

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

Injury No.: 04-034502

Employee: Thomas Barton, deceased

Dependents: Donna Marie Barton, widow; Catherine Marie Barton, Maria Rose Barton, and Alexander Thomas Barton, dependent children

Employer: W & M Properties

Insurer: Vigilant Insurance Co.
c/o Chubb Services

Date of Accident: March 24, 2004

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. Having reviewed the evidence, considered the entire record, and having heard the oral argument of the parties, the Commission issues this reversal of the award and decision of Administrative Law Judge John K. Ottenad dated February 13, 2008, pursuant to §286.090 RSMo. The award and decision is attached and incorporated to the extent it is not inconsistent with this final award.

INTRODUCTION

The award denied any benefits to dependents. It reasoned that employee was on a purely personal deviation and had not returned to the course of his employment as of the time of his automobile accident on March 24, 2004. It also stated that employee was so intoxicated at the time of the accident that he was physically and mentally unable to engage in his employment. Thus, in either case, the award indicated that dependents had not proved the automobile accident arose out of and in the course of employment. Furthermore, although the administrative law judge held that the point was moot, he suggested that §287.120.6(2) RSMo might also have served as an independent bar to benefits.

Counsel for dependents filed an Application for Review with the Commission.

SUMMARY OF FACTS

Employee married Donna Marie Barton on July 27, 1991; and they lived together as husband and wife through the date of his death. They had three children born in the marriage: Catherine Marie Barton born July 21, 1997, Maria Rose Barton born July 3, 1999, and Alexander Thomas Barton born February 28, 2001. These children lived with employee and his wife from the date of their births through the date of employee's death and continued to live with Donna Marie Barton through the date of the hearing in this matter. No one else has been responsible for their care during that time. The parties stipulated to the dependency of employee's wife and children.

Employee was on the board of directors of the St. Louis Apartment Association (SLAA). On March 24, 2004, the SLAA held one of its regular meetings at the Holiday Inn Westport at the intersection of I-270 and Page Avenue in St. Louis, Missouri. During that relevant period of time, the SLAA meetings were routinely held at this location. Employer paid employee's initiation fee, dues, mileage (he had to use his own vehicle), and any expenses connected with this association and its meetings. Employer admitted that it received a benefit from his participation in these meetings. Employer left it to employee to choose his route to and from these meetings.

Employee was scheduled to be on vacation from March 18 through 26, 2004. He was in Las Vegas for some days during that period but had returned on approximately March 22 (according to his wife). On March 24, employee apparently went to work and then went to the SLAA meeting. The board meeting started at 4 p.m. and lasted until approximately 5:00 or 5:30 p.m. Employee was present during this meeting. No alcoholic drinks were permitted during this time. After the meeting, registration began for the dinner and speaker for that evening. Dinner began at approximately 6:00 p.m. The speaker talked from approximately 6:30 to 7:30 or 8:00 p.m.

Various persons testified concerning their recollections of employee's actions that evening. He was definitely present for some period following the directors' meeting. He was seen with one or two drinks that appeared to be alcoholic beverages. No one believed he was intoxicated. To the contrary, Michael Peterson recalled that sometime between 7:00 and 8:00 p.m., employee was engaged in a conversation with Peterson and Kelly Kinneman that exhibited good use of employee's mental processes. Clare Hallstead, who worked with Peterson, testified that she left the gathering at 7:00 or 7:30 p.m. and that she believed employee was already gone at that time. Peterson recalled that employee seemed tired at the directors' meeting.

Karen Shymanski testified that employee and others would sometimes hang around following the meetings at the Holiday Inn Westport and have a couple of drinks from the on-site bar: Copperfield's. She also indicated that in conversations with employee prior to March 24, 2004, he had told her that his normal route for going home after the SLAA meetings was to take I-270 north to I-70, east to I-170, and south to his residence at employer's apartment complex in Shrewsbury.

Employer's witness, Vincent Sultana, was employee's immediate supervisor. He testified that although employer had a written policy prohibiting use of alcohol during work hours, employee would not have violated that policy by drinking alcohol after the directors' meeting. In fact, Mr. Sultana had seen employee on occasion at other company functions having a couple of drinks. Neither Mr. Sultana nor any of the other witnesses had ever seen employee intoxicated at such a function or perceived that he had a problem with alcohol.

No witness saw employee leave the SLAA meeting. No witness talked to employee about where he was going after the meeting was concluded.

At approximately 8:40 p.m., employee was seen driving south on I-170 (just north of Page Avenue) at a high rate of speed. As he approached the vehicle ahead of him, employee honked and then switched lanes (to the innermost of four lanes). He lost control of the vehicle, went into the grassy median area, rolled the vehicle, and ended up in the nearest northbound lane.

The paramedic's report makes the following statement: "PT has smell of alcohol about him." The police report notes that excessive speed and improper lane changes may have contributed to the accident. The box on the report for alcohol is not checked.

Employee was taken to DePaul Medical Center. At no point from when help arrived at the scene of the

accident until he was pronounced dead at the hospital did employee have a heart beat. The first emergency room doctor's report (Dr. John Burnsed) says nothing about smelling or any other detection of alcohol. It does, though, make the following notation under the heading "Social History": "Patient drinks alcohol." There is no indication from what this information was derived. The second emergency room doctor was a witness (Dr. David Terschulose), and he testified that he did not see or smell any signs of alcohol about employee. Dr. Terschulose suggested that Dr. Burnsed's Social History comment could have come from any number of sources, including the paramedics.

Blood was drawn from employee by DePaul. Its tests showed a .02 blood alcohol content (BAC), which is below the legal limit and is consistent with a person who has had a couple of drinks. Dr. Terschulose said that it is clear from the emergency room flow chart, which contains the contemporaneous notes of nurses during the process of trying to treat employee, that the blood was drawn at 9:55 p.m., five minutes after employee was pronounced dead. Dr. Terschulose did not know any particulars about who drew the blood or from where it was drawn, but said the normal practice was to draw from the large femoral veins.

The DePaul laboratory report shows what employer says is an inconsistency in times. It says "Collected: 03/24/04 2242". Employer contends that entry means the blood was drawn at that time (10:42 p.m.), almost an hour after employee died. Its toxicologist, Dr. Christopher Long, testified that blood could not be drawn that long after employee died because the blood would be clotted and could not be removed. Dr. Long suggested that the 2242 entry shows DePaul may have used the wrong sample.

Dr. Long is a forensic toxicologist. Although he did not actually participate in the relevant examination, he was the chief toxicologist connected with the St. Louis County Medical Examiner's office. He reviewed and signed off on the ultimate report from that office. That office received employee's body the day following his death and performed alcohol tests on blood and vitreous (from the eyeball) samples from employee about 12 hours after his death. These tests revealed BAC results of .244 and .308, respectively, from the blood and vitreous samples. Such a high level of intoxication would be consistent with an individual of employee's size who had 13 to 16 beers in his system (in addition to any alcohol his system would have already metabolized).

While Dr. Long seems to concede that internal bleeding in the abdominal area could have contaminated the blood sample, he says the vitreous sample was not subject to such contamination. He believes it was protected by the skull, even though the skull was fractured and blood was visible around the eyes, ears, and nose.

APPLICATION OF SECTION 287.120.6 RSMO TO REDUCE OR FORFEIT BENEFITS

Section 287.120.6 mandates either forfeiture or a 15% reduction in benefits if alcohol was the proximate cause or the injury was sustained in conjunction with the use of alcohol. The version of this statute that applied to employee's March 2004 accident, though, required in any event that the use of alcohol be in violation of employer's policy.

The evidence before us shows that employee did not violate any employer policy. Its policies only prohibited the use of alcohol during employer's business hours. Even its own witness admitted that employee was not in violation of its rules by having alcohol at the SLAA social gathering following the directors' meeting. Therefore, we conclude that §287.120(6) does not apply to this case.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Personal Deviation

To be compensable under worker's compensation, employee's injury must be due to an accident arising out of and in the course of employment The general rule is that an injury is one that "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 may reasonably be fulfilling the duties of employment. Generally, injuries sustained by an employee while going to or coming from work do not arise out of and in the course of employment. . . . While this is the general rule, the principle may be modified by the particular facts, circumstances and situations resulting in various and varied exceptions in order to accommodate both the employer and the employee.

An exception to this general rule involves an employee whose work entails travel away from the employer's premises. In the case of a traveling employee, the employee is considered to be in the course of his employment continuously during the trip except when a distinct departure on a personal errand is shown. When an employee abandons his employment and engages in work or pleasure purely his own, his employer is not liable for any accidental injuries sustained by the employee while so engaged because the accident does not arise out of and in the course of the employee's employment.

Doerr v. Teton Transp., Inc., 258 S.W.3d 514, 522-523 (Mo. App. S.D. 2008) (internal citations omitted).

It does not matter that employee's travel did not require an overnight stay or did not involve traveling a great distance. *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 611 (Mo. App. W.D. 2005).

Employer paid for employee's fees and expenses in connection with his travel to and from and attendance at the SLAA meetings and derived benefit from his attendance at those meetings. Accordingly, as indicated above, employee should be considered in the continuous course of employment both going to and coming from the SLAA meetings --unless employer has met its burden of proving that employee had abandoned his employment and was engaged in a purely personal deviation.

Employer presented no witness who even suggested that employee was going anywhere other than home when he left the SLAA meeting. Nonetheless, the administrative law judge held that employee was engaged in a personal deviation based solely on employee's location at the time of his accident, a lack of evidence of employee's actions during the period between the end of the directors' meeting and the accident, and the fact that one of two contradictory tests showed that employee had a high BAC at the time of the accident.

We are not persuaded that employee's location heading southbound on I-170 just north of Page Avenue in and of itself showed any personal deviation. Karen Shymanski testified as follows:

Q: And do you have any -- do you have any knowledge whatsoever as to why [employee] would have been north of Page Avenue on I-170 at the time of the incident?

A: Well, that's the way I believe he went home.

Q: I see.

A: Because I-70, then he would go up, shoot down to Georgetown.

Q: Okay.

A: And we've even talked about that with locations of our meetings and, you know, just in pure conversation.

. . .
. . . .

So that makes total sense to me that he would be on I-70.

Q: Okay.

A: Because then he goes to Hanley and then he shoots down.

Consequently, according to her, employee had previously indicated that he took this somewhat longer route home from the meetings at Holiday Inn Westport. Importantly, employer had not prescribed a route that he had to use. It was left to his discretion. Larson's treatise on Workers' Compensation Law has the following to say about what it calls the "Long Alternate Route": "If the employee for some reason having nothing to do with a private purpose, but perhaps merely in the exercise of a personal judgment or preference as to the most desirable route, takes a route other than that prescribed by this employer, this should not be considered a deviation." 1.A Larson's Workers' Compensation Law, section 17.05. This line of reasoning has been affirmed by Missouri's courts. *Doerr*, 258 S.W.3d at 526. Similarly, in the case at hand, although we might not have chosen the route employee did, our evidence suggests it was a route to his home and was not clearly a deviation.

Since it was established through testimony that employee was on a route he might have taken home from the SLAA meeting and, thus, was at a place he could have reasonably been expected to be in the course of fulfilling his duties, it was employer's burden to show otherwise. Even if for argument's sake we accept that employee's whereabouts were not known for a period of time after the directors' meeting and that he then consumed a large quantity of alcohol, such facts still do not establish that employee was anywhere other than he should have been in the course of his work. This conclusion holds especially true in light of the statutory and case law mandate that we liberally construe the provisions of the Workers' Compensation Law in favor of employee receiving benefits. *Custer*, 174 S.W.3d at 610. Therefore, we conclude that employer has not met its burden.

Lastly, and again just for argument's sake, if we were to conclude that employee was engaged in a personal deviation, a strong argument can be made that the deviation had already terminated as of the time of his accident. "The test of when a deviation begins or terminates is not so much a matter of the time consumed and the distance traveled, but rests primarily on whether the employer's or the employee's purpose is being served." *Doerr*, 258 S.W.3d at 523. Whatever arguable deviation employee would have been involved in was over. At the time of the accident, employee was only just north of Page Avenue, the same west-east street on which the Holiday Inn Westport was located; and he was heading south toward his home.

Blank Mind

We next consider the administrative law judge's conclusion that employee was so intoxicated at the time of his accident that he was incapable of and was not engaged in his employment. "[A]n employee is not prohibited from recovering by reason of alcohol consumption unless he is intoxicated to the point where his mind is a 'total blank' due to intoxication. . . . For an employee's intoxication to be a defense to a worker's compensation claim it must be shown that the employee was intoxicated to such an extent that it was impossible for him to physically and mentally engage in his employment." *Bridges v. Reliable Chevrolet, Inc.*, 940 S.W.2d 51, 55 (Mo. App. S.D. 1997) (internal citations omitted) (overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003)).

We have examined many cases in this state where courts have looked at this affirmative defense. Unlike in the case before us, these courts were generally presented with undisputed alcohol tests. Nonetheless, in the overwhelming majority of cases, the courts held that the applicable employees were not so intoxicated as to be incapable of performing their work.

Typical of these cases is *Gee v. Bell Pest Control*, 795 S.W.2d 532 (Mo. App. W.D. 1990) (overruled on other grounds in *Hampton*, 121 S.W.3d at 230). In *Gee*, the employee was involved in an automobile accident. When he was tested for alcohol approximately one-and-a-half hours after the accident, his BAC was .25. The court concluded that the only evidence of a blank mind was the alcohol test and that “mere evidence of a high blood alcohol content is insufficient to support a denial of a claim on the basis of intoxication.” *Id.* at 536-537.

In the cases where the courts found a blank mind, the facts in addition to the test results were more convincing than in the case at hand. The following are typical of these cases. In *McClendon v. Mid City Discount Drugs, Inc.*, 870 S.W.2d 456 (Mo. App. W.D. 1994) (overruled on other grounds in *Hampton*, 121 S.W.3d at 228), the employee had a long history of alcoholism and drinking on-the-job; tested .420 BAC; and was observed staggering, smelling of alcohol, slurring his words, and sleeping in a back room. In *O’Neil v. Fred Evans Motor Sales Co.*, 160 S.W.2d 775 (Mo. App. 1942), the court had evidence of the employee’s numerous alcoholic drinks at two taverns. Furthermore, the best evidence showed that the employee had absolutely no recollection following his last tavern stop. In *Haynes v. R.B. Rice*, 783 S.W. 2d 403 (Mo. App. W.D. 1989), the employee had a history of blacking out due to excessive cocaine use. The court also found that he had injected large quantities of cocaine and drank four to six beers during the evening and morning before he was found passed out at work in scalding water. In *Haynes*, too, the employee suffered a loss of memory. Eyewitnesses saw him stumbling, falling, and unable to walk.

In the case before the Commission, we have absolutely no evidence of employee’s intoxication other than the test result itself. He had no history of alcohol abuse. First-hand witnesses indicated he was acting rationally and normally after the directors’ meeting. Even the emergency room doctors and policeman at the scene of the accident made no mention of suspecting alcohol use or abuse. No alcohol was found in his vehicle, the paramedic report said only that he had the smell of alcohol about him, and we have no idea from where Dr. Burnsed’s “Social History” notation came (which, it should be noted, does not say that the patient had been drinking; instead, it indicated that the patient drinks alcohol).

Even the test result itself is sharply disputed. Dr. Long testified that the records of DePaul Medical Center suggested that employee’s blood was drawn at a time (10:42 p.m.) it would have been impossible to draw his blood because it would have been too clotted. Based on that conclusion, Dr. Long speculated that the hospital may have mixed up its blood samples.

On the other hand, Dr. Terschluse, one of the emergency room doctors from DePaul Medical Center, provided insights to the events that took place at the hospital to try and save employee. He testified that the blood sample that produced a .02 BAC was drawn from employee at 9:55 p.m., only five minutes after employee was pronounced dead.

Furthermore, there is some reason to doubt the results from the medical examiner’s office. To begin with, the sheer quantity of alcohol employee would have had to consume to produce a .308 BAC was contrary to any history connected with employee. Also, medical evidence suggests that employee was internally bleeding in the abdominal area (it was distended) and head (it was fractured and blood was visible around the eyes, ears, and nose). This type of internal bleeding may have contaminated the blood sample taken by the medical examiner’s office, which was drawn approximately 12 hours after employee’s death. Accordingly, we believe it was error to rule that employee’s mind was a total blank at the time the accident occurred.

Even if we accepted the medical examiner’s .308 BAC result as being more accurate, evidence shows that employee was still capable of making numerous decisions while driving to the scene of the accident. He had gotten on to I-270 and headed north to I-70. He had exited that interstate and entered I-70 heading east. Then, after traveling numerous miles, he again exited that highway and entered I-170 going south. At the

time of the accident, he was sufficiently aware of distances and speeds that he honked at a vehicle ahead of him but going more slowly. He then executed a lane change to avoid that vehicle. Lastly, when his car went into the shoulder area, he apparently tried to correct himself back on to the highway. Thus, like many cases upon which we have relied, we are not willing to say that the test result alone proved employee's incapacity from working.

CONCLUSION

Employee's accident and death arose out of and in the course of his employment by employer. At the time of his accident on March 24, 2004, he was at a place where he could reasonably have been expected to be in the fulfillment of his work duties, which included attendance at the SLAA meetings after normal work hours. We find there is insufficient proof that employee was involved in any personal deviation from his business purposes or that he was incapable of engaging in his work due to alcohol consumption.

Accordingly, we reverse the February 13, 2008, award and decision denying compensation to dependents.

AWARD

The parties stipulated that the appropriate rate of compensation for death benefits is \$662.55 per week and that the dependents of employee as of March 24, 2004, were his wife -- Donna Barton -- and the children born in that marriage: Alexander Thomas Barton, Maria Rose Barton, and Catherine Marie Barton. None of the dependent children have reached the age of 18 years. We direct employer/insurer to pay beginning March 25, 2004, the weekly death benefit of \$662.55 to employee's dependents (in accordance with §287.240 RSMo), which amount shall be distributed as follows: \$165.63 to Donna Marie Barton; \$165.64 to Alexander Thomas Barton; \$165.64 to Maria Rose Barton; and \$165.64 to Catherine Marie Barton. The death benefits due to Alexander Thomas Barton, Maria Rose Barton, and Catherine Marie Barton shall be paid to Donna Marie Barton (in accordance with §287.240(5)), mother and natural guardian of such dependents, for their support, maintenance, and education.

Furthermore, the funeral bill from Ziegenhein Funeral Homes dated March 29, 2004, shows a total funeral cost of \$7,125.19. Section 287.240 RSMo states as follows:

If the injury causes death, either with or without disability, the compensation therefore shall be as provided in this section:

(1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding five thousand dollars.

Accordingly, we hereby award burial expenses to Donna Marie Barton in the total amount allowed under the statute: \$5,000.00.

The benefits and compensation awarded hereunder to dependents shall be subject to a lien in the amount of 25% of all payments ordered, in favor of dependents' attorney, for necessary legal services rendered on behalf of dependents.

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

Given at Jefferson City, State of Missouri, this 23rd day of October 2008.

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Although I do not agree with all of the administrative law judge's analysis, his decision and award was correct. Accordingly, I would modify his decision only to reflect that there was insufficient evidence that employee, Thomas Barton, was so intoxicated at the time of his accident on March 24, 2004, as to be incapable of doing his job. On the other hand, I am persuaded that employee was engaged in a personal deviation at the time of the accident.

Although an unpublished decision, the Southern District Court of Appeals' opinion in *Tanner v. Crest Foam Corp.* (2004 Mo. App. Lexis 214) supports my conclusion. In that case, the relevant employee was killed in a vehicular accident that occurred at a time and place the employee reasonably could have been expected to be in the course and scope of his employment as a territory sales manager. He had told his wife he was going to call on customers. He had, in fact, visited one customer previous to his accident. His employer required him to call on at least eight customers each day. He was dressed in his coat and tie and had all the proper accoutrements of his sales trade with him in the car at the time of his accident. His accident occurred at a location within his sales territory.

Nonetheless, the court found that he was on an alcohol-related personal deviation at the time of the accident. It based its decision on facts that, in part, were not unlike those in the case before us. Importantly, the court found that while he was in his sales territory at the time of the accident, he was not on the "customary and usual route [he] would have expected to follow to get to that area."

Similarly, in the case at hand, Mr. Barton's accident occurred along a route to his home that was completely illogical and that none of the witnesses would have used. This fact, coupled with his disappearance for a lengthy period of time and his extremely high blood alcohol content at the time of his accident, point to his having taken an alcohol-related personal deviation at the conclusion of the directors' meeting.

Therefore, since his accident was not in the course of his employment, no benefits should be granted.

Because the Commission majority have concluded otherwise, I must respectfully dissent.

Alice A. Bartlett, Member

AWARD

Employee: Thomas Barton (Dec.)

Injury No.: 04-034502

Dependents: Donna Barton, Spouse;
Alexander Barton, Child;
Catherine Barton, Child;
Maria Barton, Child

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Employer: W & M Properties

Additional Party: N/A

Insurer: Vigilant Insurance Co. C/O Chubb Services

Hearing Date: September 10, 2007 and October 4, 2007

Checked by: JKO

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: March 24, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was employed as a Regional Manager for Employer, and was killed in a one-car, roll-over accident.
12. Did accident or occupational disease cause death? Yes Date of death? March 24, 2004
13. Part(s) of body injured by accident or occupational disease: Body as a Whole
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Thomas Barton (Dec.)

Injury No.: 04-034502

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to result in the maximum applicable rates of compensation
- 19. Weekly compensation rate: \$662.55 for death benefits
- 20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
0 weeks of death benefits/disability from Employer \$0.00
- 22. Second Injury Fund liability: N/A

Total: **\$ 0.00**

- 23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.
The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Joseph A. Fenlon and Gregory G. Fenlon.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas Barton (Dec.)

Injury No.: 04-034502

Dependents: Donna Barton, Spouse;
Alexander Barton, Child;
Catherine Barton, Child;
Maria Barton, Child

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Employer: W & M Properties

Additional Party: N/A

Insurer: Vigilant Insurance Co. C/O Chubb Services

Checked by: JKO

On September 10, 2007, the dependent, Donna Barton, appeared in person and by her attorneys, Mr. Joseph A. Fenlon and Mr. Gregory G. Fenlon, for a hearing for a final award on her claim against the employer, W & M Properties, and its insurer, Vigilant Insurance Co. C/O Chubb Services. The employer, W & M Properties, and its insurer, Vigilant Insurance Co. C/O Chubb Services, were represented at the hearing by their attorney, Mr. John P. Kafoury. The Second Injury Fund is not a party to this case. Since there were some additional evidentiary issues and the possible need to introduce additional evidence, the record was left open for a period of time not to exceed 30 days, for the parties to receive rulings on the evidence and to decide if they wanted to introduce further evidence. The hearing reconvened on October 4, 2007 for that purpose, and the record was formally closed on that date. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

- 1) On or about March 24, 2004, Thomas Barton (Employee) sustained an accidental injury that resulted in the death of Employee.
- 2) Employee was employed by W & M Properties (Employer).
- 3) Venue is proper in the City of St Louis.
- 4) Employer received proper notice.
- 5) The Claim was filed within the time prescribed by the law.
- 6) At the relevant time, Employee earned an average weekly wage sufficient to result in the maximum applicable rate of compensation of \$662.55 for death benefits.
- 7) Employer has not paid any benefits to date.
- 8) Employee had the following dependents at the time of his death: his wife, Donna Barton, and his children, Alexander Barton, Catherine Barton, and Maria Barton.

ISSUES:

- 1) Did Employee's accident, resultant injuries and death, arise out of and in the course of his employment?
- 2) Is Employer liable for the funeral bill?
- 3) Are Employee's dependents entitled to receive death benefits under the statute?
- 4) Is entitlement to compensation under the statute barred by virtue of Mo. Rev. Stat. § 287.120.3, 287.120.4, 287.120.5, 287.120.6, or 287.120.7?
- 5) Employee filed an Objection to and Motion to Strike Results of Blood Alcohol Tests Performed by Medical Examiner that was to be ruled on as a part of the award.

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

- A. Dr. Terschluse's History and Physical from DePaul Health Center
- B. Drug Screen results from DePaul Health Center
- C. Blood Alcohol Test results from DePaul Health Center
- D. Trauma Activity Flow Sheet from DePaul Health Center
- E. Certified medical treatment records of DePaul Health Center
- F. Curriculum Vitae for Dr. Terry Martinez
- K. Employer's Mileage Reimbursement Report and check record for Employee's attendance at the March 24, 2004 St. Louis Apartment Association Meeting
- L. Employer's record of payment for Employee's membership fess in the St. Louis Apartment Association
- N. Employee's funeral bill totaling \$7,125.19
- O. Deposition of Dr. David A. Terschluse, with attachments, dated September 4, 2007
- P. Deposition of Mr. Vincent Sultana, with attachments, dated July 31, 2006
- Q. Deposition of Ms. Karen Shymanski dated February 9, 2007
- R. Deposition of Mr. Michael Peterson dated May 1, 2007
- S. Computer satellite printout of the area showing Westport Plaza and Employee's residence at the Georgetown Apartments

Employer/Insurer Exhibits:

- 1. Death Certificate of Thomas Barton (short form)
- 2. Death Certificate of Thomas Barton (long form)
- 3. Charlack Police Department report for the accident on March 24, 2004
- 4. Certified records of the Community Fire Protection District
- 5. Certified records of the St. Louis County Medical Examiner's Office
- 6. Certified medical records from DePaul Health Center
- 7. Deposition of Christopher Long, PhD, with attachments, dated July 25, 2007
- 8. Affidavit from Donna Barton
- 9. Street and Zip Code map of St. Louis City and County
- 10. Laminated street map of St. Louis City and County
- 11. Deposition of Dr. David A. Terschluse, with attachments, dated September 4, 2007

Notes: 1) *Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.*

2) *Exhibits G, H, I, J, and M were marked for Employee prior to hearing, but were never offered into evidence in this case.*

3) *Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on September 10, 2007.*

4) *Exhibits O and 11 are, in fact, the same deposition of Dr. Terschluse, which was marked separately by the parties, but then offered as a Joint Exhibit at the time of trial.*

EVIDENTARY RULINGS:

1) As noted above, on the first day of the hearing, September 10, 2007, Dependents' counsel filed an ***Objection to and Motion to Strike Results of the Blood Alcohol Tests Performed By Medical Examiner.*** Dependents raised this objection for the first time as the trial was beginning and requested a ruling on the objection and motion to strike

so that Dependents could determine if they wanted to call an additional medical witness. Given that Dependents' motion was a five-page document which had not previously been provided to the ALJ or opposing counsel before the trial was supposed to begin, the parties agreed that Employer's attorney would have one week from the date of trial to file a response to the motion, then the ALJ would have one week to review the motion, response and relevant documents to formulate a ruling to the motion. Dependents would then have the opportunity to decide if they wished to call any further witnesses before the record closed, no later than October 10, 2007.

Pursuant to this agreed upon schedule, Employer filed his response to the original motion on September 17, 2007. Dependents then filed a response to Employer's response on September 19, 2007, and finally, Employer filed the last responsive motion on September 21, 2007. The parties participated in a conference call on September 24, 2007 with the ALJ to learn the ALJ's ruling on the motion. The ruling was eventually formally entered into the record on October 4, 2007 when the hearing was reconvened, but since Dependents made the ruling on the motion one of the issues for this award, it will also be contained in this award. Dependents declined at that time to call any further witnesses or offer any other evidence, so the record was closed as of October 4, 2007.

Issue 5: Employee filed an Objection to and Motion to Strike Results of Blood Alcohol Tests Performed by Medical Examiner that was to be ruled on as a part of the award.

From my review of Dependents' motions and objections, it appears as if Dependents sought to have Dr. Long's findings and testimony excluded for two discrete reasons: 1) That Christopher Long is not a medical doctor, but rather a toxicologist, and thus cannot be a medical expert; and 2) That the chain of custody for the blood samples used by the medical examiner and toxicologist was not properly maintained and documented.

On the first point, based on my review of Christopher Long's deposition, his curriculum vitae, and the supporting records, I find that Long is a competent, well-qualified expert to testify in the area of toxicology and the effect of blood alcohol content on drivers. This ruling is reached by virtue of his educational background, experience, his position as the Chief Toxicologist for the St. Louis County Medical Examiner's Office, and his position as the Director of the Forensic and Environmental Toxicology Laboratory and Assistant Professor of Pathology at St. Louis University Medical School. While I find that toxicology is a medical specialty and there is nothing wrong with Christopher Long expressing his opinions within a reasonable degree of medical certainty, I also found in his deposition testimony on Page 70 that he agreed all of his opinions have been given within a reasonable degree of professional, scientific and medical certainty. Therefore, whether he is technically a medical doctor or not, he offered his opinions within the appropriate standard of certainty. I find that he is clearly giving opinions within his area of expertise and the testimony is admissible under Mo. Rev. Stat. § 490.065.

Dependents' attorney cites cases in support of his motion, however, in one of those cases he cited, ***Hagen v. Celotex Corp.***, 816 S.W.2d 667 (Mo.banc 1991), the Supreme Court allowed the testimony of a chemist and toxicologist to opine as to the harmful properties of asbestos and whether asbestos constitutes a health hazard, so long as there was no opinion on whether the asbestos was the cause of the cancer. Using that same analysis in the instant case, I find that Long is certainly allowed to opine as to the effect of alcohol on individuals and on the results of the testing he normally and routinely conducts in his area of expertise. Long is not testifying on the cause of death, that clearly was the car accident in this case, but he is testifying as to the cause of the accident, and the effect of the alcohol on the accident, both of which are within his area of expertise as a toxicologist.

Regarding Dependents' second point on the chain of custody, I find that Dependents' reliance on Mo. Rev. Stat. § 577.029 (and the string of cases construing that section, ruling on the admissibility of blood alcohol content testing in criminal proceedings), is misplaced in this Workers' Compensation proceeding. I further find that the records in evidence document a clear chain of custody of the blood samples used by Christopher Long and the Medical Examiner to reach their conclusions in this case.

Despite the fact that the Supreme Court dealt with the issue of the admissibility of blood alcohol content testing results in civil cases before the more stringent criminal testing statute was enacted, the fact remains that ***Bean v. Riddle***, 423 S.W.2d 709 (Mo. 1968), has never been overruled. Therefore, the findings and determination of the Court

in that case are still relevant in determining this issue in this case.

The Court in *Bean* laid out the general rule for the foundation of admissibility of blood alcohol content testing results in civil cases based on 29 Am.Jur.2nd, Evidence § 830, p.922. The Court ruled that it must be shown the blood to be tested was that of the party in question, the continuous custody of the blood sample has been accounted for until the analysis, and the specimen was properly cared for and preserved until the analysis, so that the results are reliable. The Court further found that in a civil case, the foundation laid for the introduction of the blood analysis evidence need not preclude every possibility of a doubt as to the identity of the specimen or a change in condition of the sample. Rather, so long as the routine and procedures of the laboratory have been shown in the evidence to be commonly accepted by the medical profession, then those procedures are acceptable to the Courts.

Based on my review of Dr. Long's testimony, as well as the supporting documents he relied upon from the Medical Examiner's Office, I find that there is a clear chain of custody of the blood and vitreous samples in question. Records show that Dr. Mary Case drew the samples from Thomas Barton on March 25, 2004 at 9:40 a.m. They were assigned M.E. Case No. 04-1950. The samples were transported by an agent on that same date, who signed for them, and they were received in the lab by Michael Bruder "s/u" (sealed and unopened) on that same date at 10:15 a.m., when he put them in the refrigerator. The samples from M.E. Case No. 04-1950 were assigned a lab number of 04-1452, and then there are numerous reports showing each date and time the samples were tested and then returned to the refrigerator. There is no question in my mind that the samples came from Thomas Barton, that a continuous chain of custody has been accounted for until the analysis, and that the samples were properly preserved and cared for until the analysis. Therefore, I find that the standard of admissibility in the *Bean* case has been met in this matter.

Even putting aside the question of whether the "Crimes and Punishment" section (Title XXXVIII) of the Missouri Statutes is applicable to a Workers' Compensation case, the *Bean* case, and the rulings therein, have not been disturbed or altered despite the newer statutes governing the validity of chemical tests contained in the "Crimes and Punishment" section (Title XXXVIII) of the Missouri Statutes. Therefore, to the extent that Dependents relied on the provisions and statutes contained in the Crimes and Punishment Chapter as opposed to the generally accepted foundation for evidence in a civil case enumerated in the *Bean* case, Dependents' reliance is misplaced.

In making this ruling, I also rely on the provision of the statute most directly related to this case, **Mo. Rev. Stat. § 287.120.6 (2000)**, which sets out the elements an Employer must prove in order to avail itself of the alcohol or drug penalty. Employer must prove (among other things) that the injury was sustained "in conjunction with the use of alcohol" or that the use of alcohol was "the proximate cause" of the injury." Unlike criminal proceedings requiring a specific numerical finding on blood alcohol content, nowhere does the Workers' Compensation statute require such a specific numerical finding. Therefore, some of the technicalities raised by Dependents, which might be more germane to a criminal proceeding involving blood alcohol content, are less relevant here.

I find that while many of Dependents' arguments on the testing, chain of custody, and the expertise of Dr. Long go to the weight the evidence should be given, they do not preclude the admissibility of that evidence under the statute or relevant case law.

Accordingly, Dependents' objection to the admissibility of the blood alcohol tests, and to Dr. Long's expertise and testimony, is overruled, and the Motion to Strike that evidence is denied. The blood alcohol test results and the testimony of Dr. Long is admitted into evidence in this case.

2) Dependents' attorney raised hearsay and hearsay upon hearsay objections to the St. Louis County Medical Examiner's Records (Exhibit 5) and to the Charlack Police Department Report (Exhibit 3).

Under Mo. Rev. Stat. § 490.680 and § 490.692.1, a certified copy of a business record, upon meeting the appropriate qualifications, shall be admitted as competent evidence. In this case the records of the St. Louis County Medical Examiner (Exhibit 5) were properly certified with an affidavit meeting the qualifications set out in §§ 490.680 and 490.692.1. I find that the reports are based upon the entrant's own observations, or on the information of others whose business duty it was to transmit the information to the entrant. *State v. Boyington*, 544 S.W.2d 300 (Mo.App. 1976). Additionally, I find that the parts of the record which Dependents objected to, and sought to redact and

exclude, are also contained in already admitted medical records and documents. To remove them from this record would then be meaningless since that same information is already in the record elsewhere. ***Therefore, for all of these reasons, I find that Exhibit 5 is fully admissible in evidence and I overrule the hearsay objections raised by Dependents' attorney at trial.***

With regard to the Charlack Police Department Report of the accident (Exhibit 3), I must acknowledge that the document on its face is not certified or otherwise authenticated. However, in reviewing the evidence admitted into the record already, I found copies of that same exact police report are also attached to the deposition of Mr. Sultana (Exhibit P) and marked as deposition exhibits 4 and 5. When Dependents offered Exhibit P, the deposition of Mr. Sultana, into evidence, Employer's attorney stated on the record that he had no objection to its admission so long as it came into evidence along with all of the attached exhibits to that deposition. Dependents' attorney confirmed on the record that all of the exhibits used at the deposition were included with Exhibit P, and Exhibit P was then fully admitted into the record, along with the attached exhibits. Dependents raised no objections at that point regarding any of the attached deposition exhibits to Exhibit P, and so essentially, by offering Exhibit P, and getting it admitted into the record, Dependents put copies of the Charlack Police Department Report of the accident into evidence. Since the report is already in evidence as a part of Employee's Exhibit P, Dependents' hearsay objections to Exhibit 3 are hollow and unfounded. ***Therefore, I find that Exhibit 3 is admitted into evidence and I overrule the hearsay objections raised by Dependents' attorney at trial.***

3) In Exhibit 7, Employer's objections on page 28 at lines 14-15 and 21-23 based on facts not in evidence and misconstruing the evidence are ***SUSTAINED***. In Exhibit 7, Employer's objections on page 54 at lines 7-8, 12-13, and 20-21 based on speculation and facts not in evidence are ***SUSTAINED***. Additionally, in Exhibit 7, Employer's objections on page 89 at lines 7-8 and the objections and argument from page 89 at line 19 through page 90 at line 5 are also ***SUSTAINED***.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including the live testimony from several witnesses, the expert medical and toxicology opinions and depositions, the medical records, the death certificates, the Medical Examiner's Records, the police report, the other documentary evidence, and the deposition testimony of the other witnesses, as well as based on my personal observations of the witnesses at hearing, I find:

1) Employee was a 43-year old male who worked for Employer at the Georgetown Apartment location in Shrewsbury, Missouri for approximately ten years. Although he was originally hired as an Assistant Manager, for the three or four years prior to his death on March 24, 2004, he was employed as the Regional Manager of Georgetown Apartments for Employer. As a Regional Manager, Employee was also responsible for overseeing other W & M properties in Kansas City, Kansas and Rochester Hills, Michigan. On or about March 24, 2004, he and his family were also living at the Georgetown Apartments in Shrewsbury. Employee earned a salary of approximately \$68,000.00 per year as a Regional Manager prior to his death. In his position as a Regional Manager for Employer, Claimant was also a member of the Board of Directors for the St. Louis Apartment Association (SLAA). Employer paid his **yearly membership dues to the SLAA** (Exhibit L) and also paid him mileage for his travel to and from regular SLAA meetings.

2) Employee's direct supervisor, **Vincent Sultana**, testified live at hearing and also by deposition (Exhibit P). Mr. Sultana has worked for Employer in New York since 1972. He is currently a Vice President for Employer. He confirmed that he came to St. Louis 3-5 times per year, and Employee was the one actually running the Georgetown Apartments property for Employer. Mr. Sultana confirmed that Employer has no other properties in the area of Employee's car accident, and, in fact, had no other properties at all in Missouri except the Georgetown Apartments. He also testified that Employer was not looking at purchasing any property in the area of the car accident, and he had no knowledge of why Employee was at St. Charles Rock Road and Highway 170 on that night at the time of the car accident.

3) Sultana testified that Employee was totally in charge of Georgetown Apartments. Sultana testified as to the

company's handbooks, rules, and policies. He testified that company policy prohibits the use of alcohol during business hours. Sultana stated that Employee would be very familiar with the company handbook as the Regional Manager, because he administered the handbook and enforced compliance with the other employees. There were also signed acknowledgement forms from Employee in his personnel records that show he received the handbooks containing these provisions. Sultana testified that it would not have been a violation of company policy for Employee to have had "a drink" after an SLAA meeting. Sultana did testify, however, that Employee should not have become intoxicated at an SLAA meeting and that such behavior would be a violation of company policy, because he would not then be representing the company well. In his deposition, Sultana testified that he has never been to an SLAA meeting and did not even know that alcohol was available at the location of an SLAA meeting. Sultana testified during his deposition that he had no actual knowledge that Employee had been drinking on the day of the incident until weeks after the death when he received the death certificate. He confirmed that the trip to and from the meeting was authorized by Employer, and the company paid **mileage for the day of the accident** for the trip to and from the SLAA meeting because Employee's wife typed in the mileage request (Exhibit K). The records submitted into evidence along with Mr. Sultana's deposition shows that Employee had actually put in for vacation time from March 18 to March 26, 2004.

4) Despite having put in for vacation for the day of the accident, Employee returned from Las Vegas and traveled to the Holiday Inn at Westport Plaza (now known as the Doubletree Hotel) for the SLAA meeting on March 24, 2004. This hotel was at or near the intersection of Highway 270 and Page Avenue in St. Louis County. The hotel had a bar/restaurant attached to it as a part of the hotel complex. Employee's wife said that she last spoke to her husband at approximately 3:00 p.m. on March 24, 2004. She said that she never asked him when he was coming home, and she doesn't know why the accident occurred where it did.

5) According to the deposition testimony of **Karen Shymanski** (Exhibit Q), Association Executive of the SLAA, Employee initially attended the meeting of the SLAA Board of Directors at the Holiday Inn Westport from approximately 4:00 to 5:00 p.m. on March 24, 2004. Karen Shymanski testified in her deposition that alcoholic beverages were not allowed during the Board of Directors' meeting. Since she first saw Employee at the start of the Board of Directors' meeting, she had no idea what he did prior to his arrival at the meeting. After the meeting, at approximately 5:30 p.m., registration began for the general members of the SLAA with a buffet dinner served and a speaker for the evening. Ms. Shymanski testified that alcoholic beverages were not provided by SLAA to its members during the SLAA sponsored meeting, presentation, and dinner. Ms. Shymanski did agree that there was no prohibition by the SLAA for members to visit the nearby bar or the cash bar to obtain alcoholic beverages during the presentation and dinner. She testified that the last time she saw Employee was around 5:30 or 6:00 p.m. She did not remember seeing Employee in the room for the dinner or the speaker. She went to look for him at approximately 8:15 p.m. in the bar, where members routinely went after the meeting for a cocktail, but she did not find him there on that evening. In the past, she had witnessed Employee having a drink during the dinner or going with others into the bar after the meeting for a drink. Ms. Shymanski also recalled an alleged conversation with Employee concerning routes that he might take home from SLAA Westport meetings, however she was unclear as to the routes and highway labels, because she said she always took Highway 270 to her home in South County.

6) **Clare Halstead**, an employee of St. Louis Apartment Finder Magazine (a real estate publication), testified live at the hearing in this matter. She indicated that Employee was her sister's boss at Georgetown Apartments, where her sister, Katie Scott, was the property manager. Ms. Halstead testified that she knew Employee and had seen him at other SLAA meetings. She testified that she saw Employee at the SLAA meeting on March 24, 2004 drinking a dark colored cocktail at around 5:30 or 6:00 p.m. She said that she saw him before the meal at the bar/restaurant. She did not remember if he looked intoxicated, but he did not do anything out of line in her opinion. She knew that Employee had at least one drink that evening but did not know how many more, because she was not with him the whole time. She was there working with Michael Peterson, and there were a lot of people at the meeting, maybe 50-75 total. She further testified that after the SLAA meeting, she was with Mr. Peterson at Harpo's (another bar/restaurant) when they found out about Employee's accident, and they went to the hospital where he had been taken.

7) **Michael Peterson**, another employee of Apartment Finder Magazine, testified by deposition (Exhibit R) and testified live at the hearing. He confirmed that he was present at the SLAA meeting on March 24, 2004. He said that Employee was a friend of his for over 8 years. He testified that Employee enjoyed drinking dark beers. Both he and

Employee were there for the Board of Directors' Meeting and then the general membership meeting later that evening. He first saw Employee that day around 3:30 p.m. for the Board Meeting. He confirmed there was no liquor at the Board Meeting, but Mr. Peterson said that he knew Employee had just returned from Las Vegas and he looked tired. Mr. Peterson said that the first time Employee would have had a drink was around 5:30 or 6:00 p.m. after the Board Meeting. Mr. Peterson testified that he saw Employee drinking at least one alcoholic beverage that evening, which was typical for all of them at gatherings like this, but he had no idea how many drinks Employee may have had over the course of the evening. He confirmed that liquor was available to everyone before, during and after dinner. He remembered having a conversation with Employee during the evening at one point regarding deferred maintenance of apartment buildings, and he remembered seeing Employee in the area by the bar/restaurant where everyone was congregating, but he candidly admitted that he was working the room as a vendor to secure new business. Since he already had Employee's business, he did not pay that much attention to him during the evening. He did not think Employee appeared intoxicated when he saw him. He did not know if Employee ate dinner or not, and he did not know what time Employee left the hotel that night. He admitted that he did not eat dinner because he was working the room for business by the bar/restaurant since "it wasn't much of a speaker." He had no idea why Employee had the accident where it occurred north of any direct route to Employee's home in Shrewsbury. Mr. Peterson confirmed that he left to go to Harpo's in Chesterfield at 9:00 or 9:30 p.m., and that is where they got the phone call that Employee had been in the accident. They went to the hospital, but by the time they got there, it was too late.

8) The **Charlack Police Department Report** (Exhibit 3) confirms that Employee was involved in a one-car, roll-over accident on Southbound Highway 170, about 200 feet south of St. Charles Rock Road on March 24, 2004 at approximately 8:40 p.m. The traffic conditions were normal, the road was dry, straight and level, and the weather was clear. According to witnesses interviewed by the police at the scene of the accident for the report, Employee's vehicle approached the witness's vehicle at a high rate of speed and the witness heard a horn behind him. The witness moved into a different lane and then Employee's vehicle swerved into the inside lane and off the road. Employee's vehicle then went through the grass median, over the hill, went airborne, rolled, and then landed on its side in the Northbound lanes of traffic. The police officer determined that Employee's excessive speed and improper lane usage were probable contributing circumstances to the accident.

9) The records of the **Community Fire Protection District** (Exhibit 4) confirm that an ambulance was dispatched to the scene of the car accident on Highway 170 and St. Charles Rock Road. The ambulance arrived at 8:45 p.m. Employee was found in the vehicle between the front seat and the second row of seats lying on the right side window. The notes indicate that, "Pt [patient] has smell of alcohol about him." Employee was unresponsive. IV lines were started in the left hand and right "ac" (inner elbow). He was immobilized and taken to DePaul Hospital.

10) The medical treatment records from **DePaul Health Center** (Exhibits E and 6) document the care Employee was given after arriving by ambulance at that facility following the accident on March 24, 2004. Dr. John Burnsed's Clinical Report indicates that Employee had no pulse and no spontaneous respirations at the scene of the accident. He presented to the hospital "basically dead from the scene of the accident with the medics attempting to revive him." The social history section of the report indicates, "Patient drinks alcohol." It is unclear how exactly that is in the report since Employee arrived alone at the hospital and Employee's wife denies telling anyone at the hospital that he drank socially. Initial blood tests were drawn femorally at 9:43 p.m. according to the lab report to measure blood gases and electrolytes. Employee was given medications, and 2 units of blood and 4 liters of fluid through the left hand and right "ac" lines, up until the time he was pronounced. However, with no sign of electrical activity on his EKG, Employee was pronounced dead at 9:50 p.m. by Dr. Burnsed and Dr. David Terschluse. Dr. Terschluse diagnosed blunt trauma to the left side of the chest and abdomen with probably exsanguinating hemorrhage into the abdomen, traumatic cardiac arrest, and other diagnosis pending return of urine and serum toxicology (Exhibits A, E and 6).

11) Given that the third diagnosis was pending the results of toxicology labs, additional blood and urine had to be collected for those tests. According to the Nursing Progress Record, labs and urine were obtained for toxicology at 9:55 p.m. (Exhibits D, E and 6). However, according to the laboratory reports, the blood and urine samples were not collected until 10:42 p.m. (Exhibits B, C, E and 6) It is unclear from the records from what part of the body the labs were drawn. It is equally unclear if they were drawn through an IV or not. Those laboratory reports showed a positive result for alcohol with a level of 22.0 or a blood alcohol content of 0.02 (Exhibits C, E and 6). The Nursing Progress

Record further indicates that Employee's wife was notified at 10:15 p.m. and post-mortem care was initiated. Finally, the Medical Examiner was notified at 11:00 p.m. The Expiration and Release Report indicates that the ET (endotracheal tube) was accidentally taken out of the body by personnel who did not know it should have been left in place for the medical examiner's review of the body.

12) The certified records of the **St. Louis County Medical Examiner** (Exhibit 5) document the external examination of Employee's body and the injuries he sustained in the accident to various parts of his body. They also contain the order from Dr. Mary Case for the alcohol (ETOH) tests of the blood and vitreous samples she submitted to the lab. The tests were run under the direction of Dr. Christopher Long, the chief toxicologist for St. Louis County, in the St. Louis County Medical Examiner's Office. The blood alcohol results showed a level of 244 mg/dl or a blood alcohol content of 0.244 gm%. The vitreous alcohol results showed a level of 308 mg/dl or an alcohol content of 0.308 gm%. On the basis of her examination and the lab results, the St. Louis County Medical Examiner ruled the immediate cause of death was craniocerebrospinal trauma, with the other significant condition being acute ethanol intoxication. The **Certificates of Death** (Exhibits 1 and 2) list these same causes of death of craniocerebrospinal trauma and acute ethanol intoxication.

13) **Maps of St. Louis and St. Louis County** (Exhibits 9 and 10) allow this fact-finder to locate the site of the SLAA meeting at Westport at Highway 270 and Page Avenue, as well as to locate the site of Employee's residence at the Georgetown Apartments in Shrewsbury off Laclede Station Road near Watson Road. A review of the maps shows numerous possible reasonable routes between those sites that include Highway 270 south to Highway 44 to Murdoch and Laclede Station Road, or Page Avenue east to Highway 170 south to Highway 40 to Laclede Station Road. In fact, the area between those two points is generally surrounded by major arteries of Highway 270 on the west, Page Avenue on the north, Highway 170 on the east and Highway 44 on the south. In that area there are numerous possible routes from the meeting to Employee's home which could have been followed. However, the maps also show that the site of the accident that caused Employee's death is approximately a mile northeast of that intersection of Highway 170 and Page Avenue, and thus outside of this area previously described. Neither Employee's wife, nor anyone else for that matter, could clearly articulate a reason why Employee was north and east of any reasonable route to his home from the meeting. Employee's wife confirmed that she did not know the route he took, nor did she know why the accident occurred where it did.

14) Employee's wife signed an **affidavit** (Exhibit 8) swearing that she does not have any of the credit cards or credit card statements which had been issued to her husband in his own name or to her and her husband jointly. She further stated that she does not recall any of the credit card issuers or card numbers, and does not know how to obtain them.

15) Employee's **funeral bill** (Exhibit N) from Ziegenhein & Sons Funeral Homes dated March 29, 2004 shows a total funeral cost of \$7,125.19 for Employee's funeral arrangements.

16) The deposition of **Dr. David A. Terschluse** was taken by Employee on September 4, 2007 and jointly offered into evidence by Employee and Employer (Exhibits 11 and O). Dr. Terschluse is a general surgeon and a trauma surgeon, but not a toxicologist. He confirmed that when he arrived at Employee's bedside, blood was not pumping from the heart and they were in the process of trying to resuscitate the patient. He testified that he did not see any signs of alcohol, but agreed that if Dr. Burnsed noted the patient drinks alcohol in the social history, then either something in his personal belongings suggested that history to the doctor, or perhaps Dr. Burnsed noticed the smell associated with the patient. Dr. Terschluse agreed that the hospital was required by law in all traumatic injuries to call the medical examiner to ascertain the precise cause of death, including whether or not alcohol was a cause. He agreed the medical examiner has the "final say-so" as to the cause of death. Regarding the blood that was drawn for the toxicology tests at DePaul, Dr. Terschluse testified that he did not draw it, he did not know what part of the body it was drawn from, and he did not know any of the details on the chain of custody of the blood from the body to the lab to the toxicologist. He did not even know who the toxicologist was who interpreted the results. He confirmed there was no vitreous sample drawn or tested at DePaul. He confirmed the urine and serum toxicology results were never returned to him to write a finished diagnosis and that is why the report still lists the one diagnosis as pending.

17) The deposition of **Dr. Christopher Long** (Exhibit 7) was taken by Employer on July 25, 2007 to make his opinions in this matter admissible at the hearing. Dr. Long is a forensic toxicologist and an associate professor of

pathology with the St. Louis University School of Medicine, Department of Pathology. He is board certified in forensic toxicology and has a double masters and PhD in toxicology. He has worked in this field for over 30 years. In addition, he is the Chief Toxicologist for the St. Louis County Medical Examiner's Office, a position he has held since 1992. In that position, he was involved in Employee's case in interpreting the toxicology test results. Dr. Long has been qualified as an expert on blood alcohol content and toxicology in federal court, as well as in state courts in Missouri, Illinois and Wisconsin. In his position as the Chief Toxicologist for St. Louis County, he was the final supervisory authority in rendering the toxicology report in this matter.

18) After reviewing the records in this case, and after having reviewed and signed off on the toxicology test results conducted in his laboratory in his position as the Chief Toxicologist for the St. Louis County Medical Examiner's Office, Dr. Long issued a report dated June 4, 2007. In that report, he confirmed that Employee's post mortem blood analysis demonstrated 0.244 gm% (244 mg/dl) and his vitreous demonstrated 0.308 gm% (308 gm/dl) alcohol concentrations. He explained in his report and testimony that a 0.244 gm% blood alcohol "demonstrates significant impairment of the nervous system." He noted that impairment of vision, cognition, reaction times, attention, muscular coordination, and judgment occur from a blood alcohol content in this range. He explained that the "body's nervous system is impaired and cannot function properly in the performance of complex tasks, such as motor vehicle operation, and this results in accidents." He further explained that the 300+ alcohol in the vitreous "represents even greater impairment as this represents the brain concentration." Essentially, he had an impaired ability to see, understand what he was seeing, and decide on appropriate actions. His whole nervous system was unable to function properly. He noted that as a person exceeds the 200 level, they generally become very lethargic. In light of all this, he opined, "It is clear that the excessive alcohol consumption was the proximate cause to this accident." He confirmed that all of his findings and opinions were given within a reasonable degree of scientific, medical and professional certainty within his area of expertise.

19) Dr. Long testified extensively about the chain of custody of the blood and vitreous samples that gave rise to the above-referenced test results. Based on the records in the file, he explained that Dr. Case drew the samples at approximately 9:40 a.m. on March 25, 2004. The samples were transferred to Mary Hunt, who then transferred them to Mike Bruder in the toxicology laboratory. He received the samples sealed and undamaged, and placed them in temporary refrigerated storage at approximately 10:15 a.m. on March 25, 2004. He confirmed the new case number assigned to the samples in the laboratory which would then appear on all subsequent chain of custody and test result documents. He explained that the blood was tested twice on two separate days and the vitreous was run in duplicate to ensure the accuracy of the test results. He noted that the results must agree within 10% for accuracy purposes and then the results are averaged for the final result on the report. He also confirmed that his original report to the Medical Examiner summarizing the toxicology results was dated April 8, 2004. He noted that the blood alcohol content was approximately 3-times the legal limit and the vitreous was 3 1/2-times the legal limit. Dr. Long confirmed that the difference between the blood and vitreous results was not substantial in his opinion.

20) While testifying about the differences between the findings on the blood and vitreous results, Dr. Long explained that the vitreous is protected within the skull and so it's unable to be contaminated, and that result reflects the brain concentration, or the impairment in the brain at the time of death. Dr. Long was extensively cross-examined on various reasons why the blood alcohol testing results could have been compromised because of microbial fermentation, local diffusion of ethanol into the surrounding tissues, or internal organ rupture from abdominal trauma. However, in all of these scenarios, Dr. Long clearly testified that while these could have had an effect on the blood alcohol results, they would not have had any effect on the vitreous results, and that is why the lab ran the vitreous tests in this case. In essence, the vitreous results confirmed their blood alcohol findings in this case, which allowed him to effectively rule out contamination or any other compromise of the blood alcohol test results. When questioned about the possible effect on the test results of exposing the blood to oxygen or on fluid replacement at the hospital, he confirmed that both could serve to lower the overall blood alcohol test result, but they would not be responsible for an artificially raised result.

21) When asked to comment on the differences between his laboratory's test results and those of DePaul Hospital, Dr. Long testified that there was some confusion in the records regarding the time of the draw, whether within minutes of Employee's death or an hour later. He explained that a femoral blood draw could not be done an hour after Employee's death because of blood clots when the circulation in the body stops. He said that he was certain that the

samples his lab tested belonged to Employee based on the chain of custody documentation, but he could not be sure DePaul tested the right sample. He also testified that he did not know if perhaps DePaul tested blood drawn out of an IV line which could artificially lower the alcohol reading.

RULINGS OF LAW:

Based on a comprehensive review of the evidence described above, including the deposition and live testimony of the various witnesses, the expert medical and toxicology opinions and depositions, the medical records, the death certificates, the Medical Examiner's Records, the police report, the other documentary evidence, and my personal observations of the witnesses at hearing, as well as based upon the applicable laws of the State of Missouri, I find the following:

Issue 1: Did Employee's accident, resultant injuries and death, arise out of and in the course of his employment?

Under **Mo. Rev. Stat. § 287.120.1 (2000)**, "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment...." Courts have consistently held that for an employee to recover for an accident under this chapter, the employee must prove **both** that the accident arose out of his employment **and** that the accident occurred in the course of his employment. "These are two separate questions, both of which must be answered affirmatively before an employee is entitled to compensation." **Knipp v. Nordyne Inc.**, 969 S.W.2d 236, 238 (Mo.App. W.D. 1998) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

The Supreme Court in **Abel v. Mike Russell's Standard Service**, 924 S.W.2d 502, 503 (Mo.banc 1996) held that "An accident arises out of the employment relationship 'when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.' **Kloppenborg v. Queen Size Shoes, Inc.**, 704 S.W.2d 234, 236 (Mo.banc 1986)..." It further held that an injury occurs in the course of employment "'if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment.' **Shinn v. General Binding Corp.**, 789 S.W.2d 230, 232 (Mo.App. 1990)."

The Court in **Abel** also importantly held that the entire sequence of events that takes place, the injuries suffered, and the cause or causes that give rise to those events and injuries must be considered to determine if the accident arises out of the employment relationship. **Abel** at 504.

The employee bears the burden of proof on all essential elements of his Workers' Compensation case. **Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute**, 793 S.W.2d 195 (Mo.App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. **Fischer** at 199.

The very basic facts surrounding the accident are not in dispute. I find that Employee was killed in a one-car, roll-over accident on southbound Highway 170, about 200 feet south of St. Charles Rock Road on March 24, 2004 at approximately 8:40 p.m. I find that at the time of Employee's accident the traffic conditions were normal, the road was dry, straight and level, and the weather was clear. Earlier that afternoon/evening, I find that Employee was attending an SLAA meeting at the Holiday Inn Westport. I find that Employer authorized Employee's participation in that organization, paid for his dues to belong to that group, and reimbursed his mileage for attending SLAA functions.

In reaching my further conclusions in this case, it was important to make two initial determinations. First, it was essential to piece together a timeline of the events surrounding this accident based on the testimony of the various witnesses, since Employee was obviously not present to testify about such a timeline. Second, it was necessary to

make a finding on the credibility and reliability of the competing medical findings regarding Employee's blood alcohol content at the time of the accident.

From piecing together the credible and reliable portions of the testimony of the various witnesses in this case, I find the following timeline of events leading up to the time of Employee's fatal accident on March 24, 2004. I find that Donna Barton, Employee's wife, last spoke to him at approximately 3:00 p.m. She had no idea when he was coming home, nor what route he might take to get home from the meeting at Westport. Based on the testimony of Mike Peterson and Karen Shymanski, I find that Employee arrived at the SLAA Board Meeting sometime between 3:30 and 4:00 p.m. I find that Employee had nothing alcoholic to drink from his arrival at the Board Meeting until approximately 5:30 p.m. when the Board Meeting ended. I find that three witnesses (Mike Peterson, Karen Shymanski and Clare Halstead) place Employee at or near the hotel bar with an alcoholic beverage between 5:30 and 6:00 p.m. During that time period, Employee had a conversation with Mike Peterson and Clare Halstead regarding deferred maintenance when he did not appear intoxicated to either of them.

Although Mike Peterson suggested that perhaps he saw Employee sometime thereafter, he was unable to definitively testify to a time of that sighting, and so I find that it is impossible to know if anyone actually saw Employee after the 5:30 to 6:00 p.m. timeframe when Employee was first seen drinking. Additionally, Mike Peterson was admittedly busy working the room to secure new business and did not pay attention to Employee since he already had Employee's business. Therefore, since he was clearly preoccupied with other matters and admittedly not paying attention to Employee after the 5:30 to 6:00 p.m. timeframe, I do not find Mr. Peterson's testimony about any supposed sighting of Employee after that time to be particularly reliable or credible.

I find that the evidence clearly establishes that no one spent the whole evening with Employee to know exactly how much he drank. No witness ate dinner with him or even knew if Employee ate dinner. Based on Mike Peterson's testimony, it is clear that some individuals at the meeting did not eat dinner because they were not intrigued by the speaker. The next time that someone looked for Employee was around 8:15 or 8:30 p.m. when Karen Shymanski looked in the bar for Employee and was unable to find him. There is no clear evidence to know if Employee even stayed at the SLAA meeting or instead went somewhere else between 5:30-6:00 p.m. and the time of his car accident. I find that the credible and reliable evidence establishes that Employee was basically unaccounted for from 5:30 or 6:00 p.m., when he started drinking alcohol, until shortly after 8:30 p.m. when he crashed his car on Southbound Highway 170 near St. Charles Rock Road.

As Employee was basically unaccounted for for 2 ½ to 3 hours prior to the accident, it becomes even more important to look closely at the circumstances surrounding the accident, including the site of the accident, to try to determine if the accident arose out of and in the course of his employment. In that respect, it is important to determine which of the competing medical findings regarding Employee's blood alcohol content at the time of the accident are more credible and reliable.

After a thorough review of all the evidence in the record, I find that the test results of Dr. Christopher Long and the St. Louis County Medical Examiner's Office, as well as the opinions of Dr. Long based on those results, are more competent, credible, reliable and persuasive, than the results from DePaul Hospital. The test results from Dr. Long came from samples for which there is a clear and traceable chain of custody. Conversely, there is no clear chain of custody for the sample that gave rise to the DePaul test results. In fact, there is a frank discrepancy in the DePaul medical records regarding when the sample was even drawn. Additionally, there is no indication where the blood at DePaul was drawn from, nor who conducted the tests, or what their qualifications might be. Admittedly, it is not completely clear where the Medical Examiner drew the blood from for their tests, but the Medical Examiner also had a vitreous sample to double-check the accuracy of their results. No such vitreous sample was taken or tested at DePaul. Finally, to ensure the accuracy of their results, the Medical Examiner had two tests run on the blood and vitreous samples. Only if the results agreed within 10% of each other would the results be judged as accurate, which is the case here. Quite frankly, when comparing the quality checks, chain of custody documentation, and blood as well as vitreous samples which were tested for the Medical Examiner, it is entirely clear that the results from Dr. Long's laboratory and his opinions based on those results, are more competent, credible, reliable, and persuasive than the results from DePaul Hospital.

Therefore, I find that Employee had a blood alcohol content of 0.244 gm% (244 mg/dl) and a vitreous alcohol content of 0.308 gm% (308 gm/dl) at the time of his accident on March 24, 2004. I further find, in accordance with Dr. Long's credible and persuasive opinion, that a 0.244 gm% blood alcohol "demonstrates significant impairment of the nervous system." I find that Employee would have had impairment of vision, cognition, reaction times, attention, muscular coordination, and judgment because of his blood alcohol content in this range. I find credible Dr. Long's opinion that the "body's nervous system is impaired and cannot function properly in the performance of complex tasks, such as motor vehicle operation, and this results in accidents." I further find that the 300+ alcohol level in the vitreous sample represents even more significant impairment at the level of the brain because of the close proximity of the eye to the brain. I find that Employee essentially had an impaired ability to see, understand what he was seeing, and decide on appropriate actions. I find that his whole nervous system was unable to function properly. Finally, I find it credible and persuasive when Dr. Long opined that, "It is clear that the excessive alcohol consumption was the proximate cause to this accident."

Although we do not know Employee's exact whereabouts for almost 2 ½ to 3 hours, based on these blood alcohol and vitreous alcohol content findings, it is clear that he was somewhere consuming a large quantity of alcohol during that time. Someone who could have potentially filled in some of this timeframe or at least perhaps established his whereabouts during some of this time was Employee's wife, through the production of credit card receipts or statements for the day of the accident. Admittedly, we do not know if Employee even used a credit card to pay for his expenses at the hotel where the SLAA meeting was held, or anywhere else he may have gone that evening. However, instead of simply producing the credit card statements, she instead filed an affidavit (Exhibit 8) indicating that she did not have any of the credit cards or credit card statements issued to her husband or to her and her husband jointly. She further indicated in the affidavit that she did not know any of the credit card issuers or the numbers of said cards. It is hard for this fact-finder to believe that Employee's wife had no knowledge at all of the credit card issuers or numbers, nor access to the statements sent to her husband or to her and her husband for jointly issued accounts. Nonetheless, for whatever reason, Employee's wife was unable to fill in this timeframe at all, and so Employee remains essentially unaccounted for for the whole 2 ½ to 3 hours prior to his death.

Finally, in light of the test results and the testimony confirming alcohol consumption by Employee in connection with this meeting, it is important to consider Employer's policy on alcohol use in the workplace, and whether Employer had any knowledge of Employee's consumption of alcohol at these SLAA meetings. There is no dispute that Employer's handbooks, rules, and policies prohibit the use of alcohol during business hours. Mr. Sultana stated that Employee would be very familiar with the company handbook as the Regional Manager, because he administered the handbook and enforced compliance with the other employees. I also found that there were signed acknowledgement forms from Employee in his personnel records that show he received the handbooks containing these provisions. Therefore, I find that Employee had actual knowledge of Employer's alcohol policy. In his deposition, Mr. Sultana testified that he has never been to an SLAA meeting and did not even know that alcohol was available at the location of an SLAA meeting. Mr. Sultana testified that it would not have been a violation of company policy for Employee to have had "a drink" *after* an SLAA meeting. Sultana did testify however that Employee should not have become intoxicated at an SLAA meeting and that such behavior would be a violation of company policy, because then he would not be representing the company well.

As noted above, since Employee's whereabouts have not been clearly established for the 2 ½ to 3 hours prior to his death, in trying to determine if the accident arose out of and in the course of employment, it is also important to consider where exactly the accident occurred. Employee's meeting was at the Westport Holiday Inn at Highway 270 and Page Avenue. His home (and office) was at the Georgetown Apartments in Shrewsbury, Missouri. Certainly, from my review of the maps in evidence, I can see that there are some fairly direct routes from the meeting site to his home. He could have taken Highway 270 south to Highway 44 to Laclede Station Road. If he wanted to stay off of Highway 270 and follow a more direct route home, he could have taken Page Avenue east to Highway 170 south to Highway 40 to Laclede Station Road. In fact, the area between those two points is generally surrounded by major arteries of Highway 270 on the west, Page Avenue on the north, Highway 170 on the east, and Highway 44 on the south. In that area there are numerous possible routes from the meeting to Employee's home which could have been followed. However, the maps also show that the site of the accident that caused Employee's death is approximately a mile northeast of that intersection of Highway 170 and Page Avenue, and thus outside of this area previously described. Neither Employee's wife, nor anyone else for that matter, could clearly articulate a reason why Employee

was north and east of any reasonable route to his home from the meeting. Employee's wife confirmed that she did not know the route he took, nor did she know why the accident occurred where it did.

Employee's attorney suggests that perhaps he took a route north on Highway 270, to Highway 70 east, to Highway 170 south when the accident occurred. However, there is absolutely no credible evidence in the record to suggest that that is the route Employee took. It is nothing more than Employee's attorney's conjecture. He suggests that Employee took this route because he wanted to avoid Highway 270 south because of construction, and because he wanted to stay off of city streets like Page Avenue. However, staying off of city streets makes no sense as a reason, when going down Highway 170 would necessitate going on city streets down Laclede Station for a longer distance to his home, than if he took Highway 44.

In any event, in the absence of any clear evidence to establish why Employee was where he was, when he was killed in the car accident, I find that Employee had no work-related reason for being north of Page Avenue on Highway 170, if he was supposed to be traveling from Westport to Shrewsbury. I do not find any reasonable way home from Westport to Shrewsbury that would include travel over a mile north of Page Avenue on Highway 170. At the very least, I find that Employee was in the midst of a deviation, and although he was trying to get back into the course of his employment at the time of the accident, since he was heading south on Highway 170, I find that he had not yet returned to the course of his employment before the accident occurred.

In the case of *Miller v. Sleight & Hellmuth Ink Co.*, 436 S.W.2d 625 (Mo. 1969), the Supreme Court ruled that when an employee abandons his employment duties and engages in work or pleasure purely his own, the employer is not liable for accidents during that time, because the accidents would not arise out of and in the course of his employment. The Court further held that the test for when a deviation begins and ends is a question of fact to be determined by the Commission and is not necessarily a matter of time consumed and distance traveled. It is a finding of fact for the Commission to determine if the accident occurred before or after his employment had resumed following the deviation.

In this case, given that Employee was killed at a place he should not reasonably have been in the course of his employment, and given that Employee has failed to offer any credible or reliable evidence to explain why he was at that location for any legitimate business or employment interest, I find that the accident occurred in the midst of a personal deviation. I further find that he had not yet returned to a reasonable route that would have then put him back in the course of his employment. As such, I find that Employee has failed to meet his burden of proving that the accident arose out of and in the course of his employment.

In addition to the deviation issue, which by itself would be enough of a basis on which to deny benefits in this case, I also find that Employee was so intoxicated that he was mentally and physically unable to engage in his employment, and thus his accident did not arise out of or in the course of his employment. On this separate and distinct basis, it is also then appropriate to deny benefits under the statute for this injury.

The case law on intoxication in the workplace has commonly held that apart from the statutory limitations on recovery of benefits in § 287.120.6, an employee is not prohibited from recovering benefits by reason of alcohol consumption unless he is intoxicated to the point where his mind is a "total blank." *Gee v. Bell Pest Control*, 795 S.W.2d 532 (Mo.App. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). In other words, the question is whether employee was so intoxicated that it was mentally and physically impossible for him to engage in his employment. *Swillum v. Empire Gas Transport, Inc.*, 698 S.W.2d 921 (Mo.App. 1985) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

In this case, based on Employee's blood alcohol content of 0.244 gm% and his vitreous alcohol content of 0.308 gm%, based on his unknown whereabouts for almost 2 ½ to 3 hours prior to the accident, based on the site of the accident outside of any reasonable route from the meeting to his home, and based on Dr. Long's credible testimony of the effects that such levels of alcohol in the body could have on an individual's ability to function, I find that at the time of the car accident Employee was not able to mentally or physically engage in his employment. As such, Employee's car accident did not arise out of and in the course of his employment. Therefore, Employee and/or his dependents are not entitled to benefits under the statute for this accident.

I also base this decision on the credible and reliable facts I have found in the Charlack Police Report regarding the circumstances and conditions at the time of the accident. The undisputed and uncontradicted evidence shows that the traffic conditions were normal, the road was dry, straight and level, and the weather was clear. According to witnesses interviewed by the police at the scene of the accident for the report, Employee's vehicle approached the witness's vehicle at a high rate of speed and the witness heard a horn behind him. The witness moved into a different lane and then Employee's vehicle swerved into the inside lane and off the road. Employee's vehicle then went through the grass median, over the hill, went airborne, rolled, and then landed on its side in the northbound lanes of traffic. I find credible and reliable the police officer's determination that Employee's excessive speed and improper lane usage were probable contributing circumstances to the accident.

While there is a reported case, *Bridges v. Reliable Chevrolet, Inc.*, 940 S.W.2d 51 (Mo.App. S.D. 1997) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003), rather similar in many respects to the instant case, where the Court awarded benefits, I find it is distinguishable from the instant case. In *Bridges*, the employee basically worked on his own making sales calls, deliveries and service calls. He used a company-owned car. The employee was involved in a car accident that left him in a coma. He was found at the hospital to have had a blood alcohol level of .186 at the time of his accident. While there was an approximately 3 hour gap in time prior to the accident where no one knew what the employee was doing, the accident occurred during his normal working hours, while the employee was in a direct route ½ mile from his employer. The only medical evidence of intoxication in the record was the laboratory report and the note from the admitting doctor with an impression of "alcohol intoxication." On the basis of these facts, the Commission awarded benefits to the employee and the Court affirmed the finding of the Commission.

I find that the instant case is definitely distinguishable from the *Bridges* case, allowing for the denial of benefits I believe is appropriate. In the instant case, while we have the same approximate 3 hour gap in time, Employee's accident did not occur during his normal working hours, nor did it occur in a direct route from the meeting to his home, nor anywhere close to any place he would be conducting a business purpose for his Employer. Additionally, in the instant case, we have not only the laboratory report documenting his level of intoxication, and the Medical Examiner's records confirming that intoxication, but the record also contains credible toxicology testimony explaining the effects this level of intoxication would have on an individual's ability to function. These important differences in the facts from the *Bridges* case necessitate a finding that the accident did not arise out of or in the course of his employment since Employee was mentally and physically unable to engage in his employment as a result of his extreme intoxication.

Although one reason by itself would be enough for a denial of benefits, for two separate and distinct reasons then in this case, I find that Employee has failed to prove that his accident arose out of and in the course of his employment. First, Employee was engaged in a purely personal deviation and had not yet returned to a reasonable route that would have then put him back in the course of his employment before the accident occurred. Second, Employee was so intoxicated at the time of his accident that he was physically and mentally unable to engage in his employment. Therefore, Employee's Claim is denied due to his failure to prove that the accident arose out of and in the course of his employment.

While it does appear that perhaps the application of **Mo. Rev. Stat. § 287.120.6 (2) (2000)** might serve as another independent bar to compensation in this case, given the ruling on Issue 1, and given that that ruling is thus dispositive of this case, the rest of the issues in this case are moot and will not be decided here.

CONCLUSION:

Employee was killed in a one-vehicle, roll-over accident on southbound Highway 170, about 200 feet south of St. Charles Rock Road on March 24, 2004 at approximately 8:40 p.m. At the time of Employee's accident, he had a blood alcohol content of 0.244 gm% and a vitreous alcohol content of 0.308 gm%, both of which clearly exceed the legal limit for intoxication. The credible and reliable toxicology evidence establishes the effect that such levels of intoxication would have on an individual's ability to function. On the basis of this evidence including his intoxication

and the site of his accident, Employee was engaged in a purely personal deviation and had not yet returned to a reasonable route that would have then put him back in the course of his employment before the accident occurred. Additionally, Employee was so intoxicated at the time of his accident that he was physically and mentally unable to engage in his employment. Therefore, Employee has failed to meet his burden of proving that the accident arose out of and in the course of his employment. Dependents' Claim, and their request for benefits, is therefore denied.

Date: _____

Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation