

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 08-102159

Employee: Scott J. Beine  
Employer: County of St. Charles  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 29, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John K. Ottenad, issued April 29, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

DISSENTING OPINION FILED  
\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Scott J. Beine

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and employee should be awarded permanent partial disability benefits.

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and I adopt the same to the extent they are not inconsistent with this dissent.

The ALJ and the majority found: 1) employee's injury did not arise out of or in the course of his employment; 2) employee is not entitled to collect benefits or compensation under § 287.120.7 RSMo, the recreational activity provision; and 3) the mutual benefit doctrine does not apply to this case because employer did not derive any benefit from employee's participation in the Sheriff's Association's charity golf tournament. I disagree with said findings.

The first issue to address is whether employee's injury arose out of and in the course of his employment.

#### **"Arising out of and in the course of his employment"**

In the earliest days of our workers' compensation law the phrase "arising out of and in the course" of was not defined. When deciding the cases under the new law, Missouri courts turned to the law of states with more mature workers' compensation laws to see how the phrase was interpreted in those states.

The consensus of authority is to the effect that an injury to an employee arises "in the course of" his employment, when it occurs within the period of his employment, at a place where he might reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in the performance of some task incidental thereto. Necessarily, the converse of the rule must also apply, so that, where, at the time his injury is received, the employee is engaged in a voluntary act, not known to, or accepted by, his employer, and outside of the duties for which he is employed, the injury cannot be said to have been received in the course of his employment.

Likewise it is commonly held that an injury may be said to arise "out of" the employment, when it is reasonably apparent, upon a consideration of all the facts and circumstances, that a causal connection exists between the conditions under which the employee's work is required to be done, and the resulting injury. In other words, an injury arises out of the employment if it is a natural and reasonable incident thereof, even though not foreseen or anticipated; but, in all events, it must be the rational consequence of some hazard connected therewith.<sup>1</sup>

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<sup>1</sup> *Smith v. Levis-Zukoski Mercantile Co.*, 14 S.W.2d 470, 472 (Mo. App. 1929) (internal citations omitted).

Employee: Scott J. Beine

- 2 -

In deciding whether an injury arose out of and in the course of employment, courts expanded the interpretation of said phrase to include injuries “suffered by an employee while performing an act for the mutual benefit of the employer and the employee.”<sup>2</sup> This interpretation became a rule known as the *mutual benefit doctrine*. Application of the mutual benefit doctrine became quite prevalent. Courts even went so far as to say that the rule “is applicable even though the advantage to the employer is slight.”<sup>3</sup>

In 1993, the legislature enacted a statutory fence around the meaning of “arising out of and in the course of employment.” By its terms, the change did not abrogate the basic common law meaning of the phrases, but merely defined the outer limits of the meanings.

287.020.3(2) 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 employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) 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;

After the 1993 amendment, courts used the common law meanings and statutory limits together to determine when an injury arose out of and in the course of employment.

In 2005, the legislature again amended the language of § 287.020.3(2).

287.020.3(2) 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.

The legislature also abrogated all cases dealing with the topic: “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

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<sup>2</sup> *Wamhoff v. Wagner Elec. Corp.*, 354 Mo. 711, 718 (Mo. banc 1945).

<sup>3</sup> *Id.* at 719.

Employee: Scott J. Beine

- 3 -

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.”<sup>4</sup> Without the underlying common law meanings, § 287.020(2) has become a statutory definition.

As stated above, early in the life of our workers’ compensation system, courts adopted the *mutual benefit* doctrine. By the facts of the instant case, we are faced with the question of whether the mutual benefit doctrine is consistent with the statutory definition of § 287.020.3(2) RSMo. I think that it is.

The rationale of the doctrine is that there are certain activities that employees engage in that involve a benefit that inures not only to the employee, but to the employer as well. Thus, where the act that resulted in the injury is of some actual, substantive benefit to the employer and not merely some conceivable benefit, the risks arising from said act are risks related to the employment.

I find this rationale is still sound and is consistent with § 287.020.3(2).

In this case, employee was injured during a golf tournament, which serves as the sole fundraiser for the Sheriff’s Association’s annual year-end “Shop-With-A-Deputy” event (shopping event). In this shopping event, St. Charles County Deputy Sheriffs shop with underprivileged children to provide them with clothing and toys.

It is obvious in this instance that employee derived some benefit with respect to his participation in the charity golf tournament. He was among friends and co-workers, enjoying a round of golf. After a review of the evidence, it is also obvious that employer derived a substantive benefit from employee’s participation.

Professor Kenneth J. Novak of the University of Missouri-Kansas City Department of Criminal Justice and Criminology testified that the employer benefited from the officers’ participation in the shopping event in that it promotes positive police/public encounters and encourages trust between youth and the police. Professor Novak went on to state that employer benefited from a program such as this because positive interactions with police are critical to help the police with crime prevention and law enforcement.

It follows then, that the activities involved with the sole fundraiser that makes the shopping event possible are also activities that benefit employer.

In demonstrating the “nexus” between the association’s golf tournament/shopping event, it is worth noting the Sheriff Department’s substantial investment of resources in said events. The Sheriff’s Department allows the officers participating in the shopping event to appear in uniform and use department vehicles for transportation. In the past, the department’s Mobile Command Unit vehicle was used and the Canine Unit dog appeared. In addition, the Sheriff’s Department presumably allows the officers to

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<sup>4</sup> § 287.020.10 RSMo.

Employee: Scott J. Beine

- 4 -

coordinate their "on duty" work schedules to allow time for the organizing members to set up and participate in both the golf tournament and the shopping event.

The Sheriff's Department would not authorize the use of said resources if it did not derive a substantive benefit from the golf tournament/shopping event.

For the foregoing reasons, I find that the mutual benefit doctrine is applicable to this case and, therefore, employee's accident and resulting injury and disability arose out of and in the course of his employment.

#### Golf Tournament Not a Recreational Activity

The ALJ and majority also found that employee is denied benefits under § 287.120.7 RSMo, the recreational activity provision. Section 287.120.7 RSMo provides as follows:

Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

- (1) The employee was directly ordered by the employer to participate in such recreational activity or program;
- (2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
- (3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

The ALJ and majority concluded that the golf tournament was a recreational activity that did not qualify for exclusion under any of the subsections of § 287.120.7.

As employee argued in his brief, neither the Missouri Workers' Compensation Law nor the courts have clearly defined the term "recreational activity." *Graham v. La-Z-Boy Chair Co.*, 117 S.W.3d 182, 185 (Mo. App. 2003). In *Graham*, the court concluded that the activity involved is not to be deemed "recreational" for purposes of § 287.120.7 RSMo and the forfeiture not to be in effect, if the involved activity engaged by the employee results in a mutual benefit to the employer and the employee. *Id.* at 186.

Employee: Scott J. Beine

- 5 -

As discussed in the preceding section, I find that the golf tournament results in a mutual benefit to the employer and the employee. Therefore, I find that the golf tournament is not a "recreational activity" and § 287.120.7 RSMo is not applicable to this case.

For the foregoing reasons, I find that the ALJ and the majority are incorrect in concluding that employee's injury did not arise out of and in the course of his employment. Further, I find that their application of § 287.120.7 RSMo is misguided, as the golf tournament was not a recreational activity. The golf tournament is simply a means to promote a more positive relationship between the Sheriff's Department and the citizens it serves, which I find to be a substantive benefit to the employer. The mutual benefit doctrine should apply and employee should be awarded permanent partial disability benefits. I would reverse the award of the administrative law judge and award employee the same.

I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

# AWARD

Employee: Scott J. Beine

Injury No.: 08-102159

Dependents: N/A

Employer: County of St. Charles

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

Additional Party: Second Injury Fund

Insurer: Self-Insured  
C/O Corporate Claims Management, Inc.

Hearing Date: January 20, 2010

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? Yes
4. Date of accident or onset of occupational disease: July 7, 2008
5. State location where accident occurred or occupational disease was contracted: St. Charles 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? N/A
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: Claimant was employed as a Sheriff's Deputy for Employer, when he allegedly sustained injury to his body as a whole after being struck in the head by a golf ball, while playing golf in a charity golf event.
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: (allegedly) 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? All paid through St. Charles County's self-insured health plan

Employee: Scott J. Beine

Injury No.: 08-102159

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$897.84
- 19. Weekly compensation rate: \$598.56 for TTD/\$404.66 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable from Employer:

None	\$0.00
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22. Second Injury Fund liability:

None	\$0.00
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**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 attorney for necessary legal services rendered to the claimant: D. Andrew Weigley.

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

Employee:	Scott J. Beine	Injury No.: 08-102159
Dependents:	N/A	Before the
Employer:	County of St. Charles	<b>Division of Workers’ Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Self-Insured C/O Corporate Claims Management, Inc.	Checked by: JKO

On January 20, 2010, the employee, Scott J. Beine (Claimant), appeared in person and by his attorney, Mr. D. Andrew Weigley, for a hearing for a temporary or partial award (NOT under Section 203) on his claim against the employer, the County of St. Charles, which is duly self-insured under the statute C/O Corporate Claims Management, Inc. The employer, the County of St. Charles, which is duly self-insured under the statute C/O Corporate Claims Management, Inc., was represented at the hearing by its attorney, Assistant County Counselor Beverly E. Temple. The Second Injury Fund is a party to this case, but was not present or represented at the hearing because this was a temporary or partial hearing. 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 July 7, 2008, Scott J. Beine (Claimant) sustained an accidental injury.
- 2) Claimant was an employee of the County of St. Charles (Employer).
- 3) Venue is proper in St. Charles County.
- 4) The Claim was filed within the time prescribed by the law.
- 5) At the relevant time, Claimant earned an average weekly wage of \$897.84, resulting in applicable rates of compensation of \$598.56 for total disability benefits and \$404.66 for permanent partial disability benefits.
- 6) Employer has not paid any temporary total disability benefits to date.
- 7) Employer has paid past medical benefits through St. Charles County’s self-insured health plan.

**ISSUES:**

- 1) Did the accident arise out of and in the course of employment?
- 2) Are Claimant's injuries and continuing complaints, as well as any resultant disability, medically causally connected to his accident at work?
- 3) Did Employer receive proper notice of the injury?
- 4) Is Claimant entitled to the payment of temporary total disability benefits for the stipulated period of time of July 7, 2008 through the present time, and continuing into the future?
- 5) Is Claimant entitled to future medical treatment?
- 6) If I find for Employer on the future medical issue and I find that Claimant is at maximum medical improvement, Employer has requested a further finding on what is the nature and extent of Claimant's permanent partial disability attributable to this accident?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

- A. Deposition of Dr. Thomas Musich, with attachments, dated May 12, 2009
- B. Deposition of Mr. James Israel, with attachments, dated October 27, 2009
- C. Deposition of Kenneth Novak, Ph.D., with attachments, dated October 29, 2009
- D. Certified medical records of the St. Charles County Ambulance District
- E. Certified medical treatment records of Progress West HealthCare Center
- F. Certified medical treatment records of Metropolitan Plastic Surgery
- G. Certified medical treatment records of Midwest ENT
- H. Certified medical treatment records of Dr. Gabriel de Erausquin
- I. Certified medical treatment records of Dr. Gabriel de Erausquin
- J. Certified medical treatment records of Barnes Jewish Hospital (Neurology)
- K. Certified medical treatment records of Dr. R. Edward Hogan at Washington University School of Medicine
- L. Certified medical records of St. Louis Neurological Institute
- M. Certified medical records of Washington University Medical Center, Department of Otolaryngology
- N. Certified medical records of Washington University Medical Center, Department of Otolaryngology
- O. Certified medical treatment records of Pamela Sleeper

- P. Certified medical treatment records of Pamela Sleeper
- Q. Certified medical treatment records of Dr. Thomas Richardson
- R. Certified medical treatment records of Dr. Thomas Richardson
- S. Certified chiropractic treatment records of Dr. Corey Osborne
- T. St. Charles County Deputy Sheriff's Association Charity Golf Tournament flyer
- U. Shop-With-A-Deputy photographs
- V. St. Charles County Sheriff's Department Policy 1.5.04 (Public Events)

***Employer/Insurer Exhibits:***

- 1. St. Charles County Deputy School Resource Officer Position Description
- 2. Saint Charles County Sheriff's Department Day Watch/First Shift schedule for June 21-July 18, 2008
- 3. Claimant's amended Leave Request/Report dated July 15, 2008
- 4. Claimant's Leave Request/Report dated July 15, 2008
- 5A. St. Charles County Ordinance No. 98-245 (An Ordinance Establishing the St. Charles County Employees Shared Leave Bank)
- 5B. St. Charles County Ordinance No. 06-089 (An Ordinance Amending Chapter 115 of the Ordinances of St. Charles County, Missouri (OSCCMO) Relating to Employee Benefits)
- 6. Claimant's Hours History Detail for July 1, 2008 through December 31, 2008
- 7. Claimant's Shared Leave Program application
- 8. ***Not admitted into evidence in this case***
- 9. Correspondence from Sheriff Tom Neer to Claimant dated January 7, 2009 regarding No-Fault Separation from employment at the St. Charles County Sheriff's Department
- 10. Correspondence regarding Claimant's approval for Long Term Disability benefits

***Notes:*** 1) *Some of the exhibits were admitted subject to ruling on the objections contained therein in the award. Unless otherwise specifically noted below, the objections are overruled and the exhibits are fully admitted into evidence in this case.*

2) *Having reviewed Dr. Osborne's records contained in Exhibit S, Employer/Insurer's objections are **OVERRULED** and Exhibit S is admitted into evidence in this case.*

3) *Given that the payment of past medical expenses is not an issue in this case, and given that I am unsure how Exhibit 8 would otherwise be germane to any of the other issues presented for determination at this hearing, Employee's relevancy objection to Exhibit 8 is **SUSTAINED** and Exhibit 8 is not admitted into evidence in this case.*

4) *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 January 20, 2010.*

**FINDINGS OF FACT:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the testimony of the other witnesses, the medical records, opinions and testimony, the other expert opinions and testimony, and the other documentation, I find<sup>1</sup>:

- 1) **Claimant** is a 37-year-old, currently unemployed individual, who was employed as a Deputy Sheriff for the St. Charles County Sheriff's Department from 1997 until January 12, 2009. Claimant testified that as a deputy sheriff, he was first assigned to the Road Division in May 1997, which required him to take service calls and investigate. During his time at the Sheriff's Department, Claimant had also worked in the K-9 Unit, the Fugitive Unit and the Drug Interdiction Unit. Claimant's last assignment at the St. Charles County Sheriff's Department was as a School Resource Officer. He worked in this position for approximately a year. Claimant testified that in this position he responded to elementary and middle schools to work with the school administrators, deal with internal crime, discuss drugs and gangs with the students and serve as a positive role model for the students.
- 2) The **St. Charles County Position Description** (Exhibit 1) for a Deputy School Resource Officer lists the purpose of the position as protecting citizens and their property, preventing crime, enforcing the laws and ordinances, and implementing community education programs and services. The position description then includes a rather extensive list of duties and responsibilities, as well as qualifications and abilities needed to perform the job.
- 3) Claimant testified that as a Deputy Sheriff in St. Charles County he was also a member of the St. Charles County Deputy Sheriff's Association (Association). Claimant testified that it was a group focused on charity and helping those in need. While there are approximately 65-75 deputies in St. Charles County, Claimant estimated that only approximately half of the deputies were involved with the Association. Claimant admitted that it was not a requirement that deputies be a part of the Association. Claimant testified that dues were \$25.00 per month, and they used to be taken directly out of their checks and put into the Association's account, but that stopped and the members then had to write a check for the dues. The Association has monthly meetings, generally in the evening. At least sometimes there is drinking involved, because the Association has paid for the bar tab for the meetings in the past. Claimant noted that he has been a member of the Association since he was employed by the department in 1997. Further, Claimant served as an officer of the Association, Treasurer, from 2006 until his injury in 2008. As Treasurer, he was responsible for handling the dues money and the money from the golf tournament, issuing checks and paying bills.
- 4) Claimant testified that the main activity conducted by the Association was the Shop-With-A-Deputy event that was held each year since 2002, approximately 2 weeks

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<sup>1</sup> Only those facts pertinent to the arising out of and in the course of employment issue addressed below are being summarized here. Since that first issue was dispositive of the case, there was no reason to find any other facts or further summarize the evidence in this matter.

before Christmas. The Association would select needy families from St. Charles County and take them to stores to shop for Christmas presents. The families and children would interact with the deputies and shop with them for clothing, shoes or other household items, and then the children would get some gifts from Santa Claus. The toys Santa handed out to the children were collected through various drop boxes at the sheriff's department or other places throughout the County. Each year approximately 15-25 officers would participate in the event, which would last for about three hours. The officers would wear their Class A uniforms and arrive in patrol cars at the store to do the shopping. Claimant testified that they parked the patrol cars right in front of the store for high visibility. Claimant testified that the department's Mobile Command Unit would also be brought out for this event. In 2006, the Mobile Command Unit was used as the place where the children would meet Santa and receive their gifts. The K-9 Unit was also sometimes used at the event for interaction with the children and their families. The **Shop-With-A-Deputy photographs** (Exhibit U) depict some of these activities surrounding this event with Claimant and some other St. Charles County Sheriff's Department employees involved in the activities.

- 5) Claimant testified that the main fundraising event for the Shop-With-A-Deputy program was the charity golf tournament sponsored by the Association each year since at least 2002. Although there was some dispute in the record about where the proceeds from the tournament went, it is clear to me that they went into the Association's general bank account, and while the majority of the proceeds paid for the Shop-With-A-Deputy program, some of the proceeds also went to pay for general Association expenses such as meetings, flowers, etc. Claimant noted that he has participated in the golf tournament every year but one because he was working that year.
- 6) The Sheriff of St. Charles County, **Thomas W. Neer**, testified live at the hearing and provided more background information on the Association. He testified that the Association was formed in the early 1990s by some deputies upset with the sheriff at that time, Sheriff Runyon, because he had terminated the father of one of the deputies. They formed the Association to try to get rid of Sheriff Runyon in the next election. It was not incorporated or made a 501(c)(3) organization until sometime later.
- 7) Sheriff Neer testified that participation in the golf tournament was voluntary and it did not involve any discretionary function concerning community-based policing. Deputies are not given any duties or responsibilities to fundraise or play golf. He testified quite clearly that neither he, nor the department, scheduled the golf tournament, has any control over proceeds, or receives any of the proceeds from the tournament. He confirmed that participants must take vacation or comp time to play in or be at the tournament. They are not paid for their travel and they cannot take sick time to be at the tournament. Sheriff Neer testified that Claimant's participation in the tournament did not benefit St. Charles County.

- 8) On cross-examination, Sheriff Neer was asked about the department's **policy on Public Events [Policy 1.5.04]** (Exhibit V). The Public Events Policy states that, "It is the policy of the St. Charles County Sheriff's Department to participate (when resources permit) in any program or event when such participation would contribute to the overall goal of this office. Our focus while participating in these programs or events is to educate the public about the operation of this department." The policy also states a specific procedure that must be followed for someone to participate in any events or programs under this policy, including a request to be filed with the Supervisor of Community Education, evaluation, approval and assignment of personnel for any such programs or events. Sheriff Neer testified that he did not consider Shop-With-A-Deputy to be a program that fell under this policy. He believed things such as safety fairs or county fairs were what this policy was intended to include.
- 9) Sheriff Neer also testified about the difference between the shopping event where county cars are used and uniforms are worn and the golf tournament where county cars cannot be used and uniforms cannot be worn. He explained that each year before the shopping event, the deputies ask his permission to wear the uniforms and use the cars, and each year he has granted them permission to do so for that event. He has not, and would not, grant permission for the golf tournament (and it is not even clear that the deputies ever even asked) because he views it as more of a social event with the consumption of alcohol involved.
- 10) According to the **Saint Charles County Sheriff's Department Day Watch/First Shift schedule for June 21 through July 18, 2008** (Exhibit 2), Claimant was scheduled to take vacation from July 7, 2008 through July 14, 2008. A corresponding **Leave Request/Report** (Exhibit 4) approved by Sgt. Schwab on July 15, 2008 confirms that Claimant was originally scheduled to take a vacation day on July 7, 2008. As noted below, that leave request was eventually amended to change his off-work status for that date.
- 11) Claimant had originally taken a day of vacation on July 7, 2008 because that was the date for the annual Association charity golf tournament to support the Shop-With-A-Deputy program. According to the **St. Charles County Deputy Sheriff's Association Charity Golf Tournament flyer** (Exhibit T), the Association was sponsoring the charity golf tournament at Whitmoor Country Club that year to raise money for the Christmas shopping with a deputy program. The flyer noted that this was the tenth year for the golf tournament, and it had helped support "Christmas Shopping with a Deputy" since 2002. In reviewing the promotional flyer, I found no mention that the St. Charles County Sheriff's Department or the County of St. Charles was in any way sponsoring or promoting this event or the Shop-With-A-Deputy program. In fact, in the flyer there were numerous other charities referenced who had apparently received some of the proceeds of the golf tournament in the past, including the Make-A-Wish Foundation, MDA, Mark McGwire Cards Care, the Fourteen Fund, and the St. Charles County Regional Youth Advocacy Center. According to the flyer, payment for the golf tournament was to be made to the Association and mailed to

- their direct address, and further information could be obtained from the Association's website.
- 12) Claimant admitted that the scheduling and administration for the golf tournament was done by deputies, not anyone from St. Charles County Government. He further admitted that all the money from the tournament went into the Association's bank account. None of the money went to the St. Charles County Government.
  - 13) Claimant testified that on July 7, 2008, he arrived early at the Whitmoor Country Club to set up for the tournament with some other deputies, because he was the Treasurer of the Association that year. He mostly did the check-in and registration and handled the money. He also set up the silent auction. After performing these duties for approximately one to two hours, he went out onto the course to play a round of golf with a foursome.
  - 14) Claimant testified that somewhere around the second or third hole, he exited the golf cart he was riding in as a passenger to get some water from the beverage cart that was there. While standing by the cart, he was struck suddenly in the head, over the left eye near the middle of his forehead, by a golf ball.
  - 15) Claimant admitted that no one in county government or the sheriff's department told him to sponsor the golf tournament or be at the country club to play golf that day. He further admitted that playing golf is not a required duty of his job, and the shopping is also a voluntary activity. He admitted that beer was available on the golf course during the tournament and there were others in his foursome who were drinking. He agreed that officers were not allowed to drink while on duty. Claimant admitted that he had requested a vacation day for July 7, 2008, so he was not regularly scheduled to work that day, and then later he asked that the time be changed to sick time, but he did not know who actually made that change for him. He did not drive a county vehicle to the golf tournament. He drove his personal truck.
  - 16) A **Leave Request/Report** (Exhibit 3) approved by Sgt. Schwab on July 15, 2008 confirms that Claimant had previously entered the time off for this day as vacation time, but it was being revised to personal illness sick time because of a head injury.
  - 17) **Detective Michele Straub**, who has worked with the St. Charles County Sheriff's Department for 12 years, was working the beverage cart on July 7, 2008, stopped to give Claimant some water and witnessed Claimant get struck in the head by the golf ball. She testified that blood went everywhere and Claimant fell straight down to the ground. She obtained some towels to try to stop the bleeding. She noted that Claimant was conscious but disoriented. He was asking what happened.
  - 18) Detective Straub confirmed that she had been a member of the Association from 1998 until 2008 or 2009 when her membership expired. She testified that at the Association meetings, they discussed their pay, and projects such as Shop-With-A-Deputy and fundraisers for that program. She confirmed much of Claimant's

testimony about the Shop-With-A-Deputy program, including the use of department vehicles and the fact that they were in Class A uniform for the shopping. She testified that they were not working on county time when the shopping was performed, and the event was solely sponsored by the Association, not the county or the sheriff's department. She also testified that she took a vacation day to work at the charity golf tournament on July 7, 2008. She noted that she did not drive a county vehicle to the golf tournament because she was on vacation time, but she has sometimes driven a county vehicle to the actual shopping because she was representing the department at that event.

- 19) Records from the **St. Charles County Ambulance District** (Exhibit D) confirm that paramedics arrived on the scene at the Whitmoor Country Club to tend to Claimant's injuries. According to their records, Claimant had been struck in the head with a golf ball driven by a driver from approximately 20 yards away. Claimant was alert and oriented times three and denied any loss of consciousness. Bleeding was controlled. Claimant was given pain medication for a headache and was transported to **Progress West HealthCare Center** (Exhibit E). At the hospital, Claimant had his forehead laceration sutured and had a CT scan of the brain because of his headache complaint. The CT of the brain was negative and he was diagnosed with a forehead laceration and subcutaneous contusion (closed head injury).
- 20) Over the next year and a half, Claimant has continued to seek treatments from a number of physicians for various complaints including but not limited to trouble walking, dizziness, headaches (migraines), nausea, personality change, memory problems, inability to sleep, tinnitus, pain, vision difficulties, some hearing loss, falls, seizures, blackouts, anxiety and depression.
- 21) The deposition of **Kenneth J. Novak, Ph.D.** (Exhibit C) was taken by Claimant on October 29, 2009 to make his opinions in this case admissible at trial. Mr. Novak is an Associate Professor of Criminal Justice and Criminology at the University of Missouri-Kansas City. His specialty is policing in America, including community policing and understanding citizens' attitudes towards the police. Professor Novak explained that community policing includes problem solving, community outreach and crime prevention. Employee's attorney forwarded Professor Novak some information and records to review, including the Claim for Compensation, general information about the golf tournament (the brochure), information about the Shop-With-A-Deputy program, information about the Association, correspondence and thank you letters directed to Claimant, and information about the mutual benefit doctrine in Missouri. Professor Novak never met with Claimant in person or talked to him. Professor Novak believed the Shop-With-A-Deputy program was consistent with what community policing is, in that it promotes positive police/public encounters and encourages trust between youth and the police. He testified that Employer benefited from a program such as this because positive interactions with police are critical to help the police with crime prevention and law enforcement.
- 22) On cross-examination, Professor Novak admitted that he reached his conclusions about St. Charles County benefiting from the Shop-With-A-Deputy program based on

his general understanding of the empirical literature on policing and community relations. He admitted that he had no empirical literature about policing in St. Charles County. He admitted that his theory on the benefit to Employer from Claimant participating in a golf tournament to take children shopping, had not been tested in Missouri and had not been reviewed by peers. While he agreed on the benefit to Employer, he admitted that this hypothesis/theory was open to debate in the criminal justice science community. He further admitted that in addition to never talking to Claimant, he never met with or talked to the Sheriff, any citizens in St. Charles County about their attitudes toward the police, or anybody in St. Charles County for that matter.

### **RULINGS OF LAW:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the testimony of the other witnesses, the medical records, opinions and testimony, the other expert opinions and testimony, and the other documentation, as well as based on the applicable laws of the State of Missouri, I find the following:

The main issue on which this case turns is whether the accident (getting hit in the head with a golf ball at a charity golf tournament) arose out of and in the course of Claimant's employment as a Deputy for the St. Charles County Sheriff's Department. In reaching a conclusion on this issue, it was also important to consider the relationship between the Association which sponsored the tournament and the Sheriff's Department (Employer), as well as the extent of the connection between the golf tournament and that Association's main charitable event, the Shop-With-A-Deputy program.

#### ***Issue 1: Did the accident arise out of and in the course of employment?***

The first statutory section of importance to consider in this case is **Mo. Rev. Stat. § 287.020.3(2) (2005)**, which reads:

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.

According to the plain and ordinary meaning of this statute, only injuries that meet both prongs of this section can be found to arise out of and in the course of employment.

While the Courts had historically formulated a rich case history interpreting the phrases “arising out of” and “in the course of the employment” under the Workers’ Compensation Statute, when the Legislature amended the statute in 2005, they also included **Mo. Rev. Stat. § 287.020.10 (2005)**, which specifically rejected and abrogated earlier case law interpreting the meanings of or definitions of such phrases in the statute as “arising out of” and “in the course of the employment.” Thus, in interpreting these phrases for the purposes of reaching a determination in this case, the statute requires that the body of case law interpreting these phrases that predated the statutory change in 2005 must be excluded as having no precedential value.

In addition to the abrogation of the earlier case law as described above, the Legislature also made another significant change in the 2005 statute that affects the interpretation of these sections, and, thus, has a bearing on the outcome of this case. Whereas, prior to 2005, the Workers’ Compensation Statute was to be “liberally construed with a view to the public welfare,” **Mo. Rev. Stat. § 287.800 (2005)**, mandates that the Court “shall construe the provisions of this chapter strictly” and that “the division of workers’ compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.” Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, “In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.”

Despite the abrogation of the earlier case law, there have, however, been some more recent post-2005 rulings by the Courts that give some guidance on the interpretation of “arising out of” and “in the course of the employment” as it is currently contained in the Workers’ Compensation Statute. In *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671, 673 (Mo. banc 2009), the Court found that when the Legislature enacted the 2005 amendments to the Workers’ Compensation Statute, they “revised [Section 287.020.3(2)] to narrow the scope of those injuries that will be deemed to arise out of and in the course of employment.” Miller experienced a “popping” of his knee, followed by pain, as he walked briskly while working with his crew repairing a section of a road. Noting the 2005 amendments, the strict construction as opposed to liberal construction, and the abrogation of earlier case law, the Court found that Miller’s knee injury was not compensable and did not arise out of or in the course of his employment, because the risk of walking was the same as that to which Miller was exposed in his normal life outside his employment.

In another more recent case, *Hager v. Syberg’s Westport*, ED93420 (Mo. App. E.D. 2010), once again applying the 2005 amendments, the strict construction as opposed to liberal construction, and the abrogation of earlier case law, the Court found that Hager’s injuries from slipping on the parking lot on the way to his car did not arise out of or in the course of the employment because the injury came from a hazard or risk unrelated to his employment since he could have slipped on ice on a parking lot anywhere. Therefore, he was equally exposed to this hazard or risk outside of his employment.

Considering the competent and substantial evidence listed above and applying the relevant statute to the facts of this case, I find that Claimant’s accident and his alleged injuries

from being struck in the head with a golf ball while playing in a charity golf tournament did not arise out of or in the course of his employment for Employer.

The facts and circumstances surrounding Claimant's participation in the charity golf tournament and the relationship between that tournament and Employer are not really in dispute. I find no dispute in the evidence of record that this charity golf tournament was sponsored, planned, and executed by the Association (and members thereof) without the help or support in any way of the County of St. Charles or the St. Charles County Sheriff's Department. There was no mention in the promotional flyer that Employer was in any way supporting, promoting or sponsoring this event. In their testimony, Claimant, Detective Straub and Sheriff Neer all agreed that individuals working at or participating in this charity golf tournament had to take a vacation or a personal day to be there, could not wear their uniforms, and did not drive department vehicles. It is also clear to me, based on Claimant's testimony and the job description entered into evidence, that playing golf was not one of his assigned functions, duties or responsibilities as a Deputy Sheriff in St. Charles County. Further, the consumption of alcohol during the course of the tournament would also be a violation of Employer's policy, pointing me even more strongly to the finding that this was not an official function of the Department and not a part of Claimant's job duties for Employer.

For much the same reason that the earlier Courts in *Miller* and *Hager* found that those injuries did not arise out of or in the course of employment, namely that the injuries did not result from any increased risk connected to the employment, I, too, in this case make that same finding. Claimant was two or three holes into a round of golf on a country club golf course where other individuals were playing golf as well, when he was struck in the head by a golf ball. Employer had no right to control or direct his actions on that course during that charity golf tournament because he was off duty on a vacation day. Given these findings, I further find that the injury came from a hazard or risk unrelated to his employment. Additionally, I find that Claimant would have been equally exposed outside of and unrelated to the employment in normal nonemployment life to the hazard or risk of being struck in the head with a golf ball any time he was at or near a golf course. There was nothing unique or special about his employment that increased his risk of injury in this case. Therefore, pursuant to **Mo. Rev. Stat. § 287.020.3(2)(b) (2005)** I find that Claimant's Claim must fail because the injury did not arise out of or in the course of the employment.

In the course of this case, the parties also raised the voluntary recreational activity statute and the mutual benefit doctrine as issues that needed to be addressed in determining the compensability of this injury. Pursuant to **Mo. Rev. Stat. § 287.120.7 (2005)**:

Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

- (1) The employee was directly ordered by the employer to participate in such recreational activity or program;
- (2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
- (3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

According to the terms of this statute, unless the employee was directly ordered to participate by employer, was paid wages or travel expenses for participating, or was injured on employer's premises due to an unsafe condition known by employer, the Workers' Compensation benefits for being injured during a recreational activity are forfeited. Employer asserts that given the facts in this case, pursuant to this statute, Claimant is not entitled to Workers' Compensation benefits for this injury.

Claimant asserts instead that the mutual benefit doctrine should apply and that he is, therefore, entitled to benefits on account of this injury. Claimant alleges that Employer derived a benefit, however slight, from his participating in the golf tournament to raise money for the Shop-With-A-Deputy program, because that program was part of the county's community policing program and it fostered good will among the residents of St. Charles County which improved the department's ability to prevent crime. As support for this position, Claimant offered the deposition testimony of Professor Kenneth Novak, who agreed that Employer benefited from the Shop-With-A-Deputy program as part of an overall community policing strategy.

A quick look at the history of the voluntary recreational activity statute and the mutual benefit doctrine is instructive in this case. In *Wilson v. Monsanto Company*, 926 S.W.2d 48 (Mo. App. E.D. 1996), the employee was a salaried research biologist for the employer who was struck by a truck and injured approximately a mile from his workplace while riding his bicycle to eat at McDonald's and then to a supermarket to buy candy bars and soda. He admitted that riding his bicycle was his "primary form of recreational activity." The Court noted that the Legislature originally passed §287.120.7 to "enable employers to limit their liability for recreational injuries." In light of this express intent that they found by the General Assembly to limit liability for these injuries, the Courts declined in this case to expand employer liability even beyond that of pre-1990 case law.

In a second case decided under this same section, *Jones v. Trans World Airlines, Inc.*, 70 S.W.3d 468 (Mo. App. W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003), the employee was a mechanic who walked for recreation and exercise on a paved walking path on employer's premises during his 30-minute unpaid lunch break. On his way to the walking path, after he had changed into his tennis shoes, he tripped and fell injuring himself. The Court found that the employee had begun his recreational activity of walking when he changed into his tennis shoes and began walking toward the path, and denied benefits under this section.

In the third case decided under this section, cited by Claimant as support for his position in the case at bar, *Graham v. La-Z-Boy Chair Company*, 117 S.W.3d 182 (Mo. App. S.D. 2003), the employee was a supervisor for La-Z-Boy over their interplant shipping department. He was responsible for contacting shipping companies and arranging for them to haul freight for La-Z-Boy. CFI was one of the shipping companies he regularly contacted and used. CFI sponsored an annual golf tournament and invited participants from La-Z-Boy to play. It was not mandatory, but the employee wanted to play because it would give him the opportunity to meet the CFI employees he spoke with on the phone every day. At the tournament, CFI did the pairings and matched him up with a CFI employee. He was injured when the CFI employee lost control of the golf cart and ran them into a tree. The Court noted that Courts in the past have looked to the particular facts of a given case to determine if there is some benefit to the employer or if the activity is purely recreational for the benefit of the employee. The Court also admitted that post-1990 cases have not explicitly described the interplay between the voluntary recreational activity defense and the mutual benefit doctrine, but they have suggested that if the employer derives a benefit from the activity, then it cannot be considered purely recreational.

The Court distinguished the contrary results in *Jones* and *Wilson*. In those cases, the employees were unable to prove that their recreational activities were of any benefit to the employer. Although in *Wilson* the employee argued that the benefit to the employer was that of a "healthier, happier employee," the Court in that case said that that benefit was not the type of benefit that invokes the mutual benefit doctrine. The Court in *Graham*, then, awarded benefits citing the mutual benefit doctrine and finding that the golf tournament benefited the employer since it allowed for improved relations with their shipping company.

In the final analysis, I do not think the *Graham* case represents that much of a departure from the standard described in prior case law. Although they were dealing with a golf tournament in that case, it was really more akin to a business lunch or a business meeting with clients out at a club or restaurant, all of which would clearly be compensable under the mutual benefit doctrine. The bottom line remains that the application of the mutual benefit doctrine or the recreational activity statute is highly dependent on the facts presented in each given case.

In the case at bar, the facts as presented lead me to conclude that the Association and the department (Employer) cannot be viewed as interconnected organizations. While Claimant would seem to suggest that the Association is nothing more than a charitable organization that helps Employer foster its mission of community policing through its charitable activities, I do not find that to be the case. Instead, I find that the Association was founded originally for a political purpose and to fight for the rights and pay of deputies in St. Charles County. Given the reason for the founding of the Association and the fact that pay and benefits for deputies is still considered and discussed at meetings, I find that the Association at times would have goals and positions contrary to Employer. I further find that the Association is not promoted, sponsored or supported by Employer. I find it is a separate organization whose membership is comprised of deputies and other personnel who work for Employer. I find that any connection between the Association and the department is tenuous at best since the Association operates wholly on its own, with a separate budget, its own officers, separate meetings outside of work hours, and separate activities over which only the Association, not Employer, has complete control.

Claimant's testimony and that of Professor Novak stands for the proposition that, despite the Association and Employer being separate entities, Employer derives a benefit in the way of improved community relations and better community policing because of the Shop-With-A-Deputy program sponsored by the Association. Claimant points to the fact that deputies are in uniform and driving patrol cars on the day the shopping is done with the children, and that Employer has allowed the K-9 Unit and Mobile Command Unit to be present on site for the shopping to promote the department and educate the community. While I agree with Claimant that the department's presence, including the uniforms, vehicles, and units, at the shopping events points to more of a connection between the department and that event, I am not asked in this case to find whether or not an injury at the shopping event would be compensable under the mutual benefit doctrine. Claimant was not injured while in uniform with his patrol car at the shopping event. Taking it even one step further, I am also not asked to make a finding on whether an injury to a deputy working at the golf course for the charity tournament would be compensable under the mutual benefit doctrine. Claimant was not injured while setting up for the event or doing registration in his capacity as the Association's Treasurer. Going even one more step further removed from the shopping event itself, I am asked to make a finding on whether a deputy who is injured while merely participating in the golf event has a compensable case under the mutual benefit doctrine.

In evaluating whether mere participation in the charity golf event is enough of a connection with Employer to invoke the mutual benefit doctrine, I find it is important to consider a few more facts about the tournament itself. In addition to Employer separating itself from the golf tournament by requiring participants to take vacation and not allowing them to wear uniforms or drive department vehicles, I also find that the proceeds of the tournament did not go exclusively to the Shop-With-A-Deputy program. While most of the money may have gone to the shopping event, the tournament flyer clearly advertises a number of other charities who have received proceeds from the tournament, and also notes that the golf tournament was started ten years prior to 2008, which means it preceded the shopping event by four years. I also find that Employer had no say in the disbursement of the funds, either in the way of amounts or charities, since that was all controlled by the Association. It is clear to me that Employer never sponsored or promoted the charity golf tournament since they are nowhere to be found on the promotional flyer.

Claimant's and Professor Novak's testimony both centered around the alleged benefit Employer received on account of the Shop-With-A-Deputy program, however, as noted above, that program itself is not at issue, it is the golf tournament. Additionally, Professor Novak testified based on gross generalities regarding community policing without any direct information on community policing in St. Charles County, and without having gathered any information or conducted any interviews with anyone in St. Charles County. To the extent that Professor Novak's conclusions were reached without any direct information on St. Charles County, I find his conclusions were not probative and reliable. I am at a loss to understand how he can credibly testify about community policing in St. Charles County and the potential benefit of the shopping program when he had gathered no direct information from anyone in St. Charles County on these issues. Given all of these findings, I fail to see how the Association's charity golf tournament provided any benefit to Employer.

Applying **Mo. Rev. Stat. § 287.120.7 (2005)** to the facts of this case, I find that Claimant’s participation in a recreational activity (playing golf) is the prevailing cause of the injury (being struck in the head with an errantly struck golf ball). I find that Claimant was never directly ordered by Employer to participate in the golf tournament. Claimant took a day of vacation and so was not paid wages or travel expenses to participate in the golf tournament. The golf tournament occurred at a private country club, not on Employer’s premises. Therefore, benefits or compensation otherwise payable under the chapter are forfeited. Further, I find that the mutual benefit doctrine does not apply to the facts of this case, because, as explained above, I find that while Claimant certainly derived the benefit of a day out playing golf, Employer did not derive any benefit, however slight, from Claimant’s participation in the Association’s charity golf tournament. Accordingly, Claimant’s claim for benefits is denied. Since the Claim against Employer is denied, the Claim against the Second Injury Fund is, therefore, similarly denied.

As the finding on this issue is dispositive of the case, the remaining issues are moot and will not be ruled on in this award.

**CONCLUSION:**

Claimant was injured when he was struck in the head by a golf ball while playing golf at a charity golf tournament sponsored by the St. Charles County Deputy Sheriff’s Association. Claimant’s injury did not arise out of or in the course of his employment. Further, under Mo. Rev. Stat. § 287.120.7 (2005), the recreational activity provision, Claimant is not entitled to collect any benefits or compensation for this injury. Finally, the mutual benefit doctrine does not apply to this case since Employer did not derive any benefit, however slight, from Claimant’s participation in the Association’s charity golf tournament. Accordingly, Claimant’s claim for benefits against Employer and the Second Injury Fund is denied.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

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

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*