

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

Injury No. 15-030879

Employee: Timothy Bain  
Employer: Apria Healthcare Group, Inc.  
Insurer: New Hampshire 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 briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

**Introduction**

The parties asked the administrative law judge to decide the following issues: (1) whether employee suffered an accident within the course and scope of employment; (2) whether the injury was medically causally related to the work for the employer; (3) whether employee is entitled to temporary total disability benefits; and (4) whether employer is liable for employee's medical expenses.

The administrative law judge concluded employee failed to demonstrate that his injuries arose out of and within the course of employment, and denied compensation.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in concluding that employee's accident did not occur in the course and scope of the employment.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

**Findings of Fact**

Employer is in the business of providing and servicing durable medical equipment. Employee's duties for employer as a driver technician included the delivery, setup, and servicing of respiratory and wound therapy equipment in homes, businesses, and hospitals. Employee drove employer's 24-foot van to make deliveries and service calls. Employee drove between 150 and 250 miles per day while working for employer.

Employee's normal schedule was from 8:00 a.m. to 4:30 p.m. Employee alternated between normal and on-call weeks. During a normal week, employee drove his personal vehicle to employer's location at 2127 West Vista Street in Springfield, Missouri, where he picked up a route sheet generated by employer's logistics center, got in employer's supply van, and began making deliveries. Five employees worked at the 2127 West Vista Street location, and there was a warehouse located there.

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Every other week, employee worked on an on-call basis for employer. While on-call, employee had to remain available to respond to calls during weeknights from the moment his shift ended at 4:30 p.m. until his shift began the next morning at 8:00 a.m., and during the entire 48-hour period on Saturday and Sunday. While on-call, employee had to drive employer's supply van home at night during weeknights, and keep it during the weekends, and he took an employer-issued cell phone with him, which he was required to keep on his person at all times. Dispatchers would call this cell phone whenever off-hours deliveries, troubleshooting, or other services were required, and employee was required to answer or return the call within 10 minutes.

Employee was not permitted to use employer's van for any personal errands or appointments while on-call, and he was expected to remain close to his home so that he could get back to the van and timely respond to a call. For obvious reasons, employee was not permitted to drink any alcohol while on-call, or otherwise render himself unavailable for any reason. While working on-call, employer paid employee an extra \$10 for each weekday, and \$20 each for Saturday and Sunday, and also paid him overtime for any calls that he took.

Employee was on-call for employer during the week beginning Monday, April 27, 2015. He did not receive any service calls on Monday, Tuesday, or Wednesday. On Thursday, April 30, 2015, employee did not receive any service calls in the hours leading up to his normal shift beginning at 8:00 a.m., so he prepared himself for work and began driving employer's van toward employer's 2127 West Vista Street location.

While driving toward employer's 2127 West Vista Street location, and while he was still on-call, employee encountered a red light at the intersection of Missouri Highway 13 and Route O. Employee had almost come to a complete stop at the intersection, when he was unexpectedly struck from behind by another vehicle. Employee was dazed immediately following the accident, and began to experience pain in his head, neck, left shoulder, left elbow, and back. An ambulance transported employee to Mercy Hospital in Springfield, where he received emergency care including the prescription medications hydrocodone-acetaminophen and Valium, and a series of x-rays and CT scans, which were deemed negative for acute fractures.

Thereafter, employee saw Dr. James Shaeffer on May 15, 2015, at the Springfield Family Medical Walk-In Clinic, for his continued complaints. Dr. Shaeffer took employee's history of back pain, headaches, neck pain, and radicular complaints running down the side and back of his left leg causing intermittent numbness. Employee also reported psychiatric complaints in the form of severe anxiety. Dr. Shaeffer ordered x-rays, which he read to reveal bilateral spondylosis of the L5 pars interarticularis, as well as comminution of a prior defect of the pars.

Dr. Shaeffer's impression was that the motor vehicle accident had caused employee to suffer a significant impact and soft tissue injuries to his neck; a probable cerebral concussion; and a traumatic comminution of a prior defect of the pars on the left side at

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L5-S1. Dr. Shaeffer recommended that employee undergo an MRI; continue taking prescription pain medications in the form of oxycodone, acetaminophen, and ibuprofen; continue taking Valium for his anxiety; and remain off work at least until a follow-up appointment on June 2, 2015.

By letter dated June 2, 2015, Dr. Shaeffer reiterated his opinion that employee suffered injury to the lumbar spine, a cerebral concussion, and soft tissue injuries to the cervical spine as a result of the motor vehicle accident. Dr. Shaeffer noted that despite taking oxycodone, acetaminophen, and Valium, employee continued to suffer debilitating symptoms including photosensitivity to bright lights, an inability to endure any prolonged sitting or standing, and a need to lie down periodically to rest. It remained Dr. Shaeffer's opinion that employee was not yet fit to return to work at that time.

An MRI of June 16, 2015, revealed moderate subacute degenerative spondylosis of the lumbar spine, most prominent at L3-L4, as well as a suspected pars defect at the L5 level. On June 26, 2015, Dr. Shaeffer noted employee was experiencing symptoms suggestive of an abnormal pressure on the sacral nerve roots, and recommended that employee see a neurosurgeon to address the "pronounced abnormalities" seen on the MRI. *Transcript*, page 47. It remained Dr. Shaeffer's opinion that employee should remain off work until "further notice." *Id.*, page 49.

Since about 2008, employee has suffered some preexisting pain with muscle spasms affecting his low back; these symptoms were treated conservatively with medications. There is, however, no medical opinion on this record that would suggest that employee's onset of symptoms following the April 30, 2015, motor vehicle accident were the product of his preexisting problems. Instead, Dr. Shaeffer's opinions attributing employee's current medical condition and disability to the motor vehicle accident are unopposed on this record. We credit Dr. Shaeffer's uncontested medical opinions, and adopt them, as set forth above, as our own with regard to the effects of the April 30, 2015, motor vehicle accident; employee's inability to work; and employee's need for additional medical treatment.

In his testimony at the hearing, employee described continuing pain affecting his low back and left side, with numbness extending into the left lower extremity; he also described continuing psychiatric complaints in the form of anxiety. In employee's estimation, these complaints have continued to render him unable to work at the present time. We note that the administrative law judge found employee's testimony to be "convincing" on this point. *Award*, page 6. We discern no reason to second-guess the administrative law judge's impressions with respect to employee's credibility; consequently, we adopt her finding that employee credibly described his complaints, including his inability to work since the motor vehicle accident.

Employee provided his medical records, the bills corresponding to the treatments described in the medical records, and testimony describing his course of treatment. From this evidence, we find that employee incurred the following medical expenses as a result of the April 30, 2015, motor vehicle accident:

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<b>Provider</b>	<b>Charges:</b>
Mercy EMS	\$1,224.95
Mercy Hospital Springfield	\$5,466.50
Springfield Family Medical Walk-In Clinic	\$1,056.93
MRI of Springfield	\$1,700.00
<b>Total Charges:</b>	<b>\$9,448.38</b>

We find that the foregoing expenses were incurred for medical treatment that was reasonably required to cure and relieve the effects of employee's injuries suffered in the motor vehicle accident of April 30, 2015.

Employer provided testimony from Rhonda Barnes, a market leader, who manages employer's various locations in Arkansas and southern Missouri. From Ms. Barnes's testimony, it appears that the 2127 West Vista Street location where employee worked was one of eight similar "branch" locations in the region. Ms. Barnes did not indicate whether she works at one of the branch locations, or elsewhere. Ms. Barnes referred to a logistics center that generates the route sheets that employee used to perform his duties, but she did not indicate where this logistics center is located. Ultimately, Ms. Barnes did not provide testimony that would establish which employer location, if any, was its principal place of business in Missouri or elsewhere.

The record also contains the deposition testimony of Matt Luader, a branch logistics coordinator, and Michele Gibb, a branch manager; neither provided testimony that would establish which employer location was its principal place of business in Missouri or elsewhere. Ms. Gibb did suggest that most of employer's higher level decision making took place within employer's human resources department, but she did not provide any testimony that would establish where this department was located. We note that, at his deposition, employee indicated his understanding that employer's logistics center is located in Kansas City, and that employer's human resources department is located in the state of California.

After careful consideration, we deem the record before us insufficient to permit us to make any finding as to which of employer's various locations was its principal place of business.

### **Conclusions of Law**

#### Accident

The parties dispute whether employee suffered an "accident," as that term is defined in § 287.020.2 RSMo, which provides, in relevant part, as follows:

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.

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The motor vehicle accident of April 30, 2015, unquestionably constituted an unexpected traumatic event; the event is identifiable by time and place of occurrence; the event produced at the time objective symptoms of injury; and we are convinced that the specific event of the motor vehicle accident occurred during a single work shift, because employee was on call and working for employer at the time. We conclude that employee suffered an accident for purposes of the foregoing statutory definition.

Medical causation

Section 287.020.3(1) RSMo sets forth the standard for 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.

As we have noted above, the only medical opinion on record with regard to the causation of employee's claimed injuries is that of the treating physician, Dr. James Shaeffer. We have credited Dr. Shaeffer's unopposed opinions and found that the accident caused employee to suffer injury to his lumbar spine, a cerebral concussion, and soft tissue injuries affecting the cervical spine, as well as disability in the form of pain, anxiety, and an inability to remain in a fixed position for any length of time. We conclude employee has met his burden of proof with regard to the issue of medical causation.

We conclude that the accident of April 30, 2015, was the prevailing factor causing employee to suffer the resulting medical conditions of injury to his lumbar spine, a cerebral concussion, and soft tissue injuries affecting the cervical spine, as well as his current disability.

Injury arising out of and in the course of employment<sup>1</sup>

Section 287.020.3(2) RSMo 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

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<sup>1</sup> We note that the parties and administrative law judge framed this issue as whether employee "suffered an accident within the course and scope of employment," *Transcript*, page 5. However, Chapter 287 does not require an employee to prove that an "accident" occurred within the "course and scope of employment." Instead, the law requires the employee demonstrate that his *injuries arose out of and in the course of the employment* for purposes of § 287.020.3(2) RSMo. From the briefs and arguments of the parties, we are confident that this is the issue we are called upon to resolve.

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(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.

Section 287.020.5 RSMo provides, in relevant part:

Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable.

Section 287.808 RSMo provides as follows:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Employer argues that employee's injuries are not compensable by operation of the exclusion under § 287.020.5. We are not persuaded. The language of that section provides an affirmative defense for employer. Under § 287.808 RSMo, it was employer's burden to prove the following facts: (1) employee sustained his injuries in a company-owned or subsidized automobile; and (2) employee's accident occurred while he was travelling from his home to employer's principal place of business. Employer has failed to prove the latter proposition.

In the case of *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299 (Mo. App. 2009), the court made clear that "the exclusionary clause in § 287.020.5 can be given no broader application than is warranted by its plain and unambiguous terms," and provided the following guidance with regard to determining which of an employer's locations constitutes the "principal place of business" for purposes of § 287.020.5:

There is no statutory definition for the phrase "principal place of business" as used in § 287.020.5. When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary. Because the word "principal" was used by the General Assembly to modify the phrase "place of business," we must give effect to that limitation. The word "principal" is defined by BLACK'S LAW DICTIONARY (8th ed. 2004) to mean: "Chief; primary; most important." *Id.* at 1230. Therefore, giving the phrase "the employer's principal place of business" a strict construction as we must, § 287.020.5 only authorizes the employer to have one principal place of business. According to English's testimony, that location was the headquarters office in Fair Grove where the financials were done.

*Id.* at 304 (citations omitted).

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We have noted that the record suggests employer has at least eight locations in the region, as well as a “logistics center,” and a human resources department, which is (apparently) located in the state of California. It was incumbent upon employer to establish which of these locations was “chief,” “primary,” or “most important” but employer failed to do so. Instead, employer argues that because the evidence demonstrates that employee normally performed work for employer at its 2127 West Vista Street location, employee was travelling between “home and work,” and the language of § 287.020.5 is satisfied. But the statute does not exclude compensation for all injuries sustained in subsidized vehicles while travelling between “home and work,” and the mere fact that employee worked for employer at a particular location does not, standing alone, establish that the 2127 West Vista Street location was employer’s “principal place of business.”

We conclude that employer has failed to meet its burden with regard to its affirmative defense under § 287.020.5, and that the language of that statute is inapplicable to the facts before us, because the evidence does not show that employee was travelling between his home and employer’s principal place of business at the time of the motor vehicle accident on April 30, 2015.

We turn now to § 287.020.3(2) RSMo to resolve the question whether employee met his burden of proving that his injuries arose out of and in the course of the employment. We have already determined that the accident was the prevailing factor causing employee to suffer his claimed injuries, so we conclude that subsection (a) is satisfied. Under subsection (b), we next consider whether employee’s injuries “[did] 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 risk or hazard from which employee’s injuries came was that of being involved in a motor vehicle accident while driving employer’s van. It is uncontested that one of employee’s primary work duties for employer was driving employer’s van to deliver medical supplies to employer’s clients. We have found that employee drove between 150 and 250 miles per day for employer. In light of these facts, we can easily conclude that the risk of being involved in a motor vehicle accident while driving employer’s van was “related” to the employment. In the case of *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the court held that this showing was sufficient to satisfy the employee’s burden:

[T]he application of [§ 287.020.3(2)(b)] involves a two-step analysis. 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. 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. 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.

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*Id.* at 467.

We acknowledge that in the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012), our Supreme Court focused on the unequal exposure requirement (or second step of the test under § 287.020.3(2)(b)), but we do not read the *Johme* decision to diminish the precedential value of *Pile*, for several reasons.

First, the Court could have overruled *Pile* in the *Johme* decision if it had wished to do so, but did not. That our highest court declined to overrule a decision which the Missouri Court of Appeals, Eastern District, discussed at length in its decision ordering a transfer, see *Johme v. St. John's Mercy Healthcare*, ED96497 (Oct. 25, 2011), and upon which the Commission expressly relied in its award, strongly suggests to us that the Court saw wisdom in the *Pile* approach, and wished to leave that precedent undisturbed.

Second, the *Johme* court did not purport to shift the analysis away from the first-step *Pile* question whether a risk is related or unrelated to employment, but rather exhorted us to take better care in identifying the actual risk at issue: the Commission had considered the *Johme* employee's activity of making coffee as the risk that caused her injuries, and analyzed whether making coffee was "related" to her work, but the Court pointed out that the relevant risk from which the employee's fall came was the employee's "turning and twisting her ankle and falling off her shoe." *Id.* at 508, 511. Having appropriately defined the risk, the Court proceeded to the unequal exposure analysis, as there was no need to discuss the first-step *Pile* question whether the employee's turning and twisting her ankle was integral to her work as a billing representative: it clearly was not.

In contrast, here we are confronted with a risk source—suffering a motor vehicle accident while driving employer's van—that was directly related to the specific circumstances of employee's work for employer. As a result, we conclude that employee's injury did 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." § 287.020.3(2)(b). We conclude, instead, that employee's injuries arose out of and in the course of the employment.

#### Temporary total disability benefits

Section 287.170 RSMo provides 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 that he was rendered temporarily and totally disabled following the accident of April 30, 2015.

We have noted Dr. Shaeffer's uncontested medical opinion that employee should remain off work until further notice owing to his inability to sit, stand, or remain in one position for any length of time as a result of the work injuries. We have also adopted the administrative law judge's finding that employee credibly testified that he has been unable to work since the accident.

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Consequently, we conclude that employee is entitled to, and employer is obligated to pay, weekly payments of temporary total disability benefits beginning April 30, 2015, at the stipulated temporary total disability benefit rate of \$383.55, and continuing as long as employee is engaged in the rehabilitative process.

Medical expenses

Section 287.140 RSMo 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.

We have found employee incurred \$9,448.38 in medical expenses for treatment that was reasonably required to cure and relieve the effects of his compensable work injuries. Employer is hereby ordered to pay employee this amount. Additionally, based upon the uncontested and credible opinions from Dr. Shaeffer, we conclude that employee remains in need of medical treatment to cure and relieve the effects of the work injuries. Employer is ordered to provide employee with medical treatment consistent with the terms of § 287.140.

**Award**

We reverse the award of the administrative law judge. We conclude that employee's injuries, sustained in the accident of April 30, 2015, arose out of and in the course of the employment.

Beginning April 30, 2015, employer is liable for temporary total disability benefits at the stipulated weekly rate of \$383.55.

Employer is ordered to pay employee's past medical expenses in the amount of \$9,448.38.

Employer is hereby ordered to provide employee with that medical treatment that may reasonably be required to cure and relieve the effects of his work injuries.

This award is subject to a lien in favor of Joseph Winget, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

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The award and decision of Administrative Law Judge Victorine R. Mahon issued November 10, 2015, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 6<sup>th</sup> day of July 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

**AWARD**

Employee: Timothy Bain

Injury No. 15-030879

Dependents: N/A

Employer: Apria Healthcare Group, Inc.

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

Additional Party: Not applicable

Insurer: New Hampshire Insurance Co./  
Gallagher Bassett Services (TPA)

Hearing Date: September 8, 2015 (Record Closed October 8, 2015)

Checked by: VRM/ps

**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? No.
4. Date of accident or onset of occupational disease? Alleged April 30, 2015.
5. State location where accident occurred or occupational disease was contracted: Greene County, 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 employment? Yes.
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: Claimant was injured in a motor vehicle accident on his way to work.
12. Did accident or occupational disease cause death? No. Date of death? Not applicable.
13. Part(s) of body injured by accident or occupational disease: Back/Body as a Whole.
14. Nature and extent of any permanent disability: Not an issue at this hearing.

- 15. Compensation paid to date for temporary disability: None.
- 16. Value necessary medical aid paid to date by employer/insurer: None.
- 17. Value necessary medical aid not furnished by employer/insurer: Not applicable.
- 18. Employee's average weekly wages: \$575.32.
- 19. Weekly compensation rate: \$383.55.
- 20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None.
- 22. Second Injury Fund liability: Not applicable.

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Timothy Bain

Injury No. 15-030879

Dependents: N/A

Employer: Apria Healthcare Group, Inc.

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

Additional Party: Not applicable

Insurer: New Hampshire Insurance Co./  
Gallagher Bassett Services (TPA)

Hearing Date: September 8, 2015 (Closed October 8, 2015)

Checked by: VRM/ps

**INTRODUCTION**

The undersigned Administrative Law Judge conducted a hardship hearing on September 8, 2015, involving the claim filed by Timothy Bain, who appeared in person and with his attorney, Joseph Winget. Attorneys Patricia Musick and Corey Kilburn represented Apria Healthcare Group, Inc., and its insurer, New Hampshire Insurance Company, the third party administrator, Gallagher Bassett Services. The parties agreed to the following facts:

**STIPULATIONS**

1. On April 30, 2015, Timothy Bain (Claimant) was an employee of Apria Healthcare Group, Inc. (Employer), a Missouri employer fully insured with New Hampshire Insurance Company (Insurer) and Gallagher Bassett Services, a third party administrator (TPA). Claimant and Employer were subject to the Missouri Workers' Compensation law.
2. On that same date, Claimant was injured in a motor vehicle accident which occurred on Highway 13 in Greene County, Missouri. Jurisdiction and venue are appropriate in Springfield, Missouri.
3. Claimant's average weekly wage was \$575.32, yielding a temporary total disability rate of \$383.55.
4. Claimant gave notice of his alleged work injury as required by §287.420, RSMo.
5. The claim for compensation was filed within the time prescribed by §287.430, RSMo.
6. Employer and Insurer have provided no medical benefits and no temporary disability.

**ISSUES**

The parties have raised the following issues for this hearing:

1. Did Claimant sustain an accident as defined in the Missouri Workers' Compensation Law?

2. Did the accident arise out of and in the course of employment?
3. Did Claimant sustain injuries that are medically and causally related to the work for Employer?
4. Is Claimant entitled to temporary total disability benefits?
5. Is Claimant entitled to past medical benefits?
6. Is Claimant entitled to future medical benefits?
7. Are exhibits 8 (Medical Bills Chart), 12 (SNSI Billing Receipt) admissible?

### **EXHIBITS**

Claimant offered the following exhibits which were admitted, except where indicated:

1. Medical Records – MRI of Springfield
2. Medical Records – Family Medical Walk-In Clinic
3. Medical Records – Mercy Hospital
4. Billing Records – Mercy Hospital
5. Billing Records – MRI of Springfield
6. Billing Records – Family Medical Walk-in Clinic
7. Unpaid Temporary Total Disability Chart
8. Medical Bills Summary Chart (**Excluded as it relates to the SNSI billing which is Exhibit 12**)
9. Deposition – Rhonda Barnes, with exhibits
10. Deposition – Matt Luaders, with exhibits
11. Deposition – Michelle Gibbs, with exhibits
12. Billing Records – SNSI receipt (**Excluded**)
13. Medical Records – SNSI (**Admitted over objection**)
14. Missouri State Highway Patrol Report

Employer/Insurer offered the following exhibits, which were admitted:

- A. Deposition – Timothy Bain
- B. Deposition – Michele Gibb (with exhibits)
- C. Deposition – Matt Luaders (with exhibits)
- D. Deposition – Ronda Barnes (with exhibits)

### **FINDINGS OF FACT**

Claimant began work in October 2014 for Employer, a company that supplies durable medical equipment to individuals and businesses. As a driver-technician, Claimant delivered and set up respiratory and wound therapy equipment. To deliver these supplies, Employer provided Claimant with a 2014 Mercedes 24-foot van. Employer also had a Chevrolet van for the same purpose. Claimant and his co-worker, Matt Luaders, used the company vans during the work week and when “on-call.”

Claimant's normally worked from 8:00 a.m. to 4:30 p.m. Every-other week he was "on-call" from 4:31 p.m. to 7:59 a.m. During his "on-call" week, Claimant received an additional \$10 per day Monday through Thursday, and \$20 per day Friday through Sunday, for a total of \$100 for the week. If dispatched to a job while "on-call," Claimant received over-time pay while performing the job duties.

Claimant was required to carry a company cell phone while "on-call." If Claimant received a dispatch to make a delivery while "on-call," he was expected to clock-in and clock-out using an electronic phone system. Claimant was not required to remain home while "on call." He was expected to remain sober, respond to a dispatch call within 30 minutes, and arrive where needed within two hours. Because the van was equipped, it was not necessary for Claimant to go to his office in Springfield before traveling to the "on-call" assignment. If Claimant repeatedly failed to answer a dispatch call, the dispatcher notified the manager.

Claimant was "on-call" the week of April 27, 2015, but he received no dispatches for any assignments during his "on-call" hours on April 27, 28, 29, or 30, 2015. On the morning of Thursday April 30, 2015, Claimant left his home in the company vehicle, wearing his uniform shirt. He was not attending to an "on-call" dispatch, but was going to work to attend to his usual day-time duties at Employer's principal place of business at 2127 West Vista in Springfield.<sup>1</sup>

As Claimant was traveling on Highway 13 towards Springfield, he slowed the van in order to stop at a blinking red on Highway 13. The vehicle behind Claimant failed to do the same and struck the rear of the van. According to the Missouri State Highway Patrol report, the accident occurred shortly before 8:00 a.m. Claimant telephoned his co-worker, Matt Luaders, who also worked alternative weeks "on-call." An ambulance then took Claimant to Mercy Medical Center.

Claimant arrived at the Mercy facility on April 30, 2015 at 9:03 a.m. Medical records indicate that Claimant had been ambulatory since the accident. He was evaluated for his multiple complaints of pain, which Claimant rated as a 5 on a 10-point scale. A CT scan and x-rays revealed no signs of any acute traumatic injuries. He was treated with medication and advised to follow-up with his own physician.

Claimant later saw Dr. James Schaeffer at the Family Medical Walk-in Clinic who ordered an MRI. The MRI dated June 16, 2015, revealed:

1. Moderate subacute degenerative spondylosis of the lumbar spine most prominent at the L3-L4 level. See above for detailed discussion of individual levels.
2. suspected pars defects are seen at the L5 level. Recommend noncontrast CT to confirm.

(Exhibit 2).

After receipt of this MRI, Claimant's treating physician sent him to Dr. Salim Rahman for a neurosurgical consultation. The medical records from that consultation reveal that Claimant saw Dr. Rahman's physician assistant, who recommended an L5-S1 transforaminal lumbar interbody fusion and fixation. Dr. Rahman reviewed those medical records entries on September 1, 2015.

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<sup>1</sup> Although the deposition of Rhonda Barnes revealed that Employer had operations in eight branch locations in two different states, Claimant's office was in the branch located at 2127 West Vista in Springfield, Missouri. I find that location to be Employer's principal place of business for purposes of this case.

**Current Complaints**

Claimant complains of daily headaches, neck pain, and occasional blurred vision. He experiences stiffness, numbness, and pain in his back, radiating into his left leg. He has pain in his left shoulder with numbness and tingling into the elbow. He has had difficulty sleeping and has awakened in the middle of the night with anxiety, pain and numbness. Claimant is able to drive. He can mow his lawn in shifts. He has to vary his posture after sitting 35 minutes to an hour, and from standing after 30 to 45 minutes. He does not believe he is capable of working at this time.

**Medical Bills**

Claimant has submitted the following bills related to the motor vehicle accident of April 30, 2015, which correspond with the treatment he has obtained.

<b>PROVIDER</b>	<b>TYPE OF SERVICE</b>	<b>AMOUNT OWED</b>
Mercy EMS	Ambulance Transportation	\$1,224.95
Mercy Medical Center	Emergency Room Treatment	\$5,466.50 <sup>2</sup>
MRI of Springfield	MRI Diagnostic Testing	\$1,700.00
Family Medical Walk-in Clinic	Consults/Testing - Multiple Dates	\$1,056.93
<b>TOTAL:</b>		<b>\$9,448.38<sup>3</sup></b>

**Prior Back Injuries**

About six years before the alleged work accident on April 30, 2015, while Claimant was living out of state, he had experienced some muscle spasms in his back and intermittent numbness in his left and right side. Claimant believed he was diagnosed with neuropathy. He was treated conservatively with medication. Between October 2012 when Claimant moved to Missouri, and the motor vehicle accident on April 30, 2015, Claimant had not been under active treatment for his back.

**Temporary Total Disability**

Claimant stated convincingly that he has been physically unable to work from the date of the motor vehicle accident until the date of the hearing, a total of 19 weeks. At the stipulated benefit rate of \$383.55, Claimant would be entitled to \$7,287.45 for past temporary total disability if the claim is found compensable. Claimant also seeks ongoing temporary total disability.

<sup>2</sup> These are the total charges from Mercy Medical Center. There appears to be contractual insurance adjustments to the bill equaling \$719.47.

<sup>3</sup> Employer/Insurer objected in part or all of Exhibits 8 and 12 because the bill from Southwest Neurological Spine Institute (SNSI) had not been certified. The Administrative Law Judge admitted the exhibits provisionally, with the directive that Claimant’s counsel submit a certified copy of the SNSI bill within 30 days (which the Administrative Law Judge mistakenly said was October 12, 2015 rather than October 8, 2015). Counsel was cautioned that the SNSI bill would not be considered if a certified copy was not presented timely. Well after the deadline on October 14, 2015, Claimant’s counsel submitted by facsimile transmission a copy of the certified SNSI bill. The submission is late. Employer/Insurer’s objection is sustained as to Exhibit 12, and as to that part of Exhibit 8 which relates to the SNSI bill. The documents, together with the facsimile transmission dated October 14, 2015, are included in the record solely for purposes of appellate review.

## CONCLUSIONS OF LAW

### Course and Scope of Employment

The seminal issue is whether Claimant's injury, occurring as a result of a motor vehicle accident while on his way to work, was within the course and scope of his employment. "To be compensable under worker's compensation, an employee's injury must arise out of and in the course of his employment." *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 610 (Mo. App. W.D. 2005). Generally, an injury "arises out of" the employment if it is a natural and reasonable incident thereof, and it is "in the course of employment" if the action occurs within a period of employment at a place where the employee reasonably may be fulfilling the duties of employment. *Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529, 533 (Mo. App. W.D. 2008). Claimant bears the burden on this, as well as all essential elements of his claim. § 287.808 RSMo;<sup>4</sup> *Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo. App. W.D. 2010) The administrative law judge must construe strictly the provisions of the workers' compensation law and weigh the evidence in an impartial manner, § 287.800 RSMo; § 287.808 RSMo.

Injuries from hazards encountered while an employee is going to and from work generally are not compensable as arising out of and in the course of employment. *Baldrige v. Inter-River Drainage Dist. of Missouri*, 645 S.W.2d 139, 140 (Mo. App. S.D. 1982). The rationale is that the "employer usually controls neither the place of residence chosen by the employee nor his mode of transport and the employer therefore plays no part in the relative extent of the risk incurred by the employee in traveling to and from work." *Garrett v. Industrial Commision*, 600 S.W.2d 516, 519 (Mo. App. W.D. 1980). An exception to the "coming and going" rule, known as the *Reneau* doctrine arises when the employer has furnished the employee's transportation because of the distance to the job site or for convenience of the employer. *Reneau v. Bales Electric Company*, 303 S.W.2d 75 (Mo. 1957). In such situation, the Court has found a "specific nexus...between the work to be done and the physical movement of the employee from point to point." *Garrett*, 600 S.W.2d at 519.

In 2005, however, the Missouri General Assembly enacted an amendment to the Workers' Compensation Law abrogating the *Reneau* doctrine to the extent that injuries in a company-owned vehicle are not compensable while an employee is traveling between his home and the employer's principal place of business. *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299 (Mo. App. S.D. 2009). The applicable statute now reads as follows:

5. Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. 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.

§ 287.020.5 RSMo. Employer/Insurer contends that the amended statute precisely addresses the facts of this case and Claimant's injuries are not compensable. Claimant's position is that he was not just traveling to work, but also was "on-call" when he was injured the morning of April 30, 2015.

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<sup>4</sup> All statutory references are to the laws in effect on the date of Claimant's injury.

First, § 287.020.5 RSMo, has no provision addressing “on-call” employees. Moreover, merely because an employee is “on call” does not mean he is activity engaged in his work at the time of the injury. *See e.g., Fingers v. Mount Tablor United Church of Christ*, 439 S.W.2d 241 (Mo. App. E.D. 1969) (holding that a custodian who was subject to 24-hour emergency call, but was off duty when injured, did not sustain an injury that arose out of and in the course of his employment). *See also, Kansas City, Missouri Police Dept. v. Bradshaw*, 606 S.W.2d 227 (Mo. App. W.D. 1980) (holding that an employee who was subject to call 24 hours a day in emergency situations did not place him “on duty” with the police department 24 hours a day).

Certainly, there are a number of Missouri cases involving police officers whose injuries have been determined compensable even though they were sustained while “off duty” but while “on call.” *See e.g., Mann v. City of Pacific*, 860 S.W.2d 12, 13–17 (Mo. App. E.D. 1993); *Jordan v. St. Louis County Police Department*, 699 S.W.2d 124, 125–27 (Mo. App. E.D. 1985); *Leach v. Bd. Of Police Com’rs of Kansas City*, 118 S.W.3d 646 (Mo. App. W.D. 2003); and *Spieler v. Village of Bel-Nor*, 62 S.W.3d 457, 458 (Mo. App. E.D. 2001). In each of these cases, however, the Courts specifically found some specific nexus between the officer’s specific activities at the time of the injury that benefitted the employer. As recognized by the Missouri Court of Appeals, Eastern District in *Eubank v. Sayad*, 669 S.W.2d 566, 568 (Mo. App. E.D. 1984), “In a very real sense a police officer is never truly off-duty.” Claimant is not an emergency responder. His work is not similar to the type of emergency services police provide.<sup>5</sup>

In *Stegman v. Grand River Reg'l Ambulance Dist.*, Inj. No. 02-030431 (Mo. Lab. Ind. Rel. Comm. Nov. 4, 2009), the employee was an “on call” ambulance driver who received a page while at home. She quickly dressed and entered her garage with the intent to drive to the ambulance barn. While still in the garage, she twisted her right knee and fell backwards landing on a wheel of a bicycle. The Commission initially affirmed an Administrative Law Judge’s denial of benefits as not arising out of and in the course of employment. The Court of Appeals vacated the Commission’s Award and remanded the matter for new findings and conclusions. In its ruling, the Court specifically stated: “We do not know why the Commission thought these on-call emergency responders should be governed by the ‘going and coming rule’ as though they were typical of other workers.” *Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529, 536 (Mo. App. W.D. 2008). On remand, the Commission reversed the Administrative Law Judge’s Award, concluding that the journey to the ambulance barn *was* a part of the employment from the moment the employee began responding to the page. The Commission noted that it was not simply that Ms. Stegman was “on call” which caused her injury to be compensable. Rather, it was the urgent nature of the page, and Ms. Stegman’s required response thereto, that characterized her duty to report to the ambulance barn as a “special task.”

In this case, even though Claimant was “on-call,” he was not responding to any call, urgent or otherwise. He can point to no “special task” that would place his trip from home to work within the course and scope of his employment. I conclude that Claimant has failed in his burden of demonstrating that his injuries arose out of and within the course of employment as those terms are defined by the Missouri Workers’ Compensation Law. Compensation is denied. Because this issue is dispositive, I address no other issue, and this is designated as Final Award.<sup>6</sup>

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<sup>5</sup> It is apparent that Claimant’s work did not involve the type of emergencies faced by first responders such as police officers, considering that Claimant was given up to 30 minutes to respond to a page and two hours to arrive at a client’s location.

<sup>6</sup> Employer/Insurer suggests that *Penachio v. Capital Region Hospital*, Injury No. 07-132005 (Mo. Lab. Indus. Rel. Comm.) is persuasive precedent. I find the case distinguishable on its facts. I have not relied on it.

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