an exception to the general rule that "accidents occurring on the trip to or from work are not deemed to arise out of and in the course of employment." *See Hager v. Syberg's Westport*, 304 S.W.3d 771, 775 (Mo. App. 2010). Under the law as it existed prior to 2005, if the judicially created "extension of premises" doctrine was found to apply, then the injury was deemed to have occurred on the employer's premises, thereby satisfying both the "premises" requirement of former section 287.020.5, and the "in the course of employment" test. *See Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. banc 2000). ...

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Pursuant to the plain language of section 287.020.5, the extended premises doctrine is not totally eliminated but is now limited to situations where the employer owns or controls the area where the accident occurs.

452 S.W.3d at 683-84.

The parties stipulated that Reckitt-Benckiser owned and controlled the parking lot where employee suffered her injuries. It follows that, pursuant to § 287.020.5, the extension of premises doctrine is satisfied. Employer complains, however, that because it is the only employer involved in this workers' compensation case, it must be deemed "the employer" for purposes of any application of § 287.020.5, and thus employee cannot satisfy the language of that section, because Reckitt-Benckiser, not employer, owned and controlled the parking lot.

We are not persuaded. Section 287.130 unequivocally declares the liability of joint employers to be "joint and several," with the effect that if Reckitt-Benckiser is liable for employee's work injury under the Missouri Workers' Compensation Law, employer is equally liable. In *Equity Mut. Ins. Co. v. Kroger Grocery & Baking Co.*, 175 S.W.2d 153 (Mo. App. 1943), the court held that a finding that an employee is injured "in the course" of the employment of one joint employer is sufficient to extend liability to all other joint employers: "[i]f joint employment, and injury is in the course of joint employment, then any one of the parties who are equally liable, as all joint employers in this State who are working under the code are, can be proceeded against singly and full compensation based upon his total wages can be awarded against the one proceeded against." *Id.* at 160. The plain language of § 287.130 additionally makes clear that employee was entitled to proceed against any joint employer she chose. The fact that Reckitt-Benckiser is not a party to this workers' compensation claim is thus irrelevant.

In light of the foregoing considerations, we conclude that employee's injuries arose out of and in the course of employment.

Past medical expenses

Section 287.140.1 RSMo governs the issue of past medical expenses and provides, in relevant part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

We have credited Dr. Paul's uncontested expert medical opinion with regard to the issue whether the treatment employee received as a result of her compensable work injury was reasonable and necessary. We conclude, therefore, that the treatment at issue was reasonably required to cure and relieve the effects of the work injury.

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The courts have consistently held that an award of past medical expenses is supported when the employee provides (1) the bills themselves; (2) the medical record reflecting the treatment giving rise to the bill; and (3) testimony identifying the bills. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989). If employee does so, the burden shifts to employer to prove some reason the award of past medical expenses is inappropriate (such as employee's liability for them has been extinguished, the bills are not reasonable, etc.). *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822-23 (Mo. 2003).

Here, employee put her bills in evidence, the medical records showing the treatment giving rise to the bills, and testified that she received the treatment reflected in the records. Employer, on the other hand, did not advance any evidence to suggest that employee's liability for the bills has been extinguished, or that the charges are not fair and reasonable. Nor does employer provide any argument or evidence to suggest that the identified amount of \$36,788.87 was incorrectly totaled or otherwise unsupported by the bills or medical records themselves.

We conclude that employer is liable to employee for \$36,788.87 in past medical expenses.

Temporary total disability

Sections 287.149 and 287.170 RSMo provide for the payment of temporary total disability benefits while an employee is engaged in the rehabilitative process following a compensable work injury. *Greer v. Sysco Food Servs.*, 475 S.W.3d 655 (Mo. 2015). Employee claims temporary total disability benefits for 12 weeks following January 30, 2009. However, we have found that the evidence only supports a finding that employee was unable to work from January 30, 2009, through March 24, 2009, when Dr. Goodman opined that employee could return to light duty work.

Consequently, we conclude that employee is entitled to, and employer is obligated to pay, weekly payments of temporary total disability benefits for 7 and $\frac{5}{7}$ weeks at the stipulated temporary total disability benefit rate of \$247.32 for a total amount of \$1,907.89 in temporary total disability benefits.

Nature and extent of permanent disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee suffered a 15% permanent partial disability of the right wrist referable to her right wrist fracture. We conclude that employer is liable for 26.25 weeks of permanent partial disability benefits at the stipulated weekly permanent partial disability benefit rate of \$247.32 for a total of \$6,492.15 in permanent partial disability benefits.

In addition, § 287.190.4 provides that "[i]f an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation." We have found that employee's right wrist surgery left her with some scarring, including four round scars corresponding to the pins from the external fixator. We conclude employee is entitled to four weeks of additional compensation at the \$247.32 rate, for a total of \$989.28 for employee's disfigurement resulting from the work injury.

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Decision

We reverse the award of the administrative law judge.

Employer is liable to employee for past medical expenses in the amount of \$36,788.87.

Employer is liable to employee for temporary total disability benefits in the amount of \$1,907.89.

Employer is liable to employee for permanent partial disability benefits in the amount of \$6,492.15, plus the additional amount of \$989.28 for the disfigurement resulting from employee's right wrist surgery.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued September 15, 2015, is attached solely for reference.

For necessary legal services rendered to employee, Chad T. Courtney, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 18th day of March 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

CONCURRING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Janet Anhalt

CONCURRING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I agree with the Commission majority's choice to reverse the decision of the administrative law judge and award benefits to employee for her compensable right wrist injury. However, I write this separate opinion to address employer's argument regarding the extension of premises doctrine.

There is no premises requirement under § 287.020.3(2) RSMo

The parties placed in issue the question whether employee's injuries arose out of and in the course of employment. Employer's position is that employee is unable to so demonstrate, because she fell on premises that did not belong to employer. I find this argument unavailing, for the following reasons.

First, I note that in 2005, the legislature deleted previous language in § 287.020.5 RSMo declaring that the Missouri Workers' Compensation Law did not cover workers "except while engaged in or about the premises where their duties are being performed," with the result that there is no longer any requirement that injuries occur on or about an employer's premises to be compensable. The absence of any such requirement after 2005 is evident in the recent cases of *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012) and *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. 2014). In both cases, the courts held that injuries that were not sustained on the employer's premises were nevertheless compensable where they satisfied the "prevailing factor" and "unequal exposure" requirements of § 287.020.3(2).

Second, I note that the legislature in 2005 abrogated all prior case law interpretations on the meaning of or definition of the terms "arising out of" and "in the course of the employment." See § 287.020.10 RSMo. As a result, we cannot rely upon pre-2005 case law to import any premises requirement into our analysis under § 287.020.3(2). To the contrary, the legislature has essentially provided us with a blank slate for applying the plain language of § 287.020.3(2). In doing so, it appears that the legislature recognized the wisdom inherent in the long-standing judicial admonition in Missouri that "every case involving this phrase [arising out of and in the course of the employment] should be decided upon its own particular facts and circumstances and not by reference to some formula." *Finley v. St. Louis Smelting & Refining Co.*, 361 Mo. 142, 144 (Mo. 1950).

Third, we must strictly construe the provisions of Chapter 287 by virtue of § 287.800.1 RSMo, and "a strict construction of a statute presumes nothing that is not expressed." *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009). Consistent with this mandate, I cannot presume that the legislature intended in 2005 to preserve some requirement that an employee's injuries occur on the employer's premises where the controlling test under § 287.020.3(2) is otherwise met, where that provision contains no premises requirement, and where the legislature deleted the pre-2005 premises requirement under § 287.020.5.

Fourth, as recognized by the Commission majority, the highest court of our state has declared that "[t]he express terms of the workers' compensation statutes as revised in 2005

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instruct that section 287.020.3(2) **must control any determination** of whether [the employee's] injury shall be deemed to have arisen out of and in the course of her employment." *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509-10 (Mo. 2012)(emphasis added). Applying this unequivocal language from the Supreme Court of Missouri, I conclude that we need not consider or apply the extended premises doctrine (to the extent it remains following the 2005 amendments to § 287.020.5) to either enhance or defeat an employee's claim where the facts otherwise satisfy the plain and unambiguous requirements under § 287.020.3(2).

Employer's argument, as I understand it, is that by abrogating certain aspects of the extension of premises doctrine in 2005, the legislature intended that an employee's failure to satisfy the remaining aspects of that doctrine results in a complete bar to compensation, even where the unequal exposure test under § 287.020.3(2) is otherwise satisfied. It would appear, however, that the only way to reach that result is to apply the deleted pre-2005 premises requirement in conjunction with the body of pre-2005 case law abrogated by § 287.020.10. This is because each of the cases describing and defining the parameters of the extension of premises doctrine (including those denying compensation where the doctrine was not satisfied) did so in the context of interpreting the pre-2005 meaning or definition of the phrases "arising out of" and "in the course of employment."

Again, pursuant to the mandate of strict construction, we cannot presume any requirement that the legislature does not express. Notably, the legislature made clear in the first sentence of § 287.020.5 that injuries sustained in company-owned or subsidized vehicles are, under certain conditions, "not compensable" following the 2005 amendments. If our legislators in 2005 intended to bar compensation whenever an employee fails to satisfy the remaining aspects of the extension of premises doctrine—notwithstanding any other provision of Chapter 287 to the contrary—they easily could have used the same language in the very next sentence. But they did not.

In sum, whatever may have been the legislature's purpose in deleting the premises requirement under § 287.020.5, yet simultaneously leaving (partially) intact a judicial doctrine developed as an *exception* to that requirement, I am not persuaded that it was to render non-compensable a claim that otherwise satisfies the criteria for compensability under § 287.020.3(2).

I would end the analysis by concluding that because employee has satisfied the "prevailing factor" and "unequal exposure" requirements under § 287.020.3(2), her injuries arose out of and in the course of employment, and are thus compensable, notwithstanding any application of § 287.020.5.

Curtis E. Chick, Jr., Member

AWARD

Employee: Janet Anhalt Injury No. 09-006127
Dependents: Not Applicable Before the
Employer: Penmac Personnel Services, Inc. **DIVISION OF WORKERS'**
COMPENSATION
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Additional Party: Not applicable
Insurer: Ace American Insurance Co./
Gallagher Bassett Services (TPA)
Hearing Date: July 21, 2015 Checked by: VRM/db

FINDINGS OF FACT AND RULINGS OF LAW

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? There was an incident, but not a compensable injury.
4. Date of accident or onset of occupational disease: Alleged January 30, 2009.
5. State location where accident occurred or occupational disease was contracted: Springfield, 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 the 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 occurred or occupational disease contracted: Slip and fall on ice in the parking lot of Reckitt-Benckiser.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right wrist and shoulder.

14. Nature and extent of any permanent disability: None awarded.
15. Compensation paid to date for temporary disability: None.
16. Value of necessary medical aid paid to date by employer: None.
17. Value of necessary medical aid not furnished by employer/insurer: \$36,788.87.
18. Employee's average weekly wages: \$370.98.
19. Weekly compensation rate: \$247.32 for all purposes.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janet Anhalt

Injury No. 09-006127

Dependents: Not Applicable

Employer: Penmac Personnel Services, Inc.

Additional Party: Not applicable

Insurer: Ace American Insurance Co./
Gallagher Bassett Services (TPA)

Hearing Date: July 21, 2015

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: VRM/db

INTRODUCTION

The undersigned Administrative Law Judge conducted a hearing in the above referenced case in Springfield, Missouri on July 21, 2015. Attorney Chad T. Courtney represented Janet Anhalt (Claimant). Karen Johnson appeared on behalf of the employer – Penmac Personnel Services, Inc., and its insurer – Ace American Insurance Co., as well as the third party administrator – Gallagher Bassett Services. The parties reached the following stipulations of fact:

STIPULATIONS

- (1) On or about January 30, 2009, Claimant was injured when she fell in a parking lot owned and controlled by Reckitt-Benckiser in Springfield, Missouri.
- (2) At the time of her injury, Penmac Personnel Services, Inc. (Penmac), was a Missouri employer subject to the Missouri Workers' Compensation Law, and was fully insured with Ace American Insurance Co., and its third party administrator, Gallagher Bassett Services.
- (4) Venue and jurisdiction are proper in Springfield, Greene County, Missouri.
- (5) Claimant notified Employer of her injury as required by § 287.420 RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by § 287.430 RSMo.
- (7) Claimant's average weekly wage was \$370.98, yielding a compensation rate of \$247.32 for temporary total disability, permanent total disability, and permanent partial disability.
- (8) Employer paid no temporary total disability and no medical benefits.
- (9) Claimant incurred \$36,788.87 in medical bills.

ISSUES

The parties agree that the following are the issues to be resolved by the hearing:

- 1. Did the alleged accident arise out of and in the course of Claimant's employment with Employer?
- 2. Are the injuries medically and causally related to the alleged work accident?
- 3. Is Claimant entitled to \$36,788.87 for the payment of medical bills?
- 4. Is Claimant entitled to 12 weeks of temporary total disability beginning with the date of the injury?
- 5. If Claimant has reached maximum medical improvement, what is the nature and extent of any work related permanent partial disability?

EXHIBITS¹

Claimant offered the following exhibits which were admitted:

- A-1. Medical RecordsSt. John's/Mercy
- A-2. Medical Records Radiology and Surgical
- A-3. Medical Records Orthopedic Specialist
- A-4. Medical Records Physical Therapy
- B-1. Mercy Itemized Statement of Accounts
- B-2. Statement of Accounts Physician Services
- C. Medical Report of Dr. Robert Paul
- D. Deposition.Janet Anhalt
- E. Deposition Bruce Foster
- F. Deposition Elizabeth Kilfoy
- G. Subpoena (Withdrawn)
- H. Employee Summary
- I. Payroll History
- J. Medical Chronology and Expense Report (for demonstrative purposes only)
- K. Documents produced at the deposition of Elizabeth Kilfoy
- L. Photographs

Employer/Insurer offered the following exhibit which was admitted:

- 1. Medical Records.....St. John's Clinics

¹ There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

FINDINGS OF FACT

Claimant testified live. Her testimony is found credible. On January 30, 2009, Claimant was working as a field associate for Penmac, when she was injured in a slip and fall in a parking lot owned and controlled by Reckitt-Benckiser. Penmac had assigned Claimant to work at the Reckitt-Benckiser plant in its French-fried onion operation. Claimant normally worked a 12-hour shift in a quality control position, disposing of nonconforming product.

Whenever Claimant reported to work at the Reckitt-Benckiser plant, she was required to stop at the plant entrance to obtain permission from a Reckitt-Benckiser employee to proceed into the parking lot. Once inside the parking lot, Claimant could park anywhere in the lot. Once inside the plant, Claimant and other Penmac employees were treated separately from the Reckitt-Benckiser employees. The Penmac employees clocked-in separately. They reported to Mr. White, who was a supervisor employed by Penmac. Claimant always considered herself an employee of Penmac. She received her wages and W-2 forms from Penmac. She never received an I-9 form for independent contractors. She was not required to travel with her job for Penmac and received no mileage reimbursement, although occasionally Penmac would have a bus available for its employees to ride to work.

Elizabeth Ann Kilfoy, the Director of Risk Management and Safety for Penmac, testified live and her testimony is found credible. She said Claimant was a "field associate" employed by Penmac as a production worker in FFO (French-fried onions) at the Reckitt-Benckiser plant. Penmac and Reckitt Benckiser have a memorandum of understanding in which Penmac agrees to provide the workers' compensation coverage for the Penmac employees. The memorandum of understanding, Exhibit K, also charges Penmac with the responsibility of screening the employees who work for Penmac at the plant. Penmac supervises its own employees at the plant, pays them, and provides benefits to them. An orientation program for Penmac employees is a collaborative program between Penmac and its client Reckitt-Benckiser.

The Injury

On January 30, 2009, Claimant had completed a shift at the Reckitt-Benckiser plant. She clocked out. As she and a co-worker walked in the Reckitt-Benckiser parking lot, Claimant slipped and fell on an icy spot in that parking lot.

Other workers in the parking lot assisted Claimant back into the plant. Inside the plant, a Reckitt-Benckiser employee telephoned a Penmac representative and advised the employer that Claimant had fallen. Claimant's husband arrived and drove Claimant to the hospital. A Penmac representative met Claimant at the hospital.

At the hospital, the treating physician ordered x-rays and diagnosed Claimant with a comminuted fracture of the distal right radius with posterior displacement of the distal fracture fragments. Claimant was referred to Dr. William W. Goodman who performed surgery with external fixation. The surgery resulted in scarring. The disfigurement, alone, would warrant four weeks of disability if Claimant's claim was found compensable.

In March, Dr. Goodman noted that Claimant had developed right shoulder problems that may have been caused by the immobilization of the right upper extremity. Dr. Goodman recommended a corticosteroid injection to help with the bursitis and tendinitis. Claimant engaged in six weeks of physical therapy, but

she did not complete the series because she was anxious to return to work. In May 2009, Claimant returned to work with Penmac at the Reckitt-Benckiser facility. Claimant seeks 12 weeks of temporary total disability.

Claimant agrees that her condition has improved and she now can reach to her back with her right arm while her wrist is at a 90 degree angle. She believes she is capable of performing the manufacturing jobs at Reckitt-Benckiser. She has resumed performing her yard work and is capable of using the computer. She has no hardware in or about her arm. While she still has some pain, she does not relate the pain to the work injury as it is bilateral in nature.

Medical Opinions

Dr. Robert Paul provided an Independent Medical Examination of Claimant. Following his examination and review of medical records, he opined that Claimant's injuries were causally connected with Claimant's fall at Reckitt-Benckiser on January 30, 2009. He found Claimant to be at maximum medical improvement and gave a 10 percent rating at the 232-week level (right arm at shoulder), and 25 percent at the 175-week level (right arm at wrist).

Dr. Paul also reviewed \$36,788.87 in medical bills that Claimant incurred from various health care providers including St. John's Hospital, William Goodman, M.D., and St. John's Physical Therapy. Dr. Paul opined that all of these charges were reasonable, necessary, and related to the injury on January 30, 2009.

CONCLUSION OF LAW

Claimant has the burden of proving she is entitled to benefits. § 287.808 RSMo.² The administrative Law Judge must weigh the evidence impartially without giving the benefit of the doubt to any party, and construe strictly the provisions of the Workers' Compensation Law. § 287.800 RSMo. To be covered by the Missouri Workers' Compensation Law, an injury by accident must arise out of and in the course of employment. § 287.120.1 RSMo. Injuries sustained while an employee is going to or from work generally are not considered to be within the course of employment. *Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. banc 2000).

Missouri courts have fashioned an exception to the "coming and going" rule called the "extended premises" doctrine. This doctrine allows for the payment of workers' compensation benefits even when the employee is injured while going to or leaving work, if the injury occurs on the employer's premises or its "extended premises," such as the employer's parking lot. *Huffmaster v. American Recreation Products*, 180 S.W.3d 525, 528 (Mo. App. E.D. 2006). In such case, the injury is considered to be in the course and scope of employment as if the injury had happened while the employee was still engaged in his or her work at the place of its performance. *State ex rel. McDonnell Douglas Corp. v. Luten*, 679 S.W.2d 278, 280 (Mo. banc 1984); *Davis v. McDonnell Douglas*, 868 S.W.2d 170, 171 (Mo. App. E.D. 1994).

In *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 536 (Mo. banc 1996), the Missouri Supreme Court held that the "extended premises" doctrine included not just parking lots that were owned by the employer, but those which also had been designated by the employer as a place where employees could park. The Court

² All statutory references are to the law in effect at the time of Claimant's injury.

reasoned that the employee's injuries were compensable since the parking lot where he was injured was so situated, designed and used "that it has become 'for all practicable intents and purposes, a part and parcel of the employer's premises and operation.'" 920 S.W.2d at 536, quoting *Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 607 (Mo. App. 1968).

In 2005, the Missouri General Assembly addressed this judicial expansion of the extended premises doctrine by amending § 287.020.5 RSMo, to read in applicable part, as follows:

The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

As recognized in *Scholastic, Inc. v. Viley*, 452 S.W.3d 680 (Mo. App. W.D. 2014), the plain language of this amendment, did not totally eliminate the extended premises doctrine, but limited its application to situations where the employer "**owns or controls** the area where the accident occurs." 452 S.W.3d at 684. In *Scholastic, Inc.*, the parties agreed that the employer did not own the parking lot where the injury occurred; however, the Court determined that the employer did control the lot. 452 S.W.3d at 684.

In the instant case, the record establishes that Claimant had ceased working for the day and was in an adjacent parking lot with the intention to return home. Under *Scholastic*, only if "the employer" owned or controlled the lot where Claimant fell, is the injury compensable under the legislatively modified extended premises doctrine. See also, *Hager v. Syberg's Westport*, 304 S.W.3d 771, 777 (Mo. App. W.D. 2010) (holding that because the employer "did not regulate or govern the parking lot" where the employee fell, the resulting injuries were not compensable).

While Claimant acknowledges that Penmac was her employer, she argues in her brief that Reckitt-Benckiser, who owned the parking lot, also was her *statutory employer*. Therefore, Claimant argues that her injury on the *statutory employer's* property is compensable under the extended premises doctrine. Statutory employment occurs when:

(1) work at the time of injury is being performed pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is performed in the usual course of the alleged statutory employer's business. [citation omitted].

Fisher v. Bauer Corp., 239 S.W.3d 693, 698-99 (Mo. App. E.D. 2007)

Assuming arguendo that Reckitt-Benckiser was a statutory employer, § 287.040.3 RSMo, specifically provides that a contractor has no liability as a statutory employer "if the employee was insured by his immediate or any intermediate employer." In this case, the immediate employer – Penmac – had insurance. As to Penmac, this case is no different than that which occurred in *Hager v. Syberg's Westport*, 304 S.W.3d 771. It is not compensable under the extended premises doctrine as Penmac did not own or control the property. As to Reckitt-Benckiser (which has been dismissed as a party to this proceeding), it would have no liability because the immediate employer is insured.

Claimant laments that if the extension of the premises doctrine is not applied in this case, she is left without any remedy, citing *Harman v. Manheim, Inc.*, 461 S.W.3d 876, 884 (Mo. App. S.D. 2015). In *Harman*, Securitas had contracted to provide security services for Manheim. Harman was a Securitas

employee who fell on ice on Manheim's property while providing the contracted services. The injured employee obtained workers' compensation benefits against his immediate employer, Securitas, and then filed a civil suit against Manheim. Manheim claimed it had immunity from any liability because it was a *statutory employer* under the workers' compensation law. The Court of Appeals reversed a grant of summary judgment in Manheim's favor because Manheim had failed to demonstrate in its motion that it had complied with the workers' compensation insurance requirement of § 287.280.1 RSMo. "Without any proof of such compliance in its summary judgment record, Manheim failed to plead and prove an uncontroverted fact necessary to support its affirmative defense that the Workers' Compensation Law barred Harman from bringing this civil action." 461 S.W.3d at 884.

Claimant uses the *Harman* case to demonstrate that if Reckitt-Benckiser has fully complied with the Workers' Compensation Law, it is immune from civil suit. But unlike *Harmon*, wherein the injured worker reached a compromise settlement with his immediate employer, the Claimant in the instant case will be foreclosed from obtaining any workers' compensation benefits from its immediate employer absent application of the extension of the premises doctrine.

I am not unsympathetic to Claimant's predicament, but § 287.020.5 RSMo, plainly reads that the extension of premises doctrine is abrogated "for accidents that occur on property not owned or controlled by **the employer** [emphasis added]...." This amended provision does not read "all employers," or "an employer" or "any employer." Applying strict construction as mandated by § 287.800 RSMo, **the employer** necessarily means Penmac because it is *the only employer*, by virtue of § 287.040.3 RSMo, which has any liability *in this* Workers' Compensation case. Whether Claimant can proceed against Reckitt-Benckiser in a civil suit is not for this Administrative Law Judge to determine.

Having found that Claimant's injury is not compensable, all other issues are moot. Compensation is denied.

Made by: _____
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation