Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 06-020192

Employee: Eric Betzold

Employer: The Renaissance Guild, LLC

Insurer: Uninsured

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund (Open)

Date of Accident: February 14, 2006

Place and County of Accident: St. Louis, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued September 22, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

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 should be reversed.

The parties stipulated that several issues needed to be decided by the administrative law judge including accident, arising out of, medical causation, past medical, future medical, and temporary total disability. The administrative law judge found employee sustained an injury by accident but then spent most of her award discussing whether employee's injuries arose out of and in the course of his employment. In reaching her conclusion that employee's injuries did not arise out of and in the course of employment, the administrative law judge relied upon definitions and constructions of the phrases "arising out of" and "in the course of employment" as decided by Missouri courts before August 28, 2005. The administrative law judge's reliance is contrary to law.

2005 Amendments to the Workers' Compensation Act

Section 287.800.1 RSMo (2005) provides that,"[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly." "Strict construction mandates that a court give a statutory provision no broader application than is warranted by its plain and ordinary meaning." *State ex rel. Dresser Industries, Inc. v. Ruddy*, 592 S.W.2d 789, 794 (Mo. 1980).

Section 287.020.10 RSMo (2005) provides that, "[i]n 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."

"The language in section 287.020.10…serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020…[I]t appears from the plain language of the statute, the legislature …intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo.App. 2007). The administrative law judge erred by relying on abrogated interpretations of the phrase "arising out of" and "in the course of employment."

Blank Slate

As to the phrases appearing in § 287.020.10, the legislature created a blank slate effective August 28, 2005.

> The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.

Abrams v. Ohio Pacific Express, 819 S.W.2d 338 (Mo. banc 1991) (citations omitted).

In light of the directives of § 287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Workers' Compensation Act giving the words and phrases of § 287.020 their ordinary and usual meaning.

Credibility

At the outset, I must address credibility issues. This is not a case where witness testimony reveals subtle differences of perspective or recollection regarding salient events. The primary players in this case – employee, Joe Kriegesmann, and Renee Martin – testified very differently about significant events. The stark differences in their descriptions of the events suggest that one or more witnesses are not accurately recounting the events. Under these circumstances, the Commission is charged with the task of assessing the credibility of the witnesses to determine who is believable.

The record reveals few reasons to believe Mr. Kriegesmann and many reasons to question his veracity. Mr. Kriegesmann has several convictions for passing bad checks. Mr. Kriegesmann is romantically involved with employer's sole owner. Bad acts in a witness' past or a witness' romantic entanglement with a stakeholder do not conclusively preclude a finding that the witness' testimony is credible, but Mr. Kriegesmann's testimonial performance did not bolster my belief in his veracity.

The primary issue in dispute is whether or not employee was authorized to be working at the Watson Road site at the time of his injury on February 14, 2006. Mr. Kriegesmann testified that he pulled the crew off the Watson Road job on February 3 and had not authorized it to return as of the morning of February 14. Employee denies that Mr. Kriegesmann ever told him the job was stopped. Ms. Martin was unaware of any work stoppage at Watson Road. Mr. Kriegesmann's February 6 letter to Mr. Campiere does not allude to any work stoppage in progress. Only the testimony of Bradley Pinkerton supports Mr. Kriegesmann's testimony that he told the crew to pack up on February 3 because it might not be coming back. It was Mr. Pinkerton's first day and he was only at the Watson Road site in the morning. I am not convinced Mr. Pinkerton was familiar enough with employer's operations to provide persuasive evidence on this issue. I find incredible Mr. Kriegesmann's testimony that Mr. Kriegesmann directed employee to work elsewhere on February 14, 2006. I also find incredible his testimony that employee was not authorized to work at the Watson Road site on February 14, 2006.

Mr. Kriegesmann and employee agree that work was not performed at the Watson Road site the week of February 6 through February 10 due to inclement weather. Mr. Kriegesmann contends he left phone messages offering employee work at other job sites each day that week, yet Mr. Kriegesmann could not identify the calls on the phone records offered by employer. Employee testified he spoke with Mr. Kriegesmann only one time and that was on February 9.

By Mr. Kriegesmann's account, employee was not the only person Mr. Kriegesmann had trouble contacting by phone. Mr. Kriegesmann testified that on the morning of February 14 he tried unsuccessfully 5 or 6 times to reach Mr. Campiere by phone. Again, no such calls are reflected on the phone records offered into evidence by employer. Ms. Martin testified that Mr. Campiere came to see her at her real estate job because Mr. Campiere could not reach Mr. Kriegesmann that same morning. Mr. Campiere's act of visiting Ms. Martin lends authenticity to the suggestion that it was Mr. Kriegesmann who was out of touch that morning, not Mr. Campiere.

There are other inconsistencies and curiosities in the record involving Mr. Kriegesmann. He testified he met employee at the Watson Road site after the injury; employee testified Mr. Kriegesmann met employee at the medical clinic. Mr. Kriegesmann testified he assumed employee quit when employee did not call back to accept work on February 14. I wonder why Mr. Kriegesmann did not assume employee quit when employee allegedly did not call back to accept work on February 6? On February 7? February 8? On February 10?

Ms. Martin's testimony reveals curiosities, as well. By her account, Ms. Martin believed Mr. Kriegesmann was having no luck getting return calls from employee. Ms. Martin testified Mr. Kriegesmann failed again the morning of February 14. Yet, it is Ms. Martin's testimony that when Mr. Campiere came to see her on February 14 because he could not reach Mr. Kriegesmann, Ms. Martin told Mr. Campiere she had talked to Mr. Kriegesmann just 10 minutes earlier and Mr. Kriegesmann said he had been trying to reach Mr. Campiere all morning. Ms. Martin told Mr. Campiere, "if you want to go ahead and try and get hold of Eric, go ahead. Tell him to call Joe."

Summarizing Ms. Martin's testimony regarding the state of affairs as of the morning of February 14: Ms. Martin is employer's sole owner; Mr. Kriegesmann is her boyfriend and manages all of employer's jobs and crews; Mr. Campiere is employer's customer; and, employee has largely ignored employer over the past 11 days. Essentially, employer is asking me to believe that when employer's customer came to speak with the owner because he could not get in touch with employer's foreman, the owner told the customer to call the allegedly irresponsible employee to get in touch with the foreman, even though she had just spoken with the foreman 10 minutes prior. This makes no sense. A responsible business owner faced with this situation would pick up the phone and contact the foreman for the customer. A responsible business owner would not refer the customer to seek help from a worker the owner thinks is irresponsible. If Ms. Martin told Mr. Campiere to call employee, it was because she was authorizing Mr. Campiere to speak directly to employee to tell him to resume work at the Watson Road site. And I think that is what happened.

According to Ms. Martin's testimony, on February 24, 2006, she departed from her usual payroll procedure and purchased a money order to pay employee his final pay. She marked the receipt that the pay was for the week ending February 9, 2006. The reason Ms. Martin gives for not going through employer's regular payroll service to generate employee's payroll was because she "had not heard from [employee] in some time." I am not persuaded by Ms. Martin's explanation for paying employee with a money order for several reasons:

- The regular date to submit payroll for February 9 was February 16. As of February 16, Ms. Martin was aware that employee was injured on February 14. Her suggestion that she had not heard from employee in a while makes no sense unless "some time" meant February 15.
- Ms. Martin testified that Mr. Kriegesmann was the one who dealt with the crews, so why would she have been expecting to hear from employee?
- Employer's payroll service would have processed the payroll submitted by Ms. Martin whether Ms. Martin had spoken with employee or not.

It makes more sense that employer purchased a money order to avoid identifying the pay period for which payment was being made, e.g., the date of injury. Employee testified the pay was for his work on February 14, 2006. According to Ms. Martin's description of the usual pay schedule, a worker's pay for February 14 would be delivered on February 24. I think it is no coincidence that the money order was purchased on the usual payday for February 14. The memo written in Ms. Martin's hand identifying that the money order was payment for the week ending February 9 is simply not persuasive. I think the money order payment represented employee's pay for February 14.

Employer offered no evidence that employee had something to gain from reporting to and working at the Watson Road site if he thought the work was not authorized. This employer – which failed to secure workers' compensation coverage as required by law and as required by its contract with Mr. Campiere – very likely has something to gain if it can persuade us that employee's injury is not compensable.

In light of the above discussion, I find employee to be more credible than employer's witnesses. I believe the events unfolded as follows. Inclement weather prevented work at the Watson Road site the week of February 6 through February 10, 2006. Mr. Campiere fired employer on February 11. Mr. Kriegesmann and Mr. Campiere came to a verbal agreement to resolve all differences on February 13. On the morning of February 14, Mr. Campiere was anxious for work to resume but he could not reach Mr. Kriegesmann. Mr. Campiere visited Ms. Martin, who was working at a different job as a real estate agent. Ms. Martin told Mr. Campiere to contact employee. Mr. Campiere contacted employee to return to work with authority from Ms. Martin. Employee acted reasonably and with employer's authority when he reported to work at the Watson Road site on February 14, 2006. Employer paid employee for his work on February 14 by money order dated February 24.

Compensability

Section 287.120.1 RSMo provides:

> Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers' compensation benefits if 1) employee sustained personal injury 2) by accident 3) arising out of and in the course of his employment. Further, 287.020.3 provides that, "[a]n injury by accident is compensable only if 4) 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."

1) Injury
Section 287.020.3(5) defines "personal injury" as "violence to the physical structure of the body." Employee testified that the two parts of his leg moved in different directions resulting in intense pain. The notes of Dr. Narra reflect that Dr. Narra found left knee swelling, decreased flexion, tenderness and a dislocated knee. The report of Dr. Knutilla reflects that physical examination revealed a lateral collateral ligament injury and an ACL injury. Employee suffered violence to the physical structure of his body.

2) Accident
Section 287.020.2 defines "accident:"

> 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.

The administrative law judge found that, employee "began working at 9:30 a.m. on February 14, on Watson Road….Carrying a board on his shoulder [employee] climbed the pitch of the roof and kneeled. When he stood up, his thigh moved to the left and his lower leg went right, causing him to fall."

- "*unexpected traumatic event*" – Based upon the finding of the administrative law judge, there can be little doubt that the event during which the two parts of employee's leg shifted in opposite lateral directions was both unexpected and traumatic.
- "*identifiable by time and place of occurrence*" – February 14, 2006, at 9:30 a.m. on Watson Road.
- "*caused by a specific event*" – As he rose from a kneeling position, employee's thigh moved to the left and his lower leg went right, causing employee to fall.
- "*during a single work shift*" – Employee worked almost exclusively at the Watson Road location. The contract in evidence reveals that work was to begin each morning at approximately 7 a.m. The testimony of employee and owner Renee Martin reveals that at no time did employer shut down the Watson Road job site, as contended by Joe Kriegesmann. Employee's accident occurred at one moment while he was performing services for employer as supervisor and carpenter on an ongoing project of employer. Employee's accident was caused by a specific event during a single work shift.
- "*producing at the time objective symptoms of an injury*" -- When his knee dislocated, employee experienced immediate sharp, severe and sudden pain. Employee fell forward. Employee needed assistance sliding down the pitch of the roof. Employee had to ride a hydraulic lift to the ground.

Employee has established each element of "accident" as defined by 287.020.2.

3) Arising Out of and In the Course of Employment
The final question is whether the personal injury arose out of and in the course of employee's employment. The legislature enacted a two-part test for determining if an injury arises out of and in the course of employment. 287.020.3 RSMo (2005) provides that:

> (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.

Injury is defined variously in 287.020. As it appears in the arising out of and in the course of employment test, it carries the same meaning as "personal injury", that is, "violence to the physical structure of the body." § 287.020.3(5). Substituting this definition into the arising out of and in the course of employment test, the test becomes *[a violence to the physical structure of employee's body] shall be deemed to arise out of and in the course of employment only if*:

> *It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the [violence to the physical structure of employee's body];*
>
> ***and***
>
> *[The violence to the physical structure of employee's body] 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 testimony of employee, the medical records, and the report of Dr. Knutilla reveal that the employee's February 14, 2006, 9:30 a.m., Watson Road event, wherein the upper and lower parts of his leg moved in opposite directions (accident) was the only factor causing the violence to the physical structure of employee's body (the damage to the menisci and ligaments in employee's knee). Employer presented no evidence to the contrary. On this evidence, is the accident the prevailing factor in causing the injury? An analysis of the phrase "prevailing factor" is in order.

The phrase "prevailing factor" appears in two different subsections of 287.020. The context of the subsections reveals that the phrase is used in two different ways.

- 287.020.3(1) provides that, "[a]n 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."
- 287.020.(2) provides that, "[a]n 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,…"

Substituting the definition of "prevailing factor" for each occurrence of the phrase "prevailing factor" does not cut an easy path to a compensability determination. Substituting the definition in 287.020.3(1) produces the following redundant requirement:

> An injury by accident is compensable only if the accident was *[the primary factor, in relation to any other factor, causing both the resulting medical condition and disability]* in causing both the resulting medical condition and disability.

Substituting the definition in 287.020.3(2) produces the following somewhat unintelligible requirement:

> 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 primary factor, in relation to any other factor, causing both the resulting medical condition and disability]* in causing the injury; and,…

How do I proceed to determine whether the accident was the prevailing factor in causing the injury where, as here, I have strictly construed the statutory provision with the statutory definition, but the strict construction results in doublespeak? If I were to shorten the statutory definition of "prevailing factor" to "the primary factor, in relation to any other factor," I could give logical meaning to both subsections cited above. Is it permissible under the strict construction directive for me to use only a portion of the statutory definition of "prevailing factor?" Am I permitted to assume the legislature erred in drafting the definition? I need not know the answer to these questions in this case.

As the <u>only</u> factor, the accident is necessarily the primary factor, in relation to any other factor, in causing the physical violence to employee's body, i.e., the injury. Applying dictionary definitions, the accident is the most important influence in causing the physical violence to employee's body.[1] Employee has established the first prong of the arising out of and in the course of employment test.

I now consider the second prong of the test. The hazards posed by employee's job and job duties as a roofer include: working on an uneven surface (pitched roof), working on toe boards, and alternating between standing and kneeling on such surfaces. The violence to the physical structure of employee's body clearly does not come from a hazard or risk unrelated to employee's employment as a roofer to which workers are equally exposed in their normal nonemployment life. The hazards of roofing are not normally encountered by workers in nonemployment life.

Causation
"The testimony of the claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence." *Ford v. Bi-State Dev. Agency*, 677 S.W.2d 899, 904 (Mo. Ct. App. 1984). Employee testified he had no problems with his knee before the February 14, 2006, accident. Employee testified as to the mechanism of his injury and the immediate onset of pain. Employee offered the medical records of St. Anthony's and the report of Dr. Knutilla to support his position that the February 14, 2006, accident caused the resulting medical condition and disability of his knee, whatever they may be. We do not yet know what the condition or disability is because employee has not received the necessary diagnostic testing and treatment for his knee injury.

Final Thoughts
The administrative law judge included a discussion of the mutual benefit doctrine and the dual purpose doctrine. As those common law doctrines are interpretations of the arising out of and in the course of employment requirements as they existed before August 28, 2005, the cases establishing the doctrines have been abrogated by § 287.020.10. The administrative law judge erred in relying upon those doctrines.

The compensability of this case is clear. Employee was performing work on behalf of his employer at a site where he regularly worked. Employee was performing work on behalf of his employer at a time when he regularly worked. Employee was actually performing his work duties, i.e., roofing, at the time he suffered an accident. The accident gave rise to the injury for which employee seeks compensation.

Based upon the foregoing, I conclude that employee has established that he suffered a personal injury by accident arising out of and in the course of employment and is entitled to workers' compensation benefits as provided by law, including treatment of his knee injuries. I would issue a temporary award of same.

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John J. Hickey, Member

AWARD

Employee: Eric Betzold	Injury No.: 06-020192
Dependents: N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer: The Renaissance Guild, LLC	
Additional Party: Second Injury Fund (Open)	
Insurer: Uninsured	
Hearing Date: June 16, 2006	Checked by: SC:tr

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: February 14, 2006
5. State location where accident occurred or occupational disease contracted: St. Louis, 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? No

10. Describe work employee was doing and how accident happened or occupational disease contracted: Claimant twisted his left knee while working on a rooftop.

12. Did accident or occupational disease cause death? No

13. Parts of body injured by accident or occupational disease: Left knee

14. Compensation paid to-date for temporary disability: -0-

15. Value necessary medical aid paid to date by employer/insurer? $536.00

16. Value necessary medical aid not furnished by employer/insurer? $190.00

17. Value necessary medical aid not furnished by employer/insurer? $190.00

18. Employee's average weekly wages: $480.00

19. Weekly compensation rate: $320.00/$320.00

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: -0-

weeks of temporary total disability (or temporary partial disability) -0-

TOTAL: -0-

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eric Betzold Injury No.: 06-020192

Dependents: N/A Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri

Employer: The Renaissance Guild, LLC

Additional Party: Second Injury Fund (Open)

Insurer: Uninsured

Checked by: SC:tr

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PRELIMINARY MATTERS

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A hearing was held June 16, 2006, at the Missouri Division of Workers' Compensation in the City of St. Louis at the request of Eric Betzold (Claimant) for medical treatment under §287.450. Attorney Brian Stokes represented Claimant. Attorney Devin Sauer represented the Renaissance Guild, LLC (Employer). The Employer was uninsured at the time of the injury. The Second Injury Fund is to remain open and did not participate in this proceeding. Venue is proper and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

STIPULATIONS

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1. The Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.

2. Employer's liability was not insured.

3. Employer had notice of the injury.

4. A Claim for Compensation was filed within the time prescribed by law.

5. Claimant's average weekly wage was $480.00 based on the 30-hour rule. The rates for temporary total disability and permanent partial disability were $320.00 respectively.

6. Claimant has not been paid compensation to date for temporary total disability. Claimant has received $536.00 in medical benefits to date.

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ISSUES

The issues to be determined are:

1. Accident;
2. Arising out of and in the course of employment;
3. Medical causation;
4. Past medical expenses in the amount of $190.00;
5. Future medical care;
6. Future temporary total disability; and
7. § 287.560 Costs and fees

SUMMARY OF EVIDENCE

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Only evidence supporting this award will be summarized. Any objections not expressly ruled on in this award are overruled. Claimant offered Exhibits A through E, which were admitted into evidence without objection. Exhibit G was withdrawn. A ruling was reserved on Exhibits F, H and I. After a review of the evidence, Exhibits E, F, and H were admitted. Exhibit I was not admitted. Employer offered Exhibits 1 through 4, which were admitted into evidence without objection.

FINDINGS OF FACT

Based upon competent and substantial evidence presented at hearing, I find the following facts:

1. **Claimant** began his career in construction, working on residential and commercial buildings through the Carpenter's Union.

2. A mutual friend referred Claimant to Mr. Kriegesmann for a construction project. In mid November 2005, the Renaissance Guild LLC hired Claimant and Mr. Kriegesmann became his immediate supervisor direct contact.

3. Carlo Campieri, owner of property located on Watson Road, sought to convert the existing building into a restaurant. On December 6, 2005, Mr. Campier and Mr. Kriegesmann entered a contract for Employer to perform the work (Exhibit 1). The contract did not authorize Mr. Campieri to direct the work of Renaissance employees.

4. Claimant initially worked with Mr. Kriegesmann, George England, and Andy Frick on Watson Road. Mr. Campieri also worked on the project, provided tools, equipment, manual labor, contributed ideas, and evaluated the work. Scaffolding, a walk board, ladders, and chains were locked and left at the work site each day.

5. Claimant straightened trusses, leveled, sheeted and stabilized the roof on Watson Road. He also worked on Oakville and Murdoch projects.

6. Mr. Kriegesmann was the only one who instructed Claimant where and when to work, and gave him his paycheck.

7. Claimant was promoted to supervisor. On February 3, 2006, while Claimant worked with Brad Pinkerton, Andy Frick and Lance Jackson, Mr. Kriegesmann informed them of Mr. Campieri's non-payment. He instructed Claimant to move all the equipment, as they might not return to Watson Road.

8. The week of February 6-10, 2006, Mr. Kriegesmann called and left daily messages for Claimant to report to work with no response. He spoke to Claimant on February 9, 2006 and Claimant requested the day off as he did not feel well. Mr. Kriegesmann sent Mr. Frick to pick up the company truck from Claimant, which he used to move equipment on February 3, 2006.

9. Claimant did not recall a telephone call from Mr. Kriegesmann on February 12th or 13th telling him to report to Shrewsbury on February 13th.

10. On February 14, 2006, Mr. Campieri called Claimant about 8:45 a.m. and informed him that Ms. Martin wanted him to work on Watson Road. Claimant believed Mr. Campieri was a 'credible source' because they worked together for three months and Mr. Campieri contributed ideas to the project. However, Mr. Campieri was not his employer or supervisor, did not pay him, and it was not customary for property owners to direct a project.

11. Neither Mr. Kriegesmann nor Ms. Martin instructed Claimant to work on Watson Road on February 14th.

12. Claimant began work at 9:30 a.m. on February 14, 2006 on Watson Road with Mr. Frick and Mr. Campieri. Carrying a board on his shoulder, Claimant climbed the pitch of the roof and kneeled. When he stood up, his thigh moved to the left and his lower leg went right, causing him to fall.

13. Claimant called Mr. Kriegesmann and reported the accident; and informed him that he needed to see a doctor. Mr. Kriegesmann asked Claimant why he was on Watson Road.

14. At the Med-Stop, X-rays showed damage to Claimant's knee and the doctor recommended he see an orthopedic surgeon. Claimant made an appointment but the doctor would not see him because the Employer denied Claimant's request for authorized treatment.

15. On February 24, 2006, Claimant confronted Mr. Kriegesmann about approving his doctor's visit and to pick up his paycheck (Exhibit D). A confrontation ensued, the police were called, and Claimant was charged with common assault, a city ordinance violation.

16. Claimant's current complaints include left knee dislocation with a dull ache, constant pain, and occasional difficulty when walking. He cannot walk on a pitched roof or work as a roofer. Lateral movements are not possible. Claimant believed the injury occurred when he carried weight on the pitched roof. He had no injuries to his left knee prior to February 14, 2006.

17. Dr. Knuuttila examined Claimant and opined that he had damage to three tendons, ACL and PCL. Dr. Knuuttila recommended an MRI and opined Claimant may need surgery.

18. **Renee Martin**, the sole owner of the Renaissance Guild, LLC., was responsible for payroll, contracts, and workers' compensation matters. Joe Kriegesmann, Ms. Martin's boyfriend, is the Outside Field Supervisor. His responsibilities included: estimates, work schedules; and managing crews. She did not communicate with employees about daily work activities.

19. Claimant's final check was a money order totaling $112.00 for 7 hours work at $16.00 an hour for the week ending February 9th. Claimant was not terminated prior to February 14, 2006 and he did not resign.

20. Ms. Martin testified that Mr. Campieri visited her office on February 14, 2006, at 9:45 a.m. and informed her he could not reach Mr. Kriegesmann and asked about Claimant. Ms. Martin suggested Mr. Campieri contact Claimant and have him call Mr. Kriegesmann. She did not authorize Claimant to work on Watson Road that day.

21. No authorization for medical treatment was made after the company investigated the injury.

22. **Joseph Kriegesmann**, the Outside Field Superintendent for Employer, hired Claimant and later promoted him to supervisor. Claimant reported to Mr. Kriegesmann and he exclusively directed Claimant's daily activities.

23. On February 3, 2006, Mr. Kriegesmann met with the Watson Road crew, including Claimant, Andy Frick, Brad Pinkerton, and Lance Jackson, and explained that Mr. Campieri had not paid as agreed. Mr. Kriegesmann instructed Claimant to pack Employer's equipment and deliver it to the warehouse in the company truck, which he did.

24. A work stoppage letter was hand delivered to Mr. Campieri's home on February 6, 2006 (Exhibit 3).

25. Mr. Kriegesmann told Claimant he would call to confirm his work assignment on February 6th. He called Claimant and left messages to report to Shrewsbury on February 6th and 7th, and Broadway on February 8th, but Claimant did not respond.

26. On February 9th, Mr. Kriegesmann called and spoke to Claimant instructing him to report to Broadway. Claimant said he was sore and requested the day off, so Mr. Kriegesmann sent Mr. Frick to pick up the company truck from Claimant.

27. Mr. Kriegesmann called Claimant on February 10th and left a message but Claimant did not return the telephone call.

28. Mr. Campieri discharged Employer on February 11th and rehired them on February 13th pending written authorization by Mr. Campieri for Employer to return to the premises (Exhibits H & 2). No work was authorized until the agreement was signed. Mr. Kriegesmann concluded Mr. Campieri either lied to get Claimant to Watson Road or some other dishonest event occurred.

29. Mr. Kriegesmann made telephone calls from the office to Claimant on February 6th (5), 7th (1), 9th ((1), 10th (1), and 13th (2). Ninety-five percent of the calls were made on a pay by the minute cellular telephone, and no call records were available.

30. Mr. Kriegesmann assumed Claimant had quit when he did not respond to a 6:30 am telephone message to report to Shrewsbury on February 14, 2006.

31. Claimant called Mr. Kriegesmann on February 14, 2006 at 11:30 am to report the injury.

32. Mr. Kriegesmann did not authorize Claimant to work on Watson Road on February 14th, did not know he was there, and did not receive payment for work Claimant may have performed.

33. Work stopped because Mr. Campieri fired the company February 11, 2006, and not because of events on February 3rd. However, work did not resume on Watson Road until February 15, 2006.

34. Mr. Kriegesmann admitted he was charged with thirty-seven counts of passing bad checks, pled guilty and served thirty days in jail for probation violation under a work release program.

35. **Bradley Pinkerton** began working for Employer on Watson Road on February 3, 2006. Mr. Kriegesmann informed the crew they may not return due to non-payment. Claimant was present and it was clear that no one was authorized to return to Watson Road. The same day Mr. Pinkerton was transferred to Shrewsbury.

36. Mr. Kriegesmann informed Mr. Pinkerton that he could not reach Claimant the week of February 6th. Mr. Pinkerton worked the Shrewsbury and Broadway projects and more workers were needed. During that week, Mr. Frick retrieved the company vehicle from Claimant, which Claimant used to move equipment on February 3rd.

37. On February 14th, Mr. Kriegesmann told Mr. Pinkerton that he tried to reach Claimant for work and he later he reported that Claimant was injured on Watson Road.

38. Mr. Pinkerton was promoted to manager and communicates daily with Mr. Kriegesmann by telephone. Mr. Kriegesmann directs where, when and how he works. He does not take instruction from property owners, and if asked to appear at a site he would contact Mr. Kriegesmann first.

RULINGS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Claimant sustained an accident on February 14, 2006, however it did not arise out of and in the course of his employment

There is no dispute Claimant sustained an injury to his left knee on February 14, 2006. The issue is whether Claimant's injury arose out of and in the course of his employment.

Sree Bhramara Narra, M.D., examined Claimant on February 14, 2006 and found left knee swelling, decreased flexion, tenderness and a dislocated knee. Dr. Narra prescribed medication; an immobilizer and recommended Claimant follow up with an orthopedic doctor.
I find Claimant sustained an accidental injury on February 14, 2006.

Claimant alleges that he sustained injury to his left knee in the course of his employment. The Employer contends Claimant's injuries did not result from an accident that arose out of and in the course of his employment.

Claimant has the burden to establish that he has sustained an injury by accident arising out of and in the course of his employment, and the accident resulted in the alleged injuries. *Choate v. Lily Tulip, Inc*., 809 S. W. 2d 102, 105 (Mo. App. 1991).

§287.800.1-2 RSMo. (2005) requires administrative law judges, … and any reviewing court to construe the provisions of this chapter strictly and weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

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. §287.020.3(2).

§287.120.1 RSMo 2005, provides workers' compensation where an injured worker shows that his injury was caused by an accident "arising out of and in the course of the employee's employment." An accident arises out of the employment relationship "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Abel By and Through Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502,503 (Mo. 1996)(*citations omitted*). An injury occurs 'in the course of' employment "if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." *Shinn v. General Binding Corp*. 789 S.W.2d 230, 232 (Mo. App.1990) "Arising out of" and "in the course of" are two separate tests. "[B]oth must be met before [an employee] is entitled to compensation.' *Automobile Club Inter-Insurance Exchange v. Bevel*, 663 S.W.2d 242, 245 (Mo. Banc 1984).

I Find Claimant' injury did not arise out of the employment relationship. "To meet the test of an injury 'arising out of' the employment, the injury must be a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the duties or conditions under which the employee is required to perform and the resulting injury." *Smith v. Donco Const*. 182 S.W.3d 693, 699 (Mo. App. S.D. 2006).

In this case, there is no causal connection between the conditions Claimant was required to perform under and the resulting injury. Employer pulled Claimant off the job, directed Claimant to wait for further instructions, and did not authorize Claimant to resume work. Claimant should not have relied on the property owner's instructions, and did so at his own peril.

I further find that Claimant's injury did not occur in the course of his employment. An injury arises out of an accident, which occurs in the course of employment, if the accident "occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment." *Knipp v. Nordyne, Inc*. 969 S.W.2d 236, 239 (Mo.App. W.D. 1998) (*overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 226 (Mo. 2003)).*

Employer did not authorize Claimant to return to Watson Road. To the contrary, Mr. Kriegesmann expected Claimant to work at another job site and was surprised when he received a call that Claimant was injured on Watson Road. Mr. Kriegesmann was the only one authorized to change Claimant's assignment. Therefore, Claimant could not 'fulfill his duties of employment' on Watson Road on February 14th.

Claimant relied on *James v. CPI Corp*., 897 S.W.2d 92, 95 (Mo. App. E.D.1995) to show that "in the course" of employment applies when 1) the injury occurred within the period of employment, 2) at a place where the employee may reasonably be, 3) while engaged in the furtherance of the employer's business, or 4) in some activity incidental to the employment.

However, Claimant was hired to work where he was needed and on February 14th he was needed at another location. He did not further Employer's business by providing unauthorized work to a customer with a history of nonpayment. Claimant was not engaged in an activity incidental to employment because he was not authorized to work on Watson Road on February 14th.
Mere disobedience of an order as to the *detail* of the work in hand or the mere breach of a rule as to *manner* of performing the work are not generally sufficient to deprive an employee of his right, to compensation so long as he does not go out of the sphere of his employment. *Fowler v. Baalmann*, 361 Mo. 204, 212 (Mo. banc 1950). But compensation cannot be allowed when the employee goes outside of the sphere and scope of his employment and is injured in connection with an activity he has been expressly forbidden to undertake. *Id*.

Where the rule (order or prohibition) is one limiting the scope, ambit or sphere of work which the employee is authorized to do; such a violation forecloses the compensability of an injury so sustained. *Id* at 213. An employer has the unqualified right to limit the scope of a servant's employment and activity and to determine *what* an employee shall or shall not do. The employer likewise has the unqualified right to determine *when* an employee shall do a certain thing. *Id*. What to do and when to do it determine the sphere of employment. *Smith v. Hussmann Refrigerator Co.*, 658 S.W. 2d 948, 951 (Mo. App. End. 1983) (*overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 231 (Mo. 2003)).*

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Mr. Campieri instructed Claimant to work on Watson Road on February 14th although he was not Claimant's supervisor, did not pay him or assign him work. I find that Claimant acted outside the sphere of his employment when he followed Mr. Campieri's instructions without first discussing it with Mr. Kriegesmann.

Employer's hearsay objection is overruled because hearsay is not a material factor in this case. Employer objected to Claimant's testimony that 'Mr. Campieri said Ms. Martin wanted Claimant to work on Watson Road on February 14th, alleging hearsay within hearsay. Ms. Martin testified and credibility of the witnesses was the determinative factor, not the reliability of Mr. Campieri's alleged out of court statement.

Claimant contends Mr. Kriegesmann lacks credibility because he was convicted of thirty-seven felonies for crimes involving dishonesty. Mr. Kriegesmann admitted he was charged with thirty-seven counts of passing bad checks, pled guilty and served thirty days in jail for probation violation under a work release program. I find Mr. Kriegesmann's testimony to be credible. Mr. Pinkerton's testimony and Claimant's actions corroborated Mr. Kriegesmann's testimony. The property owner fired the Employer and Mr. Kriegesmann authorized no additional work until Mr. Campieri signed the addendum on February 14th at 9:40 p.m. permitting Employer to return to the property. No credible evidence to the contrary was presented.

Exhibit I is not admitted as the criminal charge sheet is not authenticated and lacks a proper foundation.

For these reasons, I find that Claimant's accidental injury while working at an unauthorized location did not arise out of and in the course of his employment.

3. The Mutual Benefit Doctrine does not apply

I find that the "mutual benefit doctrine" does not apply to make this a compensable case.
An injury that occurs during an activity mutually beneficial to the employer and the employee arises out of and in the course of employment. *Scullin Steel Co.v. Whiteside*, 682 S.W. 2d 1, 2 (Mo. App. E.D. 1984) "[A]n injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable." *Blades v. Commercial Transport, Inc.*, 30 S.W. 3d 827, 828 (Mo. banc 2000).

The applicability of the doctrine turns on the facts of each case, and not all injuries arising from acts that have only remote or attenuated benefits to the employer are compensable. *Id*., *Panzau v. JDLB*, Inc. 169, S.W. 3d 122, 26 (Mo. App. E.D. 2005).

Any benefit accrued to Employer from Claimant's unauthorized work is too remote or attenuated to be compensable. No evidence was presented to show financial, time or other benefits to Employer. Payroll records reflect Claimant was not paid for February 14th. I find no customer satisfaction or good will to be generated by Claimant's unauthorized work. I find Claimant's unauthorized work to be in direct violation of Employer's requirement that Mr. Campieri provide written authorization before Employer would provide anymore work. For these reasons, I find the mutual benefit doctrine does not apply in this case.

I find that the prevailing factor in Claimant sustaining a left knee injury on February 14, 2006 resulted from unauthorized work, which did not arise out of and in the course of his employment and there was no mutual benefit derived.

3. Request for Section 287.560 Costs and Fees is denied

Claimant requests costs and fees under §287.560 RSMo., for Employer's failure to raise a good faith defense. §287.560 RSMo., provides that the division… may assess the whole cost of the proceedings upon the party who …brought, prosecuted or defended without reasonable grounds. Assessment of costs of proceedings should not be made absent clear findings and an egregious offense. *Landman v. Ice Cream*

Specialties, Inc. 107, S.W. 3d 253 (Mo. banc 2003).

I find no evidence that Employer unreasonably defended the claim. The request for costs is denied. All other issues are moot.

CONCLUSION

The Claimant did not sustain an accidental injury which arose out of and in the course of his employment. §Section 287.560 costs and fees are denied.

Date: _____ Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[1] "Primary" means, "first in rank or importance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1800 (3d ed. 1971). "Factor" means, "something (as an element, circumstance, or influence) that contributes to the production of a result." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 813 (3d ed. 1971).