

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

Injury No.: 06-095060

Employee: Joyce Bivins

Employer: St. John's Regional Health Center

Insurer: St. John's Mercy Health Systems
c/o Sisters of Mercy Health

Date of Accident: August 27, 2006

Place and County of Accident: Springfield, Greene County, Missouri

The cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs, heard oral argument and considered the entire record. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 20, 2007, by issuing a separate opinion denying compensation in the above-captioned case.

I. Issue

The dispositive issue is whether or not employee sustained injury due to an accident arising out of and in the course of employment. The injury occurred August 27, 2006, consequently, the Workers' Compensation Law as amended in 2005 governs the instant case.

II. Facts

The facts were accurately recounted in the award issued by the administrative law judge. Repetition of the facts in the instant award is done so for special emphasis supporting the Commission's conclusions.

The facts which are of special emphasis to the Commission are as follows:

The parties dispute exactly how the fall occurred. Claimant contends her foot stuck to the floor and that caused her to fall. Claimant said she previously had experienced no problems walking or with her foot sticking to the floor. She had no past leg problems and was in good health at the time of her fall. Claimant was walking at her normal pace and gait and did not trip or slip on anything.

Employer presented evidence that there was nothing on the floor that would have caused Claimant's foot to stick or would have caused her to slip or trip. Claimant admitted that there were no warning signs indicating the floor was wet. Claimant saw no debris, no liquid or any sticky substance on the floor. The floor was composed of the same type of tile which is present throughout the majority of the hospital and, as Claimant admitted, similar to what one might find in a grocery store. Photographs taken immediately after the incident provided no evidence of anything on the floor. There is no credible evidence that the condition of the floor caused the Claimant to slip, trip, or caused her foot to stick, thus causing her to fall.

When provided with Employer's Exhibit 1 (Dispatch Report dated 8/27/06), Claimant acknowledged that the record indicates she 'tripped and fell face first, landing on her stomach.' She acknowledged that Employer's Exhibit 1 does not state that her foot stuck to the floor. When shown Employer's Exhibit 3 (Emergency Nursing Record dated 8/27/06), Claimant acknowledged that the record

indicates that she 'tripped.' Employer's Exhibit 2 (Patient Medical Record dated 8/27/06) states that Claimant 'slipped.' It, too, does not indicate that Claimant's foot stuck to the floor.

Claimant's friend, Howard Brown, said Claimant told him that her right foot stuck to the floor. He testified he also heard Claimant tell emergency room personnel that she fell because her right foot stuck to the floor. He further testified that, when he was in Claimant's hospital room, he witnessed Claimant tell both her supervisor, Kevin Bradley, and a Risk Management employee that her foot had stuck to the floor. Mr. Brown admitted, however, that he has a hearing problem and wears a hearing aid. Mr. Brown's hearing deficit was apparent during his testimony; and for this reason his testimony is found unreliable.

Officer Dean Fritz testified that, when he responded to the incident involving claimant, he asked if she had tripped, and Claimant responded that she 'just fell.' Claimant did not advise Officer Fritz that she had fallen because her right foot stuck to the floor. I find Dean Fritz's testimony credible.

On cross-examination, Officer Fritz agreed with Claimant's counsel that the floor could have been buffed differently in places. But, the photographs taken by Officer Fritz do not reveal an uneven surface or anything unusual about the floor. Moreover, Claimant identified nothing that would have caused her foot to stick.

Nurse Kevin Bradley, Claimant's supervisor, said he discussed Claimant's general condition with her. But, he denied that Claimant told him she had had fallen because her foot stuck to the floor. I find Kevin Bradley's testimony credible.

Sandy Moore, Employer's Workers' Compensation and Employee Health Manager, learned of Claimant's fall the following day on August 28, 2006. Ms. Moore visited Claimant in the hospital to discuss her condition, what caused her fall, and what benefits were available to Claimant. Ms. Moore said Claimant told her that she 'just fell.' I find Ms. Moore's testimony credible that Claimant did not advise her that claimant's foot had stuck to the floor.

I find claimant's recollection as to whom she told about her foot sticking to the floor is inaccurate. The testimonies of Nurse Bradley, Ms. Moore, and Officer Fritz all indicate that Claimant did not explain this detail of the fall to them. Moreover, the written documentation does not substantiate Claimant's contention that she advised hospital personnel that her foot stuck to the floor.

III. Relevant Statutes

As of the date of this accident § 286.120.1 RSMo, as amended in 2005, provided, in pertinent part, as follows:

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,

The definitions of both accident and injury were significantly changed in the 2005 legislation. The definitions are set forth in § 287.020.2 RSMo and § 287.020.3 RSMo, and are as follows:

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

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

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

(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;

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable;

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition;

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

In addition to these definitions the legislature also provided the following additional legislation contained in § 287.020.10 which is as follows:

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

IV. Findings of Facts and Conclusions of Law

Due to the extensive changes made to the Workers' Compensation Act by the General Assembly in 2005, the Commission is of the opinion that it is imperative that the basic premise of the Workers' Compensation Law be first considered, prior to reaching conclusions pertinent to the instant case.

Among its many features, the Workers' Compensation Act provides: (1) benefits to employees who sustain personal injury by accident arising out of and in the course of employment; and (2) negligence and fault are largely immaterial. Section 287.120.1 RSMo.

The construction of the phrase "arising out of and in the course of employment" historically has been broken in half, resulting in a two-prong test, with the "arising out of" portion construed to refer to causal origin, and the "course of employment" portion to the time, place and circumstances of the accident in relation to the employment. The substantive provisions of section 287.120.1 were not changed or amended by the 2005 enactment of the General Assembly.

Pursuant to this statute, proof of a compensable injury requires not only establishing that it occurred at a particular place, and at a particular time (the "in the course of" component) the injury must also be causally connected to some risk or hazard of the job (the "arising out of employment" component).

The second prong of the above mentioned two-prong test, whether the injury arose "in the course of" employment, is not in dispute in the instant case. The injury occurred within the period of employment at a place where the employee could reasonably be expected and while engaged in the furtherance of the employer's business.

The first prong, "arising out of", the test primarily concerned with causal connection, is the dispositive issue in this case.

Historically, at a minimum, our courts have required a showing that the employee's injury was caused or due to a

risk of employment. Missouri cases have uniformly held that an accident and resultant injury “arise out of” the employment when there is a causal connection between the conditions under which the work was required to be performed and the resulting injury. The injury “arises out of” the employment so long as the injury was a rational consequence of a hazard connected with the employment.

Generally speaking, all risks causing injury to an employee can be brought within three categories: risks distinctly associated with the employment; risks personal to the employee; and “neutral risks”, i.e., risks having no particular employment or personal character. Harms from the first category are universally compensable; harms from the second are universally non-compensable; and harms from the third result in controversy.

Various lines of interpretation of the phrase “arising out of” have historically risen of which three are the increased risk doctrine, the actual risk doctrine and the positional risk doctrine.

The increased risk doctrine, in summary fashion, requires that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to the employment.

As to the actual risk doctrine, whether the risk was also common to the public is of no concern, if it were a risk of the employment. The employment subjected employee to the actual risk that caused the injury.

The positional risk doctrine determines that an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed employee in the position where he was injured.

Consequently, since risks distinctly associated with the employment fall readily within the increased risk doctrine, they are considered to arise out of the employment. As to risks personal to an employee, the origins of harm are personal and cannot possibly be attributable to employment.

However, neutral risks are defined as being neither distinctly employment nor distinctly personal in character. Furthermore, the cause is unknown, unexplainable or happenstance; known, but not associated with employment or the employee personally. In these types of risks, an award of benefits can only be justified by accepting the but for reasoning of the positional risk doctrine.

As previously mentioned, the legislature, in 2005, redefined the words accident and injury. Section 287.020.2 and section 287.020.3. In addition the legislature specifically abrogated certain earlier case law interpretations concerning the meaning of accident, arising out of and in the course of employment. Section 287.020.10 RSMo. All three of the cases referred to in the statute that were abrogated have one component in common, i.e., it was difficult, or impossible, to ascertain where or if the employment subjected the employee to some risk or hazard greater than that to which an employee regularly experiences in everyday life. In other words, there was no rational connection between the employment and the injury.

In the instant case, the Commission finds and concludes that the employee was walking in a hallway on the premises of the employer when the employee “just fell”, meaning that she simply or merely fell, without explanation. The Commission does not find credible employee’s trial testimony that her foot stuck to the floor immediately prior to falling. The Commission specifically finds the most credible version of what transpired, is that employee “just fell”, i.e., the injury simply was the result of an unexplained fall.

Due to the fact that the injury was the result of an unexplained fall, the Commission is unable to determine or conclude there was any unique condition of employment which contributed to the resultant injury.

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be issued if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and as a part of the employment. It is not sufficient that the employment may simply have furnished an occasion for an injury from some unconnected source.

Due to the fact that the injury sustained was due to an unexplained fall, the Commission cannot establish a causal connection between the conditions under which the employee was performing her work, and her resultant injury. An award of compensation, given the facts of the instant case, i.e., an unexplained fall, can only be justified by accepting the but for reasoning of the positional or actual risk doctrine, which holds that an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed employee in the position where he or she was injured.

In 2005, the legislature specifically abrogated such earlier case law interpretations involving any potential positional or actual risk doctrine, and required proof greater than the fact that the conditions and obligations of the employment placed employee in the position where he or she was injured. An employee must satisfy the concept of causation, i.e., establishing some rational connection between his or her work and the injury sustained. Since employee's fall is not able to be explained, i.e., she "just fell", or simply or merely fell, the element of proof needed to establish that the injury arose out of her employment, is lacking.

V. Conclusion

In conclusion, employee has presented to the Commission a resultant injury due to an unexplained fall. In so doing, employee has failed to prove that the resultant injury arose out of her employment since there is lack of proof of a rational connection between the accident, the injury and the employment. Accordingly, employee's claim for benefits is denied since employee has not sustained her burden of proof that her injury was due to an accident arising out of and in the course of her employment. Section 287.120.1 RSMo.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 20, 2007, is attached, but her findings and conclusions are not to be construed as being incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of November 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 main question in this case is whether employee's injuries arise out of and in the course of her employment. The majority finds that employee's version of how she fell is not credible. I strongly disagree.

Employee testified that as she walked down employer's hallway on August 27, 2006, on her way to clock in for her shift, her right foot stuck and she fell forward. Two contemporaneous medical records reflect that employee tripped. Another contemporaneous record says employee slipped. All three descriptions of the fall, although not

identical, convey some interaction between employee's foot and the floor giving rise to her fall. The record reveals no evidence that employee deliberately threw herself to the floor. Employee's description is consistent with the medical records and employer offered no evidence of an alternative reason for the fall. Based upon the foregoing, I find persuasive the testimony of employee and the notations made by the treating medical professionals.

Remarkably, the administrative law judge found that, "there is no credible evidence that the condition of the floor caused the Claimant to slip, trip, or caused her foot to stick, thus causing her to fall." The administrative law judge and the majority of the Commission not only discount employee's testimony without explanation but disregard the notations of the medical personnel. The majority is persuaded that employee did not trip, slip, or stick because three people – who are not treating medical professionals – testified that employee did not tell them her foot stuck. Employee also did not tell the three that her foot did *not* stick. She simply did not discuss foot sticking with them.

Officer Fritz: He says employee told him she "just fell." He says employee did not tell him that she fell because her foot stuck. He concedes, however, that he did not specifically ask employee if her foot stuck. Officer Fritz did not advise employee to choose her words carefully or to include every detail of her ordeal. He concedes that employee told him she was in severe pain while they were speaking and that he was making small talk with employee to keep her calm. Employee testified that she was in so much pain she does not remember what she told Officer Fritz. It is unreasonable to expect employee to recount seemingly insignificant details of how she fell while she is suffering the results of the fall and before she has received treatment.

Sandra Moore: Ms. Moore also says employee told her she "just fell." Ms. Moore testified that employee did not tell Ms. Moore that employee fell because her foot stuck. Ms. Moore concedes that she did not specifically ask employee if her foot stuck. Mr. Moore did not advise employee to choose her words carefully or to include every detail. Ms. Moore visited employee in her hospital room the day after the accident while employee was on morphine. Employee testified she does not recall what she discussed with Ms. Moore because she was on morphine. It is unreasonable to expect an employee on narcotic pain medication to recount seemingly insignificant details of how she fell.

Kevin Bradley: Employee testified she told Kevin Bradley she fell because her foot stuck. Mr. Bradley testified he never discussed the cause of employee's fall with her. While employee's recollection is inconsistent with Mr. Bradley's recollection, Mr. Bradley testified about nothing that directly contradicts employee's trial testimony regarding her work fall.

I find employee was walking down employer's hallway en route to clock in for her shift when her right foot stuck to the floor and she fell to the floor.

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."

Section 287.020.10 RSMo (2005) provides:

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

"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).

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 their ordinary and usual meaning.

Notwithstanding the legislature's specific abrogation of all earlier interpretations of the phrases "arising out of" and "in the course of," the majority errs by resorting to historical interpretations of these phrases. For that reason, the award and decision of the majority cannot stand. I conduct my analysis without so resorting, so as to apply the law in accordance with the legislature's stated intention.

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 her employment.

Section 287.020.3 defines "injury" and sets forth a two-part test for determining when an injury arises out of and in the course of employment.

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

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

(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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

...

There is no dispute that employee fell in employer's hallway on August 27, 2006. Further, the parties stipulated that the fall was the prevailing factor in causing employee's back injury. This satisfies the first prong (subparagraph (a)) of the 'arising out of and in the course of employment test.' Therefore, I need only concern myself with subparagraph (b) of the test. Employee's injury is compensable so long as it did not come from a "hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." As will be seen, the evidence does not establish that employee's injury came from a hazard or risk so this prong of the "arising of out and in the course of employment"

test is met.

As always, definitions are in order:

- “Hazard” means “a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty.”^[1]
- “Risk” means, “someone or something that creates or suggests a hazard or adverse change: a dangerous element or factor.”^[2]

The majority concludes the fall is unexplained. I disagree because employee has shown that her foot stuck causing her to fall. However, in the instant case, our disagreement does not change the outcome. The evidence does not permit us to identify *any* thing or condition that operated against employee’s safety or any dangerous element or factor. That is, the evidence does not establish any hazard or risk. In cases where no hazard or risk gives rise to the injury, subsection (b) will always be met.

Employee has satisfied her burden under each prong of § 287.020.3(2). Her injury must be judged to have arisen out of and in the course of employment.^[3]

Even if we were able to identify a hazard giving rise to employee’s injury, the injury would still fulfill the “arising out and in the course of employment test” because any hazard or risk presented to employee on employer’s premises on employee’s routine walk to the time clock is related to employment. That is not to say all injuries an employee sustains performing duties on an employer’s premises are compensable. Section 287.020.3(3) specifically excludes injuries resulting from idiopathic causes from compensability even if they satisfy the “arising out of and in the course of employment” test of § 287.020.3(2).^[4] No party asserts that employee’s injuries resulted from an idiopathic condition so the exclusion does not apply in this case.

Below is a sampling of some burdens the majority erroneously imposes upon employee. The phrases in italics are found nowhere in the plain language of the Workers’ Compensation Act as amended in 2005. “The burden rests upon the employee to show *some direct causal connection* between the injury and the employment. An award of compensation may be issued if the injury were a *rational consequence of some hazard connected with the employment*...[T]he employment must in some way expose the employee to an *unusual risk or injury* from such agency which is not shared by the general public. The injury must have been a rational consequence of the hazard to which the employee has been exposed and *which exists because of and as a part of the employment*....”

I empathize with the majority’s inclination to impose such standards regarding proof of work-relatedness. I am so inclined myself after years of determining claims under the Workers’ Compensation Act as it read before the 2005 amendments. Section 287.020 of the old Act provided, among other things, that: an injury is compensable if it is clearly work related; the injury must be incidental to and not independent of the relation of employer and employee; it is reasonably apparent...that the employment is a substantial factor in causing the injury; the injury can be seen to have followed as a natural incident of the work; the injury can be fairly traced to the employment as a proximate cause.

But the legislature removed those phrases and commanded that we stick to the words of the new Act as written. The new Act changed the primary focus away from whether the *employment* caused the injury (“the *employment* is a substantial factor in causing the injury”) to whether the *accident* caused the injury (“the *accident* is the prevailing factor in causing” the injury). Because the majority misapplies the Workers’ Compensation Act as amended in 2005, I respectfully assert that the majority decision should not stand.

Employee’s Back Injury is Compensable under 287.120.1 RSMo.

Based upon the foregoing, I conclude that employee has established that she suffered a personal injury by accident arising out of and in the course of employment. Section 287.120.1 dictates that employer is liable to employee for workers’ compensation benefits, including treatment of her back injury and other temporary benefits. I would issue a temporary award of same.

John J. Hickey, Member

FINAL AWARD

Employee: Joyce Bivins Injury No. 06-095060
Dependents: N/A
Employer: St. John's Regional Health Center
Additional Party: N/A
Insurer: St. John's Mercy Health Systems c/o Sisters of Mercy Health
Hearing Date: December 6, 2006

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

Checked by: VRM/meb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged August 27, 2006.
5. State location where accident occurred or occupational disease was contracted: Alleged to have occurred in Greene County, Springfield, 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? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease was contracted: Claimant was walking in the hallway of the employer's place of business prior to work.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Alleged back.
14. Nature and extent of any permanent disability: Not applicable.
15. Compensation paid to date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$258.00
19. Weekly compensation rate: \$172.00

20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: N/A.

TOTAL: NONE.

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Joyce Bivins	Injury No. 06-095060
Dependents:	N/A	Before the
Employer:	St. John's Regional Health Center	DIVISION OF WORKERS'
Additional Party:	N/A	COMPENSATION
Insurer:	St. John's Mercy Health Systems c/o Sisters of Mercy Health	Department of Labor and Industrial
Hearing Date:	December 6, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: VRM/meb

INTRODUCTION

Claimant, Joyce Bivins, requested a temporary award after the Employer denied liability for medical treatment or temporary total disability. The parties appeared for a hardship hearing before the undersigned Administrative Law Judge on December 6, 2006, in Springfield, Missouri. William Francis represented Claimant, Joyce Bivins. Greg W. Pearman appeared on behalf the Employer, St. John's Regional Health Center. The parties agree that the fall Claimant sustained on the premises of St. John's Regional Health Center was the prevailing factor in the Claimant's injuries. The seminal issue for determination is whether the accident resulting in Claimant's injuries occurred within the course and scope of employment. Employer contends that the case is not compensable.

EXHIBITS

The following exhibits were admitted on behalf of Claimant:

Exhibit A Deposition of Kevin Bradley, RN, BSN

Exhibit B Medical Records of Joyce Bivins

The following exhibits were admitted on behalf of the Employer:

Exhibit 1 Security Dispatch Report

Exhibit 2 Patient Medical Record

Exhibit 3 Emergency Nursing Record

Exhibit 4 Accident Interview Form

Exhibit 5 Nine photographs Taken August 27, 2006

WITNESSES

Joyce Bivins, Claimant

Howard Brown, Claimant's Companion

Lt. Dean Fritz, Safety Officer

Kevin Bradley, Nursing Supervisor

Sandi Moore, Employer's Employee Health and Workers' Compensation Manager

FINDINGS OF FACT

Claimant, Joyce Bivins, is a licensed practical nurse who has been employed by St. John's Regional Health Center (Employer) for 19 years. Her work shift begins at 6:30 a.m. The Employer's policy provides that employees are not to clock in more than six minutes early. At about 6:08 a.m., on August 27, 2006, Claimant arrived at the hospital. She had parked her vehicle, entered the hospital building, and headed to the time clock. Prior to clocking in, Claimant fell forward to the floor and onto on her left side. No one witnessed Claimant's fall.

As Claimant fell she screamed, "my back, my back." A coworker stopped to assist Claimant after she had fallen and called safety and security. Officer Dean Fritz reported to the scene. When he arrived, Claimant told him she had fallen. Officer Fritz arranged for Claimant's transportation to the emergency room. Officer Fritz took photographs of the incident scene and of Claimant's shoes and made a report of the incident.

Claimant was diagnosed with an L-1 compression fracture and admitted to the hospital. She subsequently underwent a Kyphoplasty at the L-1 compression fracture site. Claimant has also received medication, physical therapy, and the use of the TENS unit. Despite such treatment, Claimant's back remains painful.

The parties dispute exactly how the fall occurred. Claimant contends her foot stuck to the floor and that caused her to fall. Claimant said she previously had experienced no problems walking or with her foot sticking to the floor. She had no past leg problems and was in good health at the time of her fall. Claimant was walking at her normal pace and gait and did not trip or slip on anything.

Employer presented evidence that there was nothing on the floor that would have caused Claimant's foot to stick or would have caused her to slip or trip. Claimant admitted that there were no warning signs indicating the floor was wet. Claimant saw no debris, no liquid or any sticky substance on the floor. The floor was composed of the same type of tile which is present throughout the majority of the hospital and, as Claimant admitted, similar to what one might find in a grocery store. Photographs taken immediately after the incident provided no evidence of anything on the floor. There is no credible evidence that the condition of the floor caused the Claimant to slip, trip, or caused her foot to stick, thus causing her to fall.

When provided with Employer's Exhibit 1 (Dispatch Report dated 8/27/06), Claimant acknowledged that the report indicates she "tripped and fell face first, landing on her stomach." She acknowledged that Employer's Exhibit 1 does not state that her foot stuck to the floor. When shown Employer's Exhibit 3 (Emergency Nursing Record dated 8/27/06), Claimant acknowledged that the record indicates that she "tripped." Employer's Exhibit 2 (Patient Medical Record dated 8/27/06) states that Claimant "slipped." It, too, does not indicate that Claimant's foot stuck to the floor.

Claimant's friend, Howard Brown, said Claimant told him that her right foot stuck to the floor. He testified he also heard Claimant tell emergency room personnel that she fell because her right foot stuck to the floor. He further testified that, when he was in Claimant's hospital room, he witnessed Claimant tell both her supervisor, Kevin Bradley, and a Risk Management employee that her foot had stuck to the floor. Mr. Brown admitted, however, that he has a hearing problem and wears a hearing aid. Mr. Brown's hearing deficit was apparent during his testimony; and for this reason his testimony is found unreliable.

Officer Dean Fritz testified that, when he responded to the incident involving Claimant, he asked if she had tripped, and Claimant responded that she "just fell." Claimant did not advise Officer Fritz that she had fallen because her right foot stuck to the floor. I find Dean Fritz's testimony credible.

On cross-examination, Officer Fritz agreed with Claimant's counsel that the floor could have been buffed differently in places. But, the photographs taken by Officer Fritz do not reveal an uneven surface or anything unusual about the floor. Moreover, Claimant identified nothing that would have caused her foot to stick.

Nurse Kevin Bradley, Claimant's supervisor, said he discussed Claimant's general condition with her. But, he denied that Claimant told him she had fallen because her foot stuck to the floor. I find Kevin Bradley's testimony credible.

Sandy Moore, Employer's Workers' Compensation and Employee Health Manager, learned of Claimant's fall the following day on August 28, 2006. Ms. Moore visited Claimant in the hospital to discuss her condition, what caused her fall, and what benefits were available to Claimant. Ms. Moore said Claimant told her that she "just fell." I find Ms. Moore's testimony credible that Claimant did not advise her that Claimant's foot had stuck to the floor.

I find Claimant's recollection as to whom she told about her foot sticking to the floor is inaccurate. The testimonies of Nurse Bradley, Ms. Moore, and Officer Fritz all indicate that Claimant did not explain this detail of the fall to them. Moreover, the written documentation does not substantiate Claimant's contention that she advised hospital personnel that her foot stuck to the floor.

Still, the fall may have occurred exactly as Claimant described; and I do not disbelieve her version of how she fell. But, even if Claimant's foot stuck to the floor immediately before she fell, such fact should make no difference in the resolution of this case, as discussed below.

CONCLUSIONS OF LAW

This case is similar to *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512 (Mo. banc 1999). In that case, an airline reservationist had a 30-minute lunch break. She purchased food at a vending machine and went to a break room on another

floor to eat her lunch and smoke a cigarette. While walking with her lunch, Ms. Drewes fell and injured her ankle. A majority of the Missouri Supreme Court held the injury was compensable. The Court reasoned that the act of eating lunch was incidental to employment under the personal comfort doctrine and Ms. Drewes was “about” the premises of the employer. Thus, the Court held that Ms. Drewes’ injury occurred in the course and scope of employment. The Court further concluded that there was no evidence of an idiopathic condition innate or peculiar to Drewes that caused her to fall. ^[5]

The *Drewes* decision would have served as precedent for the instant case had the Missouri General Assembly not made significant changes to the Workers’ Compensation Law in 2005. The General Assembly amended § 287.020, RSMo, which contains the definitions for the terms “accident,” “injury,” and “arise out of and in the course of employment.” The legislature also stated its intention that prior case law interpretations of these terms, including the *Drewes* decision and its progeny, be rejected. § 287.020.10, RSMo Cum. Supp. 2005. And, the General Assembly amended § 287.800 RSMo, which now admonishes Administrative Law Judges, the Commission, and all reviewing courts to construe strictly the provisions of the Workers’ Compensation Act.

Under current law, Claimant’s injury is compensable “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), RSMo Cum. Supp. 2005. Employer concedes that Claimant’s incident of falling is the prevailing factor causing her injuries. Thus, the question is whether Claimant’s injuries fall within the subsection (b) pertaining to hazards or risks unrelated to the employment. In answering that question, I find persuasive the dissenting opinion of Judge Covington in *Drewes*. ^[6]

As Judge Covington noted,

Even assuming arguendo, that the break room was part of the TWA premises, thus arguably related to Drewes’ employment, there is no evidence that her fall was caused by any characteristic or condition of the break room. Drewes inexplicably fell. She was not more likely to fall in the break room during her lunch break than in her “normal nonemployment life.”

984 S.W.2d at 516 (Covington, J. dissenting). Likewise, in the instant case, there is no evidence that Claimant’s fall resulted from a hazard or risk to which she would not have been equally exposed outside of her employment. Claimant has demonstrated nothing unique about the hospital floor that would have caused her foot to stick or caused her to slip or trip or fall. It was the same type of floor Claimant could encounter in a grocery store in ordinary nonemployment life. The photographs verify such fact. The floor does not appear to be highly waxed or slippery. There does not appear to be any unevenness about the floor. Claimant did not identify anything about the floor that caused her to foot to stick or caused her to fall.

Thus, using the same rationale employed by Judge Covington in her dissent in *Drewes*, and strictly construing the

Workers' Compensation Law as I am required to do, and in considering the General Assembly's express intention to reject the majority holding in *Drewes*, I conclude that Claimant's back injury did not arise out of and in the course of employment. Compensation is denied.

Date: February 20, 2007

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret
Director
Division of Workers' Compensation

[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1041 (3d ed. 1971).

[2] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2432 (3d ed. 1971).

[3] "Deem" means, "to consider, think, or judge." BLACK'S LAW DICTIONARY 446 (8th ed. 2004).

[4] "Idiopathic" means, "peculiar to the individual: innate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1123 (3d ed. 1971).

[5] Injuries from idiopathic causes are not compensable now under § 287.020.3(3), RSMo Cum. Supp. 2005.

[6] The statutory provision Judge Covington discussed in *Drewes*, is the same as that now included in § 287.020.2(3), RSMo Cum Supp. 2005.