

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

Injury No. 10-005912

Employee: Gwendolyn Beem
Employer: Missouri Department of Social Services
Insurer: C A R O
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the February 28, 2014, award and decision of the administrative law judge.

Issues Presented

The primary issue we must decide is whether employee sustained an injury by accident arising out of and in the course of her employment. If we decide the primary issue in the affirmative, we must determine how much compensation employer owes to employee.

Findings of Fact

Preliminaries

The administrative law judge identified the primary issue for determination at trial as “whether employee, Gwendolyn Beem, sustained an accident arising out of and in the course of her employment with the Missouri Department of Social Services on February 1, 2010.” The parties do not dispute that on February 1, 2010, employee slipped on ice in the parking lot adjacent to the building in which employer directed employee to work and that employee sustained injury to her left lower extremity as a result of the slipping incident.

Mechanism and Circumstances of Accident

The administrative law judge accurately recounted the circumstances and mechanism of employee’s slip and resulting injury in paragraphs four and five of the “Discussion” section of his award. We adopt the administrative law judge’s findings in this regard, as supplemented herein.

Employer’s Lease

Employee works in a building located at 1661 Hilltop Drive, in Warsaw, Missouri.² Employer first leased the building in 1994 and has continuously leased the building since that time. The 1994 lease was executed by and between employer and Gib Adkins/Wyota Investments, Inc. At some point, Wyota Investments transferred ownership of the property upon which the building and parking lot sits to Blandwal, Incorporated (Blandwal) so at the time of employee’s injury, the lease was between Blandwal and employer. Mike Walters

¹ Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

² At the time of the execution of the original lease, the address of the building was 2175 Hilltop Drive.

Employee: Gwendolyn Beem

- 2 -

was the principal of Blandwal with whom employer conducted its negotiations and communications regarding the leased property.

The lease contains the following provisions relevant to our analysis:

The LESSOR agrees to provide 23 parking spaces located on the premises or within a reasonable distance from the premises.

The LESSOR agrees to direct and pay for removal of snow and ice from the sidewalks and parking area and to provide and pay for general lawn care.

Notably, the lease does not reserve to Blandwal exclusive control of the parking lot. Nor does the lease prohibit employer from removing snow and ice from the sidewalks and parking area or from performing general lawn care.

Employer's designee testified that employer leased both the building and the parking lot at 1661 Hilltop Drive. Her testimony coupled with the stipulation of employer's counsel that employer leased the parking lot from Mike Walters convinces us that the lease in the instant case created a landlord/tenant relationship between Blandwal and employer as to the building and the parking lot. We find that on the date of employee's fall, employer had a leasehold interest in the parking lot upon which employee was injured.

Use and Maintenance of the Parking Lot

To fulfill its lease obligation to provide 23 parking spaces to employer for its use, Blandwal provided the parking spaces in the lot adjacent to the building; that is, Blandwal provided for employer's use the "spaces located on the premises." The employer's designee testified that generally, the visiting public parked in the parking spaces in front of the building by the entrance to the building. Employees generally parked on the lot running from the side of the building out to the street. Employee generally parked in the spot adjacent to the street and she was parked there on the day of her injury.

Although Blandwal agreed to pay for removal of snow and ice from the sidewalks and parking area, it was all-too-common during the course of the lease that Blandwal did not promptly clear snow and ice. According to the testimony of employee and employer's designee, on many of those occasions individuals employed by employer – including employee and employer's designee – cleared the sidewalks throughout the lot with supplies purchased with their own funds.

Employee testified that after one significant snowfall, she was the only one of employer's workers to make it to the office. Upon arriving, employee discovered that the parking lot and sidewalks were not cleared. Employee called employer's designee who told employee to contact Mike Walters. It was during his telephone conversation with employee that Mike Walters discovered he had no one under contract to perform snow removal at 1661 Hilltop Drive. On that occasion, employee contacted Crain's – a snow removal contractor – to clear the lot and sidewalks for employer.

Employee: Gwendolyn Beem

- 3 -

Blandwal eventually contracted with Crain's to clear the parking lot after snow and ice events and contracted with one of employer's workers (Robert DeWitt) to clear the sidewalks. Crain's performed snow removal from the lot after the snow event that immediately preceded the date of employee's injury. Crain's shoveled some of the snow from the parking lot into a significant pile on a sidewalk adjacent to the section of the lot considered to be the employee parking area. It was this pile of snow blocking the sidewalk that forced employee to be on the parking lot at the time of her fall and it was melting snow from this pile which ran onto the parking lot and refroze to form the black ice patch upon which employee slipped resulting in her injury.

Medical Treatment and Bills

Employee offered into evidence medical records documenting the medical treatment she received for her injured leg and ankle. We highlight treatment milestones here. The Warsaw-Lincoln Ambulance District transported employee to Bothwell Regional Health Center (Bothwell) in Sedalia by ambulance. The ambulance crew administered intravenous pain medication en route. Emergency room staff ordered diagnostic films which confirmed employee had fractures of her fibula and tibia with dislocation. Dr. Kiburz performed surgery late in the afternoon. The operative note records employee's preoperative diagnosis was a fracture/dislocation of the left ankle. Hand-written notes in Dr. Kiburz's records record employee also had syndesmotoc ligament disruption and torn ligaments/tendons. Dr. Kiburz recorded the procedure he performed as an "ORIF with syndesmotoc fixation and splinting." Dr. Kiburz's records indicate he affixed the following hardware to employee's left lower extremity: a semitubular plate on employee's fibula (with five cortical screws), a syndesmotoc ligament anchor, and a malleolar screw on employee's tibia.

The hospital discharged employee on February 4, 2010. Dr. Kiburz next examined employee on February 10, 2010 at which time he put employee's leg in a cast. At this visit, Dr. Kiburz released employee to return to light duty work on February 16, 2010. Dr. Kiburz next examined employee on March 3, 2010, at which time he took new x-rays and applied a new cast. Dr. Kiburz examined employee again on March 17, 2010, at which time he placed employee in an air cast. Dr. Kiburz prescribed physical therapy. Employee participated in physical therapy until her release from therapy on April 23, 2010. Dr. Kiburz last examined employee on April 14, 2010, with the note reading "at this point will return as needed, hoping not to take the metal out."

Employee introduced medical bills reflecting the charges for employee's medical treatment:

| | |
|-----------------------------------|------------------------|
| Warsaw-Lincoln Ambulance District | \$1,118.94 |
| Dr. Kiburz | 3,200.00 ³ |
| Bothwell Regional Health Center | 15,489.59 ⁴ |

Employee testified that employer has paid no amount toward the above-described bills.

³ Total charges on the bill for employee's 2010 treatment equal \$3,200.00. In order to grant employee an office visit, Dr. Kiburz's office required employee to pay for some visits. Three credit card payments totaling \$240.00 are credited against the balance. Employee is entitled to reimbursement of these payments.

⁴ The Bothwell Regional Health Center bills reflect adjustments and/or payments by UMR, the administrator of employee's health coverage.

Employee: Gwendolyn Beem

- 4 -

Current Complaints

Employee testified she walks with a strange gait. She explained that going down stairs is particularly difficult and she has to take stairs one at a time. Employee reported she has difficulty walking on uneven terrain and often wears an ankle brace, even to walk in her yard. Employee explained that when the instrumentation in her leg gets cold (for example, in air conditioning) she can feel the cold run up the bone in her leg. Employee keeps a blanket at her desk to keep her leg warm. Employee testified that due to her ankle condition she is no longer able to engage in her hobbies in the manner she could before the injury. She has given up playing tennis. If employee hikes on a trail – something she used to do frequently – she is sore for a couple days. Employee has given up running longer distances because the pounding causes discomfort. She also is unable to cross her legs at the ankle because the screws in her leg cause her discomfort. Employee testified she has difficulty sleeping due to pain if the hardware in her leg comes into contact with anything. Employee states it feels as if her left leg is longer than her right leg. Employee has difficulty engaging in climbing activities requiring her to flex her foot at the ankle such as climbing a ladder. Employee experiences fatigue if she stands for long periods.

Employee takes ibuprofen to relieve symptoms associated with her ankle injury. Based upon a conversation with her evaluating physician Dr. David Volarich, employee believes the discomforting instrumentation could be removed from her leg because the bones in her leg and ankle have reached maximum healing.

We find credible employee's testimony.

Expert Medical Opinion

Dr. Volarich evaluated employee and issued a report on October 25, 2010. His opinions are the only expert medical opinions appearing of record and stand unchallenged.

Dr. Volarich relayed employee's history that her ankle ached 75% of the time and remains swollen. Employee also reported difficulty walking down steps or slopes. Employee said she takes steps one at a time on her tiptoes and uses a handrail. Employee reported she is unable to walk on uneven terrain without an ankle brace and she must wear a brace when gardening. When shopping, employee said she uses a shopping cart as a walker due to her concern about slick surfaces. Employee reported difficulty sleeping due to the hardware in her ankle. She also is unable to cross her legs at the ankle and knee due to discomfort caused by the hardware. Employee is also unable to stand with her leg behind her. Employee's ankle is sensitive to cold and when the hardware gets cold it sends pain up her leg to her hip. Employee stated that due to her ankle condition she has given up hiking and playing tennis and she has difficulty running and biking. Employee also reported difficulty squatting and kneeling due to the angle of her injured ankle.

Dr. Volarich diagnosed employee with bimalleolar fracture/dislocation status post open reduction internal fixation including syndesmotic screw fixation and mild bilateral SI joint discomfort secondary to abnormal weight bearing. Dr. Volarich believes that employee's February 1, 2014, work accident is the substantial contributing factor, as well as the prevailing or primary factor causing the left ankle bimalleolar fracture/dislocation that

Employee: Gwendolyn Beem

- 5 -

required surgical repair. He asserts employee was at maximum medical improvement as of the time he evaluated her.

Dr. Volarich is of the opinion that employee sustained a 40% permanent partial disability of the left lower extremity rated at the calf due to the bimalleolar fracture/dislocation that required open reduction internal fixation including syndesmotic screw fixation. Dr. Volarich's rating accounts for ongoing discomfort, lost motion, swelling, crepitus and weakness, as well as atrophy in the left lower extremity. Dr. Volarich explained that he rated the disability at the calf because employee has calf atrophy and the bones that were broken begin at the knee and go down to the ankle. Dr. Volarich believes employee has a 5% permanent partial disability of the body as a whole rated at the pelvis, due to SI joint dysfunction secondary to abnormal weight bearing.

Dr. Volarich also believes employee will need ongoing care for her pain syndrome using modalities including but not limited to (NSAID's), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of her complaints. At deposition, Dr. Volarich testified he thought employee may need something over the counter when her pain flared up such as Motrin or Aleve. Dr. Volarich does not recommend additional surgery at this time.

Dr. Volarich reviewed the medical bills related to employee's treatment. He testified that the charges of Dr. Kiburz and Bothwell are comparable to what other providers charge and are reasonable charges.

We find Dr. Volarich's medical opinions to be credible. We find employee sustained a 40% permanent partial disability of the left lower extremity at the level of the calf and a 5% permanent partial disability of the body as a whole referable to the pelvis.

Law

Section 287.020 RSMo provides, in relevant part:

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

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

Employee: Gwendolyn Beem

- 6 -

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

...

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

...

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

Discussion and Conclusions of Law

Arising out of and in the course of employment

I. Does the extension of premises doctrine apply in this case?

Employee argues the extension of premises doctrine applies in this case. Employer disagrees. The legislature specifically abrogated the extension of premises doctrine for injuries sustained by workers on premises not owned or controlled by employer. Logically, then, the converse is true; the legislature retained the extension of premises doctrine as to injuries sustained by workers on premises owned or controlled by employer. The legislature's codification of a portion of the judicially-created extension of premises doctrine left us with a statutory extension of premises doctrine, albeit of narrower application.

The current version of the extension of premises doctrine states that injuries sustained while going to or from work arise in the course of employment if:

- 1) an injury-producing accident occurred on premises owned or controlled by the employer,⁵

⁵ Before the 2005 amendments, the first element of proof could be satisfied by proving the injury-producing accident occurred on premises that, although not actually owned or controlled by the employer, had been so appropriated by the employer or were so situate, designed and used by the employer and his employees incidental to their work as to have made them, for all practicable intents and purposes, a part and parcel of the employer's premises and operation.

Employee: Gwendolyn Beem

- 7 -

- 2) that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workers to get to and depart from their places of labor, and,
 3) that portion of such premises was being used by the injured worker to get to or depart from her place of labor at the time of the injury.

A. *Did employee's injury-producing accident occur on premises owned or controlled by employer?*

Employee concedes that employer did not own the parking lot where employee slipped and fell but employee argues employer controlled the parking lot. Employer argues employer did not control the lot where employee fell. A review of employer's brief suggests employer believes that in making a finding about employer control of the lot, we should consider only the lease language and give no weight to the actual course of conduct of employer and Blandwal as regards the parking lot and sidewalks over the then fifteen-year life of the lease. This we will not do. While the terms of the lease are relevant to our determination where, as here, employer leased the premises for a lengthy period up to and including the date of employee's injury, evidence regarding the actual conduct of the parties vis à vis the parking lot and sidewalks over the years is material and relevant to our determination.

In finding employer did not control the parking lot where employee fell, the administrative law judge found that the lease provisions in this case are "very similar" to the lease provisions in *Hager v. Syberg's Westport*.⁶ We disagree.

In *Hager*, Syberg's restaurant shared the parking lot with its landlord, who operated a hotel on the property. Guests, employees, and invitees of Syberg's restaurant used the parking lot as did the guests, employees, and invitees of the landlord's hotel. Thus, in *Hager*, the parking lot was what is referred to in landlord liability cases as a "common area."⁷ "Common areas have been defined as areas 'which are used by more than one tenant.' If the area is solely used by one tenant, it is not a 'common area.'"⁸ In the instant case, Blandwal did not operate a business at 1661 Hilltop Drive. Only employer's workers, guests, and invitees used the parking lot so the parking lot at 1661 Hilltop Drive was not a common area.

The landlord in *Hager* expressly retained "exclusive control" of the common area parking lot upon which Mr. Hager fell. Blandwal did not expressly retain "exclusive control" of the parking lot in this case.

The *Hager* lease explicitly granted the landlord the power to make "reasonable rules and regulations pertaining to the use of such parking areas by [Syberg's], its guests, invitees and suppliers." The instant lease grants Blandwal no power to make rules regarding employer's use of the parking facilities.

⁶ *Hager v. Syberg's Westport*, 304 S.W.3d 771 (Mo. App. 2010).

⁷ *Dean v. Gruber*, 978 S.W.2d 501, 503 (Mo. Ct. App. 1998)(internal citations omitted)(In landlord liability cases, "[a] landlord is not ordinarily liable for injuries resulting from a defective condition in part of the premises not reserved by the landlord for the common use of two or more tenants, but which are demised to a particular tenant.")

⁸ *Id.*

Employee: Gwendolyn Beem

- 8 -

The *Hager* lease expressly provided that the parking lots “shall be managed and maintained under the supervision of” the landlord. The lease in this case says only that Blandwal is contractually obligated to clear the parking lots and sidewalks of snow and ice.

In *Hager*, the landlord did not guarantee any particular number of parking spaces for Syberg’s use and the landlord expressly reserved to itself the right to change, rearrange, alter or modify any of the facilities designed as parking lots. Under the terms of the instant lease, Blandwal must provide employer with 23 parking spaces either “on the premises” at 1661 Hilltop Drive or within a reasonable distance from the premises. Blandwal has consistently fulfilled this term of the lease by providing the 23 spaces “on the premises” as allowed by the lease. In any event – and contrary to the administrative law judge’s analysis – Blandwal’s option to change the location of the required parking spaces does not defeat a finding that employer had control of the parking lot.⁹

In summary, the terms of the *Hager* lease left little room for Syberg’s to exercise any control over the common area parking lot. The lease in the instant case contains no prohibitions on employer’s use or control of the single-tenant lot at 1661 Hilltop Drive. *Hager* provides little if any support for the administrative law judge’s finding that employer did not control the parking lot in this matter.

For reasons more fully set forth below, we find employer controlled the parking lot upon which employee fell. For purposes of our application of the extension of premises statute, “control,” means “1. To exercise power or influence over.... 2. To regulate or govern.... 3. To have a controlling interest in.”¹⁰

As noted above, since the inception of the lease and including the date of employee’s injury, Blandwal chose to provide 23 parking spots to employer in the parking lot at 1661 Hilltop Drive where employee slipped. Blandwal did not reserve to itself any right to use the parking spots provided to employer. Blandwal’s provision of the parking spots in the lot granted employer exclusive possession and use of the lot to the exclusion of Blandwal as of the time of employee’s injury.¹¹ The grant of the use of the lot to employer was a grant to employer of the **power** to determine the use of the lot and affected a concomitant decrease in Blandwal’s power to determine the use of the lot. We find that as of the date of employee’s injury employer had control of the parking lot where employee fell.

As we have found, employer had a leasehold interest in the parking lot. Employer’s estate in the parking lot for a limited term establishes that employer has a **controlling interest** in the parking lot. Providing further evidence that employer has a controlling interest in the lot is the lease provision granting employer the right to transfer its interest in the lease – including the 23 parking spots – to other governmental entities, even without Blandwal’s approval.

⁹ See *Hardesty v. Mr. Cribbins's Old House, Inc.*, 679 S.W.2d 343 (Mo. App. 1984)(where lease required landlord to provide tenant with a particular number of parking spaces, trial court’s finding that tenant had exclusive control of the portion of the lot upon which the guaranteed spots were located was upheld even though the lease contained a provision allowing the landlord to change the location of the guaranteed spaces). See also, *State ex rel. State Highway Com. v. Johnson*, 592 S.W.2d 854 (Mo. App. 1979).

¹⁰ *Hager*, 304 S.W.3d at 776, citing BLACK’S LAW DICTIONARY (8th ed., 2004).

¹¹ See *Hardesty*, supra, fn. 9.

Employee: Gwendolyn Beem

- 9 -

When employer contacted Blandwal to request snow clearance of the lot – a service Blandwal was obligated to perform under the terms of the lease – employer exercised a contractually bargained-for **influence** over the lot.¹²

Employer did not limit its influence over the lot to requesting clearance of the lot. Employer frequently exercised its **power** to clear the sidewalks near the building and throughout the lot on the many occasions Blandwal did not fulfill its obligation to do so. Employer's clearance of the sidewalks in the lot shows that employer, in fact, **governed** the condition of the lot. Employer even exercised its **power and influence** over the lot to hire a contractor to clear the parking lot and walks on at least one occasion. We give great weight to this evidence of employer's actual exercise of power and influence over the lot.

For the forgoing reasons, we conclude that employer controlled the parking lot for purposes of our application of § 287.020.5. The first prong of the extension of premises test is satisfied because employee's injury-producing accident occurred on premises controlled by employer.

B. Was that portion of the premises part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workers to get to and depart from their places of labor?

The testimony of employee and employer's designee establishes that the portion of the lot where employee slipped was part of the customary, approved, permitted, usual and acceptable routes for employee to depart from her place of employment.

C. Was employee using that portion of the premises to get to or depart from her place of labor at the time she sustained her injury?

The un rebutted testimony of employee establishes that employee slipped while she was walking to her car to depart her place of employment. The extension of premises doctrine applies in this case.

II. What is the effect of the application of the extension of premises doctrine in this case? Now that we have determined that the statutory extension premises doctrine applies in this case, we must determine the effect of the application of the doctrine. We have looked to the Workers' Compensation Law (Law) to determine the effect but we find no answer there. In fact, the legislature has never enacted legislation setting forth the rules of the extension of premises doctrine or its legal effect on those cases to which it applies.¹³

The definition of the extension of premises doctrine and its legal effect were created judicially and have evolved *only* through case law interpreting the meaning of "arising out of" and "in the course of employment." But, as noted by the court in *Hager v. Syberg's*

¹² See *Cherry v. Powdered Coatings*, 897 S.W.2d 664, fn 2. (Employer control of a parking lot was present where the lease 1) expressly provided that employer's workers could use the parking lot, and, 2) granted employer a contractual right to require landlord to maintain the lot. That employer never exercised its contractual right did not mean employer did not control the lot.)

¹³ For a brief history of the evolution of the extension of premises doctrine, the reader may refer to our decision in *Viley v. Scholastic, Inc., and Treasurer of Missouri as Custodian of Second Injury Fund*, Injury No. 10-050708 (LIRC, April 16, 2014).

Employee: Gwendolyn Beem

- 10 -

Westport,¹⁴ the legislature specifically rejected and abrogated all case law interpretations on the meaning of or definition of “arising out of” and “in the course of employment” including the cases creating and applying the extension of premises doctrine. We are obligated to give meaning to the legislature’s retention of the extension of premises doctrine as it relates to injuries sustained on premises owned or controlled by employer, but the case law defining the doctrine has been abrogated.

Generally, a provision in a statute must be read in harmony with the entire section.¹⁵ Statutes relating to the same subject matter are in *pari materia* and should be construed harmoniously.¹⁶ This principle is all the more compelling when the statutes are passed in the same legislative session. Where two statutory provisions covering the same subject matter are unambiguous when read separately but conflict when read together, the reviewing tribunal must attempt to harmonize them and give effect to both. Where, as here, one statute deals with a particular subject in a general way, and a second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific.¹⁷

In the instant case, the specific retention of a portion of the extension of premises doctrine must prevail over the general abrogation of all cases interpreting the meaning of “arising out of” and “in the course of employment.” Under these circumstances, we do not think it inappropriate for us to refer to such cases for guidance and, to the extent their reasoning does not conflict with the plain language of the Law, to rely upon such reasoning. The legislature is presumed to know the state of the law when it effects a statutory change.¹⁸ The alternative would be for this Commission to create from whole cloth the rules for the new statutory extension of premises doctrine. We do not believe a strict construction of the Law permits such an endeavor.

The effect of the extension of premises doctrine immediately before the 2005 amendments was succinctly stated in the most recent Missouri Supreme Court decision applying the doctrine:

If an employee is injured on extended premises while coming to or from work, the injury is in the course of employment as if "it had happened while the employee was engaged in his work at the place of its performance."¹⁹

¹⁴ *Hager*, supra. See also, § 287.020.10 RSMo.

¹⁵ See *Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 107-108 (Mo. App. 2008). See also *Chester Bros Constr. Co. v. Mo. Dep't of Labor & Indus. Rels.*, 111 S.W.3d 425, 427 (Mo. App. 2003) (“Provisions of an entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized.”)(internal citation omitted).

¹⁶ See *Harpagon Mo, LLC v. Bosch*, 370 S.W.3d 579, 584 (Mo. 2012).

¹⁷ *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. 2010) (“The doctrine of *in pari materia* recognizes that statutes relating to the same subject matter should be read together, but where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute prevails over the general statute.”).

¹⁸ *State ex rel Nothum v. Walsh*, 380 S.W.3d 557, 567 (Mo. 2012) (“It is a cardinal rule of statutory interpretation that “[t]he legislature is presumed to know the existing law when enacting a new piece of legislation.”), citing *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001).

¹⁹ *Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. 2000), superseded by statute as stated in *Hager*, supra.

Employee: Gwendolyn Beem

- 11 -

Based upon this holding, since employee has shown that the statutory extension of premises doctrine applies in this case, we conclude that employee's injuries arose in the course of her employment.

III. May we deem employee's injury to arise out of and in the course of employment?
Our inquiry now turns to § 287.020.3(2) which lays out the statutory test for which injuries we may "deem" arise out of and in the course of employment.

Employee's slip on black ice on February 1, 2010, was an accident as defined by § 287.020.2 RSMo. The testimony of Dr. Volarich establishes that the accident was the prevailing factor in causing employee's ankle injury and resulting disability. The requirements of § 287.020.3(2)(a) are satisfied.

We proceed to a consideration of § 287.020.3(2)(b). If employee's injury did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life, then we will conclude that her injury arose out of and in the course of employment.

Because the extension of premises statute applies, we have concluded that employee was in the course of her employment at the time of her injury. As she was crossing the parking lot to her vehicle, employee was exposed to the risk of slipping on the black ice that formed due to the manner in which snow was cleared from the parking lot and sidewalks. In light of the forgoing, we find that employee was in an unsafe location due to her employment. Employee succumbed to the unsafe condition at that location by slipping on that black ice, thereby sustaining injury to her ankle.

Missouri judicial decisions instruct us how to apply § 287.020.3(2)(b) when a worker in the course of her employment sustains an injury resulting from being in an unsafe location due to her employment. In *Duever v. All Outdoors, Inc.*,²⁰ Mr. Duever fell on ice while in the course of his employment. The *Duever* court compared Mr. Duever's exposure to the hazard of slipping on *that* ice in *that* particular parking lot with the exposure of workers in general to the hazard of slipping on *that* ice in *that* parking lot and found that Mr. Duever had the greater exposure.²¹

The court in *Dorris v. Stoddard County*²² relied upon the holding in *Duever*. The *Dorris* court held that, in the context of a worker injured due to an unsafe condition of the workplace, we are to compare the worker's work-related exposure to the particular hazard presented by the unsafe location against the worker's non-work-related exposure to the particular hazard presented by the unsafe location.

Inherent in the *Duever* and *Dorris* holdings is the proposition that where the hazard giving rise to the injury is a dangerous condition of the location where the worker's employment

²⁰ *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012).

²¹ The Missouri Workers' Compensation Law has never required that the injury-producing hazard be unique to the workplace, only that there be something in the nature of the work that exposes the worker to a greater danger of falling victim to the hazard than the danger faced by workers in non-employment life. See *Morris v. Dexter*, 40 S.W.2d 750 (Mo. App. 1931).

²² *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. 2014).

Employee: Gwendolyn Beem

- 12 -

require her to be, the hazard is (almost by definition) a hazard related to employment to which this worker or workers in general are not equally exposed outside of that workplace.

We find the circumstances of the instant case indistinguishable from the circumstances of *Duever* as regards the application of the equal exposure test. Our employee, like Mr. Duever, was traversing a parking lot in an unsafe condition (a patch of black ice) while in the course of her employment. Our employee, like Mr. Duever, suffered an injury attributable to the unsafe condition of the parking lot.

Based upon the foregoing, we find that employee has proven that her injury did not come from a hazard or risk unrelated to employment to which workers would have been equally exposed outside of and unrelated to employment. Employee has satisfied the requirement of § 287.020.3(2)(b).

Employee has satisfied both prongs of § 287.020.3(2). Thus, employee's injury arose out of and in the course of her employment and we may so deem.

Under the facts of this case, the extension of premises statute applies such that we can consider the parking lot employer's extended premises. Employee fell due to an unsafe condition on employer's premises. Employee's injury came from a hazard related to her employment. Employee fell *because* she was at work, not merely *while* she was at work.²³ Employee's injury arose out of and in the course of employment.

Past Medical Expenses

Employee produced treatment records related to treatment of her ankle injury and the bills detailing the provider charges for that treatment. Employee added her testimony and the testimony of Dr. Volarich to establish that the bills upon which she bases her claim for medical expense compensation consist of charges for medical treatment reasonable and necessary to cure and relieve her of the effects of her work injury.²⁴ The total amount of the medical charges billed for employee's treatment is \$19,808.53. Although the Bothwell bill reflects downward adjustments made on account of employee's health insurer, employer has not established it is entitled to any reduction of its workers compensation obligation for the Bothwell bill on account of the adjustments.²⁵ Accordingly, employee is entitled to medical expenses in the amount of \$19,808.53.

Temporary Total Disability

The parties stipulated that if we find this claim compensable, employer is liable to employee for one week of temporary total disability. Employee is entitled to temporary total disability for one week at the stipulated temporary total disability rate of \$406.61.

Permanent Disability

We found employee sustained a permanent partial disability of 40% of her left lower extremity at the calf which corresponds to 62 weeks of benefits and 5% of the body as a

²³ See *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315 (Mo. App. 2012); *Miller*, supra.

²⁴ *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822-823 (Mo. 2003).

²⁵ *Id.* (Once employee established a prima facie entitlement to reimbursement of medical expenses, it was a defense of employer to establish that employee was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished, and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270.).

Employee: Gwendolyn Beem

- 13 -

whole referable to the pelvis which corresponds to 20 weeks of benefits. Employee is entitled to permanent partial disability benefits for 82 weeks. The parties have stipulated that employee's permanent partial disability rate is \$406.61.

Award

We reverse the award of the administrative law judge. We find employee sustained an injury by accident arising out of and in the course of her employment.

We direct employer to pay to employee the sum of \$19,808.53 for employee's past medical expenses.

We direct the employer to pay to employee \$ 406.61 for past due temporary total disability benefits.

We direct employer to pay to employee \$33,342.02 for permanent partial disability benefits ($\$406.61 \times 82 = \$33,342.02$).

Roger M. Gibbons, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

We attach the February 28, 2014, award and decision of Chief Administrative Law Judge Robert J. Dierkes and we adopt his findings as indicated herein and solely to the extent that they are not inconsistent with our findings, conclusions, award, and decision herein.

Given at Jefferson City, State of Missouri, this 24th day of October 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

Dependents:

Employer: **Missouri Department of Social Services**

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

Additional Party: **Second Injury Fund (dismissed)**

Insurer: **Self-Insured**

Hearing Date: **January 30, 2014**

Checked by: **RJD/njp**

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? **No.**
2. Was the injury or occupational disease compensable under Chapter 287? **No.**
3. Was there an accident or incident of occupational disease under the Law? **No.**
4. Date of accident or onset of occupational disease: **Alleged as February 1, 2010.**
5. State location where accident occurred or occupational disease was contracted: **Alleged as Benton County, Missouri.**
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? **Yes.**
7. Did employer receive proper notice? **Yes.**
8. Did accident or occupational disease arise out of and in the course of the employment? **No.**
9. Was claim for compensation filed within time required by Law? **Yes.**
10. Was employer insured by above insurer? **Employer is self-insured.**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Employee was leaving work to let her dog out. On the way to her vehicle, she slipped on black ice in the parking lot and fractured her left ankle. The parking lot was not owned or controlled by Employer.**
12. Did accident or occupational disease cause death? **No.** Date of death? **N/A.**
13. Part(s) of body injured by accident or occupational disease: **Alleged as left ankle.**
14. Nature and extent of any permanent disability: **N/A.**
15. Compensation paid to-date for temporary disability: **None.**
16. Value necessary medical aid paid to date by employer/insurer? **\$262.25.**

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

17. Value necessary medical aid not furnished by employer/insurer? **None.**
18. Employee's average weekly wages: **\$609.92.**
19. Weekly compensation rate: **\$406.61 for temporary total disability and permanent total disability; \$406.61 for permanent partial disability.**
20. Method wages computation: **Stipulation.**

COMPENSATION PAYABLE

NONE. The claim is denied in full.

j

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

FINDINGS OF FACT AND RULINGS OF LAW

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

Dependents:

Employer: **Missouri Department of Social Services**

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

Additional Party: **Second Injury Fund (dismissed)**

Insurer: **Self-Insured**

ISSUES DECIDED

The evidentiary hearing in this case was held on January 30, 2014 in Sedalia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on February 13, 2014.

The hearing was held to determine the following issues:

1. Whether Claimant sustained an accident arising out of and in the course of her employment with the Missouri Department of Social Services on February 1, 2010;
2. The liability, if any, of Employer for temporary total disability benefits;
3. The liability, if any, of Employer for reimbursement of past medical expenses;
4. The liability, if any, of Employer for permanent partial disability benefits; and
5. Whether Employer should be required to reimburse Claimant for costs of depositions.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this claim;
2. That venue for the evidentiary hearing is proper in Benton County and adjoining counties, including Pettis County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage is \$609.92 with compensation rates of \$406.61 for temporary total disability benefits and permanent total disability benefits, and \$406.61 for permanent partial disability benefits;
6. That the notice requirement of Section 287.420, RSMo, has been satisfied;
7. That Employer paid medical benefits in the amount of \$262.25;
8. That Employer paid no temporary disability benefits;

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

9. That if Claimant is entitled to total disability benefits, one week of benefits should be awarded; and
10. That Missouri Department of Social Services was and is an authorized self-insurer for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Gwendolyn Beem; the deposition testimony of Sheila Hicks, Employer's designee; lease documents; claim for compensation; answer; CARO internal injury report; the narrative report and deposition testimony of Dr. David Volarich; emails and other documents; medical records; medical bills; affidavit of Claimant's counsel, re: deposition expenses.

DISCUSSION

The facts of this case are simple and essentially undisputed. Gwendolyn Beem, age 46, has been employed by the Missouri Department of Social Services, Family Support Division ("Employer") for 18 years. On February 1, 2010, the date of the alleged accident, Claimant was employed as an Eligibility Specialist. Claimant's work was done in Employer's leased premises on Hilltop Drive in Warsaw.

In 2010, Employer leased the premises from a corporation named Blandwal, Incorporated; the principal of Blandwal Incorporated was Mike Walters. The original lease on the premises was executed in 1994 between the State of Missouri as Lessee and Wyota Investments, Inc. as Lessor. In 1999 the lease was assigned by Wyota Investments to Blandwal Incorporated; in 2006 the lease was amended to include a new lease term of July 1, 2006 through June 30, 2007 and granting Lessee the option to renew for four successive one-year periods.

Section (1) of the lease described the lease premises as "the property located at 2175 Hilltop Drive, Warsaw (Benton County), State of Missouri, hereinafter called the 'premises' and containing 4,325 net rentable square feet". Section (7) states: "The LESSOR agrees to provide the Lessee with 23 car parking spaces located on the premises or within a reasonable distance from the premises." Section (8) states: "The LESSOR agrees to direct and pay for removal of snow and ice from the sidewalks and parking area and to provide and pay for general lawn care."

A few days prior to February 1, 2010, there was a large snowfall in Warsaw. It is undisputed that the Lessor was generally less than prompt in undertaking snow and ice removal; nevertheless, prior to February 1, 2010, Lessor (apparently through a third-party contractor) had scraped the snow from the parking lot and deposited the snow in large piles on and near the sidewalk. There were also piles of snow near the parking spots on the side of the building where Claimant and other employees generally parked. The parking spots in front of the building were generally used by the public.

The parking lot on the side of the building ("the employee parking lot") is sloped from the building down to the street. Claimant always parked her Jeep at the very end of the employee

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

parking lot “down by the road”. That is where Claimant parked her Jeep on the morning of February 1, 2010. Claimant arrived at work at the regular time (7:30 AM). Claimant worked on case files from 7:30 AM to 9:00 AM, and from 9 AM until approximately 10:00 AM, Claimant worked the customer counter. At approximately 10:00 AM, Claimant decided to take her 15 minute morning break. Per Claimant’s testimony and Sheila Hicks’ testimony, all employees were allowed a paid 15 minute break in the morning and again in the afternoon; Claimant and Hicks also agreed that employees (including Claimant) were allowed to leave the work premises during a break. On February 1, 2010 at approximately 10:00 or 10:15 AM, Claimant left the building on her break. It was Claimant’s intention to use her break to drive home to let her dog out. Claimant could not use the sidewalk to walk to her vehicle because of the piles of snow; therefore, she began walking across the sloped parking lot toward her Jeep. It is undisputed that there was a patch of “black ice” which caused Claimant to slip and fall. It is also undisputed that Claimant sustained a serious left ankle fracture in the fall. Claimant was taken by ambulance to Bothwell Hospital in Sedalia and surgery with instrumentation was performed the same day.

The threshold legal issue in this case is whether Claimant’s accident and injury is compensable. There are two subsections of Section 287.020 which may have applicability here.

Section 287.020.3(2) states:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Section 287.020.5 states (in pertinent part):

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

Hager v. Syberg’s Westport, 304 S.W.3d 771 (Mo. App. E.D. 2010), involved a factual scenario similar to the instant case. Hager was employed as a cook at the employer’s restaurant; after finishing his shift, Hager was walking to his vehicle, slipped and fell on black ice and severely injured his left ankle, requiring surgery with instrumentation. Syberg, the employer, leased the restaurant premises, including the parking lot where Hager was injured. The lease required the Lessor to provide snow removal, sidewalk cleaning, landscaping and pothole repair. The *Hager* court looked to the above-quoted portion of Section 287.020.5; the court found that the employer clearly did not “own” the parking lot, and thus Hager’s injury could only be compensable if the employer “controlled” the parking lot. The court found that the employer did not “control” the

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

parking lot “because it did not exercise power or influence over the parking lot ... (t)he lease merely granted the ‘right to use ... the parking facilities in accordance with the provisions of the lease.’” The court found that the lease “clearly evidences that *Landlord* had control over the parking lot as Landlord: (1) was charged with managing and maintaining the parking areas, and (2) had sole discretion to change, rearrange, alter or modify the parking areas.” *Hager* at 776-7.

The lease provisions in the instant case are very similar to those in *Hager*. The Missouri Department of Social Services clearly did not “control” the ice and snow removal on the parking lot. Nor did the Missouri Department of Social Services otherwise have “control” over the parking lot; in fact, per the lease, Lessor could provide Employer with 23 parking spaces on the premises “or within a reasonable distance from the premises”. Theoretically, at least, Lessor could have provided Employer with parking spaces across the street from “the premises” and Lessor could have used the parking lot “on the premises” for storage of vehicles or materials. Clearly, per the lease, Lessor, not Employer, controlled the parking lot.

Claimant cites the similarity of this case to *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. E.D. 2012) and to *Dorris v. Stoddard County*, 2014 WL 350422 (Mo. App. S.D. 2014). In *Duever*, the employee slipped and fell on ice in a leased parking lot while on his way back to the office after a safety meeting; the court found the accident compensable. In *Dorris*, the employee tripped and fell on a crack in a public street while returning to her office after inspecting (at the employer’s request) an employer-owned building under construction across the street; the court found the accident compensable. *Duever* and *Dorris* are easily distinguishable from the instant case. In both *Duever* and *Dorris* the injured employee was on the clock and was returning to the office from performing a clearly work-related task when the injury-producing fall occurred; Claimant Beem, while on the clock, was walking to perform a totally non-work-related task (letting her dog out). In both *Duever* and *Dorris* it was the employer’s work which exposed the employee to the hazard of falling; that is clearly not what happened in the instant case.

I find that *Hager* is controlling here. Even though Claimant was “on the clock” (a paid break) when she fell, she was not working. Claimant was on a break from work, on her way to do a wholly personal task – let her dog out. She left the place of employment to go home – just as the claimant in *Hager* left the place of employment to go home. The facts of *Hager* and the instant case are essentially identical, save one: *Hager* had “clocked out” and Claimant Beem had not. Clearly, if Claimant had waited until work was over to leave and let the dog out and then suffered a similar fate, the accident/injury would not have been compensable. Similarly, if Claimant had waited until her unpaid lunch hour to leave and let the dog out and suffered a similar fate, the accident/injury would not have been compensable. The fact that Employer graciously allowed its employees, including Claimant, to leave the premises during a paid break should not, in my opinion, turn a clearly non-compensable injury into a compensable one.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and the legal conclusions to which the parties stipulated, I find the following:

Employee: **Gwendolyn Beem**

Injury No. **10-005912**

1. On February 1, 2010, and for several years prior to February 1, 2010, Claimant's place of employment was an office building on Hilltop Drive in Warsaw, Benton County, Missouri ("the office");
2. On and prior to February 1, 2010, Employer, Missouri Department of Social Services, leased the office pursuant to a written lease agreement;
3. Section (7) of the written lease agreement states: "The LESSOR agrees to provide the Lessee with 23 car parking spaces located on the premises or within a reasonable distance from the premises."
4. Section (8) of the written lease agreement states: "The LESSOR agrees to direct and pay for removal of snow and ice from the sidewalks and parking area and to provide and pay for general lawn care."
5. Employer did not own the parking lot, nor did Employer control the parking lot;
6. At approximately 10:00 AM on February 1, 2010, Claimant left the office while on a paid 15-minute break, with the intention of driving home to let her dog out;
7. While walking through the parking area at the side of the building, where her vehicle was parked, Claimant slipped on black ice, fell, and severely and permanently injured her left ankle;
8. Section 287.020.5 is applicable to this case;
9. Per Section 287.020.5 and *Hager v. Syberg's Westport*, 304 S.W.3d 771 (Mo. App. E.D. 2010), Claimant has not sustained an accident arising out of and in the course of employment;
10. As Claimant has not sustained an accident compensable under Chapter 287, RSMo, Employer has no liability, and all other contested issues are moot.

ORDER

Claimant's claim for compensation is denied in full.

Made by /s/Robert J. Dierkes 2/28/14
Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation