TEMPORARY AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 11-015959

Employee: Allen Baldwin

Employer: City of Fair Play

Insurer: Missouri Rural Services Workers' Compensation Trust Fund
c/o Cannon Cochran Management Services

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this temporary award modifying the November 3, 2011, temporary or partial award of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We agree with the ALJ's conclusions as to the compensability of employee's claim and the award of future medical care. However, we disagree with the ALJ's finding that insurer is liable for employer and employee's reasonable attorney fees and expenses.

Section 287.560 RSMo provides, as follows:

> The division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. … [I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The primary issue in this case concerns whether employee's February 27, 2011, injury arose out of and in the course of his employment. Following the 2005 amendments to Missouri Workers' Compensation Law and the introduction of strict construction to Chapter 287 of the Revised Statutes of Missouri, this issue of whether an injury "arises out of" and "in the course of" employment has been highly contested. Based on the facts of this case and the arguments proffered by insurer, we do not find that its defense of this claim was egregious or without reasonable grounds. Therefore, we find that employee and employer's claims for costs against insurer are denied.

[1] Statutory references are to the Revised Statutes of Missouri 2010 unless otherwise indicated.

The award and decision of Administrative Law Judge Victorine R. Mahon issued November 3, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this temporary award.

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.

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

Given at Jefferson City, State of Missouri, this 21st day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Allen Baldwin

Injury No. 11-015959

Dependents: N/A

Employer: City of Fair Play

Additional Party: Not Applicable

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

Insurer: Missouri Rural Services Workers' Compensation Trust Fund c/o Cannon Cochran Management Services

Hearing Date: September 13, 2011; Record Closed September 28, 2011

Checked by: VRM/ps

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: February 27, 2011.

5. State location where accident occurred or occupational disease contracted: Fair Play, Mo.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? 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 happened or occupational disease contracted: Employee slipped and fell while performing his work duties as a police officer and storm spotter.

12. Did accident or occupational disease cause death? No. Date of death? N/A.

13. Parts of body injured by accident or occupational disease: Right shoulder.

14. Nature and extent of any permanent disability: Not at issue at this time.

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? See Award.

18. Employee's average weekly wage: $ 440.00.

19. Weekly compensation rate: $293.33.

20. Method of wage computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: No temporary total disability at this time.

    Insurer shall pay $8,798.18 for the whole cost of the proceeding, with $4,976.18 of that amount to reimburse Claimant for his reasonable attorney fees and expenes, and the remainder to reimburse Employer, the City of Fair Play, for its reasonable attorney fees and expenses.

22. Second Injury Fund liability: Not Applicable.

23. Future requirements of the Award:

    Employer/Insurer shall provide future medical care to cure and relieve the effects of the work related injury.

This award is only temporary or partial, is subject to further order, and the proceedings are continued and remain open until a final award can be made.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Allen Baldwin Injury No. 11-015959

Dependents: N/A

Employer: City of Fair Play

Additional Party: Not Applicable

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

Insurer: Missouri Rural Services Workers' Compensation Trust Fund c/o Cannon Cochran Management Services

Hearing Date: September 13, 2011; Checked by: VRM/ps
Record Closed September 28, 2011

INTRODUCTION

The parties appeared before the undersigned Administrative Law Judge for a hardship hearing on September 13, 2011, in Springfield, Missouri. Allen Baldwin (Claimant) appeared in person and with his attorney, Kyle L. Kanable. Employer Craig Heidemann appeared on behalf of City of Fair Play (Employer). Its insurer, the Missouri Rural Services Workers' Compensation Trust Fund, and its third party administrator Cannon Cochran Management Services, appeared by attorney Clinton Collier. This case has had significant pretrial and post trial activity.

Attorney Paul Huck had been contracted by Insurer to represent the separate interests of Employer. Approximately one week prior to hearing, Attorney Paul Huck sought to withdraw because Employer had no uncovered liability exposure, and because Craig Heidemann also had entered his appearance on Employer's behalf. Because Employer had two counsel, Mr. Huck's request was granted. On the day of hearing, Mr. Heidemann, who was the second counsel representing Employer, filed a motion to withdraw. That motion was denied as it appeared to this Administrative Law Judge that there remained a conflict between Employer and its Insurer, in that the two parties do not agree on the issue of compensability.

At the hearing, Counsel for Employee made a request for costs for having to proceed to hearing in a case which he believed was clearly compensable. Mr. Heidemann sought to join in that motion. The record remained open 15 days for the receipt of evidence on the issue of costs. Employee's documentary evidence of costs was submitted on September 23, 2011 and is marked as Exhibit H. On September 27, 2011, Mr. Heidemann filed a motion for costs and submitted documentation thereof. Because the record still was open, the evidence and motion were taken with the case. By telephone conference conducted September 28, 2011, the parties were advised that Mr. Heidemann's motion for costs and his evidence would be received. Insurer's counsel was given 15 days thereafter to file a response to the motion for costs. Briefs on all other issues also were to be filed within 15 days.

Also at the onset of the hearing, Employer's counsel alleged that Insurer, which is a Trust Fund, had no standing to proceed because it was taking a position contrary to Employer's position, which

was to compensate Claimant. The issue of standing was taken under submission with the case. Employer was given 15 days (September 28, 2011) to submit any supplemental evidence and argument on the issue of standing by the Trust Fund. That issue subsequently was withdrawn by telephone conference by all of the parties.

At the conclusion of the initial hearing on September 13, 2011, the Administrative Law Judge provided the parties with an oral opinion. Despite that oral opinion, the parties failed to resolve their differences. Having received the briefs and the additional evidence on the issue of costs, I issue this Award in favor of Employee and Employer.

STIPULATIONS

The parties agree to the following facts:

1. Allen Baldwin was an employee of the City of Fair Play on February 27, 2011.
2. On February 27, 2011, Claimant was covered by, and Employer was subject to the Missouri Workers' Compensation Law.
3. On February 27, 2011, Claimant sustained an injury.
4. Claimant's average weekly wage on that date was $440.00, yielding a temporary total disability rate of $293.33.
5. Employer and its Insurer have provided no medical care and no temporary total disability.

ISSUES

The following are issues are in dispute:

1. Did Claimant's injury, sustained on February 27, 2011, arise out of and within the course of employment with the City of Fair Play?
2. Is Claimant entitled to medical care as a result of the injury?
3. Are any of the parties entitled to costs?

EXHIBITS

Exhibits offered by Claimant and admitted:

A. Employee Policy – June 12, 2008
B. Fair Play Police Dept. Log – February 27, 2011
C. Payroll Summary – March 3, 2011
D. Employment Agreement
E. Statement – Mayor Bern Johns – March 21, 2011
F. Letter from City of Fair Play to CCMSI – June 17, 2011
G. Missouri Rural Services Workers' Compensation Insurance Trust
H. Affidavit – Kyle L. Kanable
I. Activity – Attorney Kanable

Exhibits offered by Insurer and admitted:

1. Deposition – Sarah Newell – with exhibits
2. Letter – February 28, 2011

Exhibits offered by Employer City of Fair Play and admitted:

A. Attorney Referral Form
B. Letter to Insurer from Employer
C. Motion for Costs with Exhibit A. - Affidavit[1]

FINDINGS OF FACT

Claimant Allen Wade Baldwin is the Chief of Police of the City of Fair Play, a small Missouri municipality with a population of less than 600 residents. As would be expected in most any small town, Chief Baldwin's duties are multiple and varied. He initially was hired in 2001 as a maintenance worker. Between 2003 and 2004, Claimant became a certified water operator. His job was to test the chlorination system and assure that the City's water supply was safe. These duties were in addition to those as a maintenance worker. In 2008, with the City having paid for his training, Claimant became a police officer for the City of Fair Play. His new duties as a police officer required that he respond to calls for service, as well as enforce traffic laws and ordinances. He still maintained his duties as a certified water operator. Claimant also was required to perform maintenance duties as needed.

Claimant's new duties in 2008 as a police officer were set forth in Exhibit A, which was an agreement that Claimant signed with the City. That document, provided by Mayor David Vincent, requires that all employees be willing to report to duty in the case of an emergency. In May 2009, Claimant became the Chief of Police.

As Chief of Police, Claimant had some supervisory duties. He reviewed reports of any other officers. His duties as the certified water operator continued, so that Claimant had to assure that the wells and sewers were functioning properly. He also was responsible for storm spotting on the East or West side of town. When there is the threat of severe weather, Claimant was to go to a location at a high point to begin spotting for tornadoes, power outages, and damage within the city. If any tornadoes were spotted, he was to immediately contact dispatch by cell phone or radio. It was typical for Claimant to use his personal vehicle for storm spotting as his police cruiser routinely was left at the garage near the fire department. While Claimant normally did not receive overtime, he was paid for those hours he worked when he was required to respond to calls on his day off.

On Sunday February 27, 2011, Claimant received notification around 7:30 p.m. that there was the possibility of severe weather that evening. At 9:15 p.m., a tornado warning was sounded for Polk County, including the City of Fair Play. The sirens were activated. David Vincent, Claimant's landlord and a former mayor of the City of Fair Play, called regarding the sirens. He wanted to know why the sirens were sounding. At 9:28 p.m., Claimant took up a position to spot for storms. He saw no direct evidence of damaging winds. At 10:00 p.m., Claimant returned to his residence

[1] Upon the submission of additional evidence, the Administrative Law Judge directed the docket clerk of the Division of Workers' Compensation to schedule a post-hearing telephone conference. Exhibit C, which is the motion of the Employer's counsel for costs, contains the notations of the Division's docket clerk as she was attempting to schedule the telephone conference. If any other exhibit contains markings, those were not made by this Administrative Law Judge or the Division's staff, and would have been present at the time the exhibit was received in to evidence.

and called Bern Johns, the current mayor, to advise him that there was no damage. At that time the two men discussed that there was the threat of additional severe weather. Claimant indicated that he would watch the radar at his residence.

As confirmed by Sarah Newell, the 911 director for Polk County, Claimant called the dispatch at 10:09 p.m. from his cell phone to inquire as to why the sirens still were sounding. He was advised that the sirens would be shutting off shortly. At 10:24 p.m., David Vincent then telephoned Claimant when the sirens continued. Sarah Newell stated that the storm sirens for all of Polk County were supposed to have stopped at 22:10 (10:10 p.m.). In fact, based on another recorded call, the storm sirens were still sounding in Polk County at 10:20 p.m. Based on the records in Ms. Newell's possession, she was not able to state when the sirens actually ceased operation (Ex. 1, p. 21). She agreed, however, that the sirens are only to be sounded for tornado activity, and not for lightening, severe winds, or the threat of large hail (Ex. 1, p. 24).

David Vincent is the current mayor of the City of Fair Play, who assumed his position in April 2011. Although he was not the mayor in February 2011, he had been the mayor of the City of Fair Play for 10 years prior to 2009. David Vincent explained that even though he was not the current mayor, he called Claimant regarding the weather when he heard storm sirens. He also advised Claimant that the City was experiencing high winds, heavy rain, and hail. Mayor Vincent explained that even if there was no imminent threat of a tornado, if a siren became stuck, it could result in the drive burning up, causing a considerable expense to the City. This had happened in the past and the police chief has the capability of shutting off the sirens. He also said that it would be a bad situation if the sewer system shut down due to a lighting strike, and it was appropriate for the police chief to check on that situation.

After speaking with David Vincent, Claimant left his residence to storm spot and check for damage. As he walked out of his front door, it was raining, lighting, thundering, hailing, and there was high wind. As he grabbed the door handle of his truck, he slipped and fell, jerking his shoulder. He immediately felt a sharp pain in his right shoulder, but nevertheless got up and drove into town. While en route, the storm began to subside. He checked the city for damage. When he was satisfied there was no damage, he returned home and notified the Mayor Johns, as is his usual practice. As best he could with his left hand, Chief Baldwin wrote in his log that he had returned home at 10:40 p.m.

Bern Johns, the mayor of the City of Fair Play on the evening of February 27, 2011, emphasized that Claimant's duties not only included storm spotting, but also involved checking on the wells and sewer lift station during severe weather. He explained that it becomes an emergency situation for their small town if a lightning strike causes the City to lose water or have a sewer interruption. Mayor Johns said Claimant had the discretion as Chief of Police to go back out into the field if he believed there was a threat. This was normal procedure, and it included Claimant's job as a storm spotter.

The day following his accident, when his shoulder was still hurting, Claimant notified Mayor Johns of the injury and requested medical attention. Claimant saw Dr. Stortz at the Humansville Family Medical Center who performed x-rays and prescribed medication. When his pain did not subside, Claimant again saw Dr. Stortz, who advised Claimant that he needed an MRI. Despite his

request, Claimant's medically prescribed MRI has been denied. Mayor Bern Johns was adamant that Claimant acted in accordance with his job duties as Chief of Police. In fact, at the time of the storm that evening, Claimant was the only officer employed by the City of Fair Play. Mayor Johns believed Claimant's activities on February 27, 2011 were due to an emergency and urgent nature.

Likewise David Vincent, the current mayor since April 2011, was in complete agreement that Claimant's action on February 27, 2011 were in response to an emergency situation when Claimant was injured. He testified that it was certainly Claimant's duty to respond as quickly as possible once he determined there was a potential for danger and the threat of severe weather. Mayor Vincent and three Aldermen for the City of Fair Play provided a letter to their workers' compensation insurer stating that it was their unanimous opinion that Claimant was on duty and performing severe weather duties as required for his position at the time he was injured, and requesting that the insurer immediately provide Claimant with medical attention (Ex. F). It is undisputed that despite such correspondence, the City's insurer – Missouri Rural Services Workers' Compensation Trust, c/o Cannon Cochran Management Services, Inc. – has provided no medical care. According to evidence submitted by Employer, the third party administrator in this case initially provided an authorization for an MRI, but the Trust Fund never related that authorization to Employer and took the position that the case was not compensable.

Claimant testified that he was paid hourly. He keeps his time recorded on timesheets which he submits to the City for the payment of wages. Claimant's timecard reveals that he was paid one hour and 25 minutes from 9:15 to 10:40 p.m. on February 27, 2011 (Ex. C). These times correspond with the tornado warning for Fair Play at 9:15 p.m. until he returned home the second time that evening at 10:40 p.m.

Costs

Claimant, as well as the City of Fair Play, have requested costs pursuant to § 287.560 RSMo. Attorneys for both parties were permitted to submit as additional evidence their costs associated with the prosecution of this case. Claimant's costs (Ex. H) total $4,695.00 in attorney fees and $281.18 in various expenses, such as deposition, postage, and mileage. Employer's counsel submitted an affidavit outlining attorney and paralegal fees totaling $3,822.00. While Insurer objected to the payment of any costs, it has not objected to the reasonableness of these fees or expenses.

Employer and Claimant have asked for costs based on Insurer's alleged unreasonable refusal to provide treatment to Chief Baldwin. They assert that Insurer denied Claimant medical treatment without investigating the facts. Both mayors testified credibly that Insurer never contacted them to investigate the facts of the claim. Employer alleges that the third party administrator ignored the City's attempt to obtain authorized treatment for Claimant.

CONCLUSIONS OF LAW

Arising Out of and Within the Course of 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.

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. *Bond v. Site Line Surveying*, 322 S.W.3d 165, 170 (Mo. App. W.D. 2010)

Employer – through the former and current mayors and the City's aldermen – are convinced that Claimant's actions were within the course and scope of employment. Employer not only authorized initial care, but has requested that Claimant be provided with additional medical as prescribed by the treating physician. Despite these facts, Insurer has refused to provide any treatment, contending that the claim is not compensable.

The parties agree on the essential facts. Insurer presented no witnesses or any other evidence that contradicts the statements of Claimant or other witness who substantiated Claimant's testimony. Thus, the issue in this case is one of law and not fact.

That legal issue is substantially similar to the one discussed in *Stegman v. Grand River Reg'l Ambulance Dist. Insurer*, Inj. No. 02-030431 (Mo. Lab. Ind. Rel Comm. Nov. 4, 2009).[2] Claimant was an "on call" ambulance driver. As found by the Commission, the ambulance driver had not left her house at the time of the injury. She had been standing in her kitchen in her pajamas scooping ice cream for her family when she received a page. She quickly dressed and then exited her home and entered her garage. After putting on her shoes, and while still in the garage on her way to her vehicle to drive to the ambulance barn, she stepped around the front of her husband's pickup truck near the driver's side, twisted her right knee and fell backwards landing on a wheel of a bicycle. Employee was going as fast as she could when the incident occurred. Employee was then taken to the emergency room at Heartland Regional Medical Center in St. Joseph, Missouri.

The Commission initially affirmed an Administrative Law Judge's denial of benefits as not arising out of and in the course of employment. Because the Court of Appeals found that the Commission had failed to identify the significant facts it found as pertinent to the issues, the Court vacated the Commission's Award and remanded the matter for new findings and conclusions. In so 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."

[2] Interestingly, the insurer in *Stegman*, was *Missouri Rural Services Workers' Comp. Ins. Trust.* There is no question that this Trust had notice of the Labor and Industrial Relations Commission's conclusion of compensability on nearly identical facts.

Like *Stegman,* Allen Baldwin was engaged in a special task at the time he was injured. He was required to respond to all emergencies per the Employee Policy of the City of Fair Play. (Ex. A). He and both the current and previous mayors indicated that Claimant's response to weather alerts on the evening of February 27, 2011, were within his job duties. Spotting tornadoes and checking for storm damage are tasks that could not be performed from Claimant's home. Because storm sirens continued to sound even after the dispatcher indicated that they should be subsiding, together with evidence that the City was getting high wind, hail, and heavy rain, there were sufficient facts to place Claimant on alert that the City of Fair Play could be in danger. Claimant was required, not only to spot for tornadoes and look for damage, but to monitor the city for damage or power outages that could cause the water wells or sewer lift stations to become inoperable. Further, he was the person with authority to turn off tornado sirens if they continued to operate without the threat of severe weather. There was evidence that a tornado siren had become stuck in the past, causing substantial damage to the siren resulting in considerable expense to the City for its repair. Claimant's case is not only substantially similar to the facts in *Stegman,* it is much more compelling.

Stegman is not the only case supporting a holding in Claimant's favor. The books are replete with appellate decisions finding compensable injuries sustained by off duty police officers who were hurt while performing some duty that benefited the employer, even if the officer was otherwise "off duty." Most noteworthy is *Mann v. City of Pacific,* 860 S.W.2d 12, 13–17 (Mo. App. E.D. 1993), and *Jordan v. St. Louis County Police Department,* 699 S.W.2d 124, 125–27 (Mo. App. E.D. 1985).

In *Mann,* a police captain brought a workers' compensation claim for injuries he sustained while refueling his personal automobile after assisting patrol officers on his day off. The Labor and Industrial Relations Commission reversed an award of compensation made by the administrative law judge. The police captain appealed and the appellate court reversed, holding that the injury arose in course of police captain's employment, and out of his employment. In so holding, the Court stated that in certain circumstances the period of employment may include periods when an employee voluntarily works to perform activities that are reasonably incidental to the employment and an employee's course of employment may be expanded to off-duty periods due to the employee's desire to advance his employer's interest. *Mann,* 860 S.W.2d at 15. As in *Mann,* Claimant Baldwin in this case was injured while advancing his employer's interest. And even more compelling than in *Mann,* Mr. Baldwin's employer agreed to pay him for his time on the evening of February 27, 2011, even though he may normally have been off work on a Sunday.

Similarly in *Leach v. Bd. Of Police Com'rs of Kansas City,* 118 S.W.3d 646 (Mo. App. W.D. 2003), the employee was an off-duty officer working for Westport Security when he was injured. The fact that the employee was "off-duty," in the loose sense of the term, did not preclude compensability. The appellate court held that by issuing citations and summonses, making arrests, and responding to calls directly from dispatch, the "off-duty" officer still may be protected by workers' compensation. 118 S.W.3d at 651.

In *Spieler v. Village. of Bel-Nor,* 62 S.W.3d 457, 458 (Mo. App. E.D. 2001), Claimant was a police officer of the Village of Bel–Nor in Saint Louis County. He was not scheduled for duty on the evening of December 18, 1998, or on the following day. He attended a Christmas party

with a date, and then left in her car, which she drove. He was not in uniform but had his badge and gun with him. While driving through Creve Coeur, approximately eight miles from Bel–Nor, the pair came upon the scene of a two-car accident. The employee asked his date to pull over. He checked the passengers in the cars, found that there were possible injuries, and used his date's cellular phone to call 911 for medical and police assistance. While standing in the street at the scene he was struck by a passing car and severely injured. The officer filed a claim for workers' compensation benefits. The Labor and Industrial Relations Commission, reversing the Administrative Law Judge, found that the accident arose out of and in the course of his employment and awarded benefits for permanent partial disability along with future medical expenses. The appellate court affirmed.

In *King v. City of Clinton*, 343 S.W.2d 185, 186–89 (Mo.App.1961), a police officer was compensated for an injury caused by the accidental discharge of police firearm while dressing for work.

In one of the very few cases pertaining to police officers where benefits were denied, the officer was injured in an accident while going to a second job. In that case, the Court found while the Police Department had given its permission for the officer to hold a job at the Plaza, his trips between home and the Plaza for the purpose of performing his job with the Plaza had not become an incident of his employment with the Police Department. *Kansas City, Missouri Police Dept. v. Bradshaw*, 606 S.W.2d 227, 233-34 (Mo. App. W.D. 1980). The instant case clearly is distinguishable because Chief Baldwin, in the instant case, was acting solely to benefit his employer when he was injured outside his home on February 27, 2011. It was not to benefit him, personally, or some other entity. Moreover, as recognized by the Missouri Court of Appeals, Eastern District in *Eubank v. Sayad,* 669 S.W2d 566, 568 (Mo. App. E.D. 1984), "In a very real sense a police officer is never truly off-duty."

The one factor that each of the above cases do not have in common with the instant case is that they all involved injuries arising from circumstances prior to the enactment of the 2005 amendments to the Workers' Compensation Law. That is significant because § 287.800 RSMo, as amended on August 28, 2005, now requires that the Workers' Compensation Law be interpreted strictly rather than liberally. Still, when an employer readily admits that its employee was performing required, emergency duties at the time of his injury, and has paid him for his time that evening, and logs and telephone calls substantiate his activity, it is difficult, even under the strictest of statutory interpretations, to not find this claim compensable.

Insurer next argues that Claimant was injured at his home on rental property outside of the city limits, and not owned or controlled by the City of Fair Play. As *Stegman* instructs, it makes no difference that Claimant was still at his home, given the evidence that he had taken steps toward performing a task to benefit his employer. Further, § 287.020.5 RSMo Cum Supp. 2010, states that the "extension of premises doctrine" is abrogated to the extent it extends liability for accident that occur on property not owned or controlled by one's employer. But Claimant has never contended that his injury is compensable because he fell in a parking lot or other authorized route on his way to work. *Compare, Hager v. Syberg's Wesport,* 304 S.W.3d 771 (Mo. App. E.D. 2010), (holding that a fall in the parking lot that was neither owned nor controlled by the employee's employer arose out of or in the course of employment, and came from a non-employment risk to which the employee would have been equally exposed).

Claimant's theory of compensability relies on the "special task" or "special errand" exception of the "coming and going" rule. In *McClain v. Welsh Co.*, 748 S.W.2d 720 (Mo. App. E.D. 1988), the appellate court noted that going to and returning from work is a personal act, akin to dressing for work, and bears no immediate relation to the actual services one performs for the employer. But the court recognized a series of exceptions to the usual "going and coming" rule, chief among them is the "special task" exception, whereby the employee performs a special task, or errand in connection with his employment. Injuries occurring under the special task exception are compensable.

Compensation also is not precluded by the remainder of § 287.020.5 RSMo Cum Supp. 2010, which related to the injuries sustained in company owned or subsidized vehicles while traveling to the employer's principal place of business. Here, Claimant traveled to assess storm threats and storm damage, not just to travel to his employer's fixed place of business. *See also, Harness v. Southern Copyroll, Inc.,* Inj. No. 06-086280 (LIRC Aug. 8, 2006) (affirming an Award Allowing Compensation in which the Administrative Law Judge thoroughly discusses the viability of the extended premises, mutual benefit, and dual purpose exceptions to the "coming and going" rule under the post-2005 amendments to the Workers' Compensation Act).

Finally, Insurer attempts to distinguish *Stegman*, arguing that Claimant was not in an emergency mode, but simply was going back to town after the threat of any tornado had subsided. Insurer suggests that Claimant was hurrying due to rain, rather than the need to get to town quickly, and thus his slip and injury to his shoulder was no different than what would have occurred in non-employment life. Query what would have occurred *if* the siren had not subsided and driver burned up, or severe weather had caused damage to the city, or the sewer or water system had shut down, and Claimant had simply remained at home or lazily taken his time to assess the situation. In the judgment of Claimant and his employer, the prudent action was to go back into town and spot for storms and check for damage. Claimant's injury incurred during this special errand for the benefit of Employer. A tornado does not have to be looming overhead for Claimant to be on a "special errand" or task benefiting Employer's interests. It bears emphasizing that the Mayor and Aldermen of the City of Fair Play believed Claimant was performing a task integral to the City's interests, and paid Claimant for his time that evening.

Section 287.140, RSMo, requires an employer/insurer to provide medical treatment as reasonably may be required to cure and relieve an employee from the effects of the work-related injury. To "cure and relieve" means treatment that will give comfort, even though restoration to soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003). The claimant must prove the need for treatment by "reasonable probability" rather than "reasonable certainty." *Downing v. Willamette Industries, Inc*., 895 S.W.2d 650, 655 (Mo. App. W.D. 1995), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). "Probable" means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. *Sifferman v. Sears, Roebuck & Co.,* 906 S.W.2d 823, 828 (Mo.App. S.D.1995), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). Dr. Paul Stortz has recommended that Claimant have an MRI. Employer and its Insurer shall provide such treatment as will cure or relieve the effects of the injury.

Costs

Section 287.560 RSMo, provides in relevant part:

> [I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

An award of costs is generally reserved for egregious conduct. *See e.g., Clark v. Hart's Auto Repair,* 274 S.W.3d 612 (Mo. App. W.D. 2009) (holding that costs were appropriate when an Employer spurned all efforts to negotiate in good faith in an attempt to resolve a conflict, and forced the matter to hearing); *See also, Monroe v. Wal-Mart Associates, Inc.,* 163 S.W.3d 501 (Mo. App. E.D. 2005) (awarding fees and costs where the defense ignored its own expert's opinion on causation and liability).

Here, Insurer contends that costs are inappropriate because it has a meritorious defense, or at least an arguable defense, on the law. It suggests that even considering the truthfulness of the mayors' testimonies, it should not be penalized for forwarding a defense based on an application of the law to those facts. I would agree if Insurer's defense was not contrary to numerous cases directly on point.

I abhor awarding costs if there is *any* reasonable or even arguable defense being proffered. But in this case, Insurer offered no evidence suggesting that Claimant's injury is anything but compensable. Insurer offered no evidence contradicting Claimant's rendition of the facts. It offered no evidence contradicting the testimonies of the City's mayors. The sole reason Claimant was out in the rain, wind, hail, and severe weather on February 27, 2011 was to benefit his Employer and the citizens of the City of Fair Play.

Insurer proffered the deposition of Sarah Newell. But that evidence only served to bolster Claimant's position that he was acting appropriately in quickly leaving his home to storm spot and perform related duties. Through Ms. Newell's testimony, Insurer actually proved that the tornado sirens were still sounding at 10:20 p.m., well past the time that Claimant was advised they would be turned off. It is undisputed that the tornado sirens were to sound only if there was a tornado. The only reasonable inference was that there was something wrong with the sirens or a tornado was again in the vicinity. In either case, it was incumbent upon Claimant, the *only police officer employed by the City at that time,* to look out for the safety of the citizens and assure that the City's emergency equipment and water and sewage treatment facilities were operating properly. To refuse compensability under these circumstances, even given strict statutory interpretation, is unreasonable. To then callously ignore even Employer's pleas to provide its sole law enforcement officer some basic medical treatment, is simply wrong. Insurer's callous refusal to provide medical treatment, in light of all of the uncontradicted evidence in this case, warrants an award of costs.

The next question is how much is to be awarded in costs. Section 287.800 RSMo, requires that all statutes within the Missouri Workers' Compensation Law be strictly construed. The statute, city above, states that the "whole cost" of the proceeding "may" be awarded. The statute

provides that the costs be assessed against the offending party, but it does not prescribe to whom the costs are to be awarded.

Insurer argues in its brief that there was no conflict between Employer and Insurer and thus, no reason for Employer to have hired separate counsel. In other words, Insurer believes Employer's only legitimate interest in regard to the claim is to have it paid by Insurer if compensable, and in that regard, to have legal representation from Insurer in defending it, as set forth in the terms of the Missouri Rural Trust Agreement. The Trust Agreement states in applicable part:

> The Member shall not, except at its own cost, which shall not be reimbursed by the Trust, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or other services at the time of injury as a required by the Act.

(Ex. F, § 10.6 Trust Agreement). According to Insurer, an assessment of costs in favor Employer would only be reasonable if Insurer unreasonably denied insurance coverage for the claim (which it did in this case) *and* refused to proffer a defense. In this case, Insurer provided counsel to defend the claim from the outset.

Whatever agreement Employer has with Insurer is a matter of contract law, or in this case, trust law. As an Administrative Law Judge for the Division of Workers' Compensation, I do not pretend to be an expert in that area, nor do I believe the settling of trust disputes is appropriately in my jurisdiction. Certainly, there existed a very real conflict between Insurer and Employer. Employer's interest is not in "winning," but in assuring that benefits are provided to its employees according to the law. Insurer, which seeks to avoid paying benefits unnecessarily, proffered absolutely no evidence contrary to Claimant's assertion that he was performing duties within the course and scope of his employment when he was injured on February 27, 2011. If Employer violated the Trust Agreement by having separate legal counsel representing the City's interest in this proceeding, Insurer can proceed against the City of Fair Play in circuit court. The Trust Agreement does not preclude me from awarding the whole costs of a proceeding that I find was defended without reasonable ground, pursuant to § 287.560 RSMo. Given a strict interpretation of the statute, I find that costs are appropriate. Here, Employer's counsel prepared and participated in the hearing and helped elucidate all of the necessary facts.

I find and conclude that the submissions made by Employer and Claimant for legal fees and expenses are reasonable and were necessary given Insurer's unreasonable refusal to provide medical treatment for a clearly compensable injury. Insurer shall pay $8,798.18 in costs, with $4,976.18 of that amount to reimburse Claimant for reasonable attorney fees and expenses, and the remainder to reimburse Employer, the City of Fair Play, for its reasonable attorney fees and expenses.

This is a Temporary or Partial Award. It is subject to modification and review only as provided by law. The failure to comply with this Award may result in a doubling of the amount in the Final Award, as prescribed by law.

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