

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

Injury No.: 05-109411

Employee: Jessica Brame  
Employer: Applebee's  
Insurer: Zurich American Insurance Co.

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, heard the parties' arguments and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of Administrative Law Judge John A. Tackes dated April 29, 2009. The award and decision of the administrative law judge is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, decision and award herein.

**Preliminaries**

Employee filed a claim for compensation for injuries she sustained when a co-worker assaulted her as she stepped out of her car after returning home from work. The assault occurred on October 10, 2005.

The administrative law judge heard this matter to determine: 1) whether employee's injuries arose out of and in the course of her employment; 2) employer/insurer's liability for temporary total disability benefits; 3) employer/insurer's liability for past medical expenses; and 4) employer/insurer's liability for permanent partial disability benefits.

The administrative law judge found that employee's injuries did not arise out of and in the course of her employment and, therefore, found that the claim is not compensable. Employee filed an Application for Review.

The threshold issue is whether employee's injuries arose out of and in the course of her employment. All other issues are dependent upon that determination.

**Findings of Fact**

Assault

The administrative law judge found the assault on the employee in this case was of a neutral origin and that it was irrational, unexplained or accidental. We disagree. After considering all of the evidence, we find that the assault was the result of work friction.

On October 10, 2005, there was an altercation at work that was originally based upon a co-worker's, Kenyatta Wooden's, decision to quit her job. The incident began with a dispute between Ms. Wooden and a manager. Ms. Wooden kicked the manager and later turned her aggression towards a sixteen year-old co-worker. Employee stepped in between Ms. Wooden and the sixteen year-old co-worker in an effort to prevent Ms. Wooden from assaulting the co-worker. Following this commotion, Ms. Wooden left the premises. However, after employee got off work, Ms. Wooden followed her home and assaulted her as soon as employee got out of her car.

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Ms. Wooden initially punched employee in the face and they began fighting. The majority of the fight took place on the ground and employee testified that they fought for approximately five minutes. Employee stated that as the fight wound down she got off of Ms. Wooden and went to her car to pick up her things. At that point, Ms. Wooden got in her car and struck employee with it. Employee testified that she rolled up on the hood of Ms. Wooden's car and then Ms. Wooden hit the brakes, causing employee to be flung off the hood, into another car, and onto the ground. Ms. Wooden then drove off.

Employee and Ms. Wooden had no interaction between the time Ms. Wooden left work and the time she arrived outside of employee's home and began assaulting her.

Employee's relationship with Ms. Wooden was limited strictly to their time working together at Applebee's. They never did anything together outside of work. There was no evidence that the assault was private nor was anything said between employee and Ms. Wooden which indicated any type of unrelated problem existed between them.

If employee and Ms. Wooden had a relationship outside of work, there might be, at most, a weak argument that this assault was spawned by something unrelated to the altercation at work. However, all the testimony indicated that employee and Ms. Wooden did not associate at all outside of work. There is no evidence that this assault was the result of anything other than the altercation that occurred at work.

Employee stopped an altercation involving Ms. Wooden at work and was attacked at the first opportunity by Ms. Wooden thereafter. We find that employee's risk was directly attributable to her employment, because the only altercation that could have motivated Ms. Wooden to attack employee occurred at work when employee stopped Ms. Wooden from assaulting another co-worker. When the facts, as in this case, are not in dispute, we are permitted to make such an inference. See *Adams v. Continental Life Insurance Company*, 101 S.W.2d 75, 82 (Mo. 1937).

See also, *Keithly v. Stone & Webster Engineering Corp*, 49 S.W.2d 296 (Mo. App. 1932). The *Keithly* court examined evidence similar to the evidence before us and concluded that an assault was connected with and pertained to employment where there was evidence of a disagreement about work and "[t]here [was] no evidence of any other foundation for the quarrel. Prior to the time the participants were friendly; there had been no strife or feud and no animosity arising from matters or subjects wholly independent of the work and purely personal to the individuals." *Id.*, at 300.

#### Medical Evidence

Employee was knocked unconscious during the assault and was taken to Barnes Jewish Hospital. She was treated there for three fractures to her skull, three fractures to her right wrist (employee is right-handed), and a perforated right eardrum. She stayed the night at the hospital, and later returned for follow-up treatment and surgery on her wrist.

Employee testified that she has several lingering effects from her injuries. With regards to her right wrist, employee testified that she experiences pain in it when the weather changes. Employee also stated that she feels a pressure on her wrist when she lifts heavy things. Employee also stated that the injury caused her to lose full range of motion in her wrist. With regards to employee's head injuries, she testified that she has constant

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ringing in her ear and experiences headaches more often than she ever did before the assault.

Dr. Musich, at the request of employee's attorney, performed an independent medical evaluation on employee. Dr. Musich noted that employee complained of frequent right-sided headaches and tinnitus status post trauma. Employee complained that the tinnitus is uncontrollable and totally incapacitating. Dr. Musich noted subjective hearing loss, right greater than left. Employee related that she had never suffered from headaches, a skull fracture, tinnitus, or hearing loss prior to October of 2005.

With regards to employee's right wrist, Dr. Musich noted that employee had some diminished range of motion in her wrist. On physical examination, employee's maximum right hand grip strength was 58 lbs. with radial wrist pain. Employee's maximum left hand grip strength was 76 lbs. without pain.

Dr. Musich opined that employee is 35% permanently partially disabled of the right upper extremity rated at the wrist (61.25 weeks), and 25% permanently partially disabled of the body as a whole due to the closed head fracture, right temporal bone fracture, chronic tinnitus, hearing loss, and headaches (100 weeks).

Employer sent employee to Dr. Wayne for an independent medical evaluation. Dr. Wayne noted that employee complained of headaches, constant ringing in her right ear, and has been more irritable ever since the injury. The headaches last 1-2 hours at a time and usually resolve with taking Excedrin. On physical examination, Dr. Wayne noted some degree of diminished hearing in employee's right ear.

Dr. Wayne does not believe that employee sustained any significant ongoing sequelae or any evidence of persistent post-concussion syndrome.

Dr. Wayne noted, with regards to employee's right wrist, that the orthopedic follow-up notes indicate she has been making a good recovery. Employee has had extensive hand therapy and Dr. Wayne believes she would benefit from continued home exercises and stretches to maximize her range of motion at the wrist and to also maximize her strength.

Dr. Wayne opined that employee is 5% permanently partially disabled of the right upper extremity rated at the wrist (8.75 weeks). Dr. Wayne further opined that he would defer to the opinion of an ENT specialist with regards to any permanency regarding her tympanic membrane perforation and possible ongoing issues with her hearing. Dr. Wayne does not believe employee sustained any permanency in regards to the concussion she sustained, nor did she sustain any permanency in regards to the right temporal bone fracture.

Employer also sent employee to Dr. Mikulec for the purpose of evaluating employee's complaints of hearing loss and tinnitus. Dr. Mikulec opined that employee had 0% hearing loss in both her right and left ears. Dr. Mikulec opined that due to employee's tinnitus in her right ear employee is 0.5% permanent partially disabled of the body as a whole rated at her right ear (2 weeks).

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### Conclusions of Law

At the outset, we point out that the administrative law judge's reliance on *Thompson v. Delmar Gardens of Chesterfield, Inc.*, 885 S.W.2d 780 (Mo. App. 1994) as precedent for determining whether the assault arose out of and in the course of the employment is misplaced. It is unclear if the reasoning of *Thompson* survived the 2005 amendments to the law, one of which specifically abrogated all case law interpretations of "arising out of" and "in the course of the employment" that predated the 2005 amendments. Section 287.020.10 RSMo. But we need not decide whether the reasoning survived. This case is distinguishable from *Thompson* because *Thompson* involved a neutral assault. We have already decided that the assault in the instant case grew out of work friction.

The parties have stipulated that the assault constituted an accident. The parties do not dispute that the assault caused the injuries for which employee claims compensation. We turn to § 287.020.3(2) to determine if the injuries arose out of and in the course of employment such that they are compensable:

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 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.

It is obvious and undisputed that the assault which took place on October 10, 2005, was the prevailing factor in causing employee's injuries, so subparagraph (a) is easily satisfied. Employee produced evidence that convinced us her injuries were the result of an assault springing from work friction. Specifically, employee's injuries arose because her co-worker acted violently in response to employee's successful efforts to prevent an assault in the workplace – efforts clearly in furtherance of employer's interest. The risk that was realized here was the possibility that the co-worker would react violently to employee's intervention. Employee's injuries did not come from a hazard or risk unrelated to employment. Subparagraph (b) is satisfied.

Employee's injuries suffered as a result of the October 10, 2005, assault arose out of and in the course of her employment.

### Award

For the foregoing reasons, we reverse the award of the administrative law judge. Employee has established that she is entitled to compensation.

### Temporary Total Disability

Employee was off work for twelve weeks as a result of the fracture to her right wrist and problems with her ear. Employer is liable for employee's temporary total disability benefits for twelve weeks at the rate of \$164.55, as stipulated by the parties, for a total of \$1,974.60.

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Past Medical Expenses

We find that all medical treatment for which employee claims compensation was reasonable and necessary to cure and relieve the effects of employee's injuries. We further find that the expenses related to the treatment, as reflected on employee's medical bills, are fair and reasonable. Employer is liable for all of employee's past medical expenses, which were the direct result of the assault. Said expenses amount to \$19,666.63.

Permanent Partial Disability

As previously noted in employee's testimony and in the reports of Drs. Musich and Wayne, employee has numerous ongoing complaints related to her injuries suffered on October 10, 2005. However, we find that neither doctors' ratings are truly reflective of employee's actual disabilities incurred. Dr. Wayne's mere 5% permanent partial disability of the right upper extremity rated at the wrist does not fully account for her permanent disabilities relating to her loss in range of motion and lifting limitations. On the other hand, Dr. Musich's 35% permanent partial disability rating of employee's right upper extremity rated at the wrist and 25% permanent partial disability rating of employee's body as a whole due to the closed head fracture, right temporal bone fracture, chronic tinnitus, hearing loss and headaches, are excessive.

Based upon the medical evidence, employee's testimony, and the record as a whole, we find employee is 12.5% permanently partially disabled of the right upper extremity rated at the wrist (21 6/7 weeks), and 5% permanently partially disabled of the body as a whole due to the closed head fracture, right temporal bone fracture, chronic tinnitus, hearing loss, and headaches (20 weeks). Therefore, we award from employer to employee \$6,887.59 (41 6/7 weeks x \$164.55).

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

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

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Jessica Brame

**SEPARATE OPINION**

Concurring in Part and Dissenting in Part

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, as the majority concluded, that the decision of the administrative law judge should be reversed and employee should be awarded benefits. However, I dissent from the majority's decision as to the amount of permanent partial disability benefits employee should be awarded.

It is my opinion, based upon the medical evidence, employee's testimony, and the record as a whole, that employee is 30% permanently partially disabled of the right upper extremity rated at the wrist (52 4/7 weeks), and 20% permanently partially disabled of the body as a whole due to the closed head fracture, right temporal bone fracture, chronic tinnitus, hearing loss and headaches (80 weeks). Therefore, it is my opinion that employee should be awarded permanent partial disability benefits from employer in the amount of \$21,814.63 (132 4/7 weeks x \$164.55).

For the foregoing reasons, I respectfully concur in part and dissent in part from the decision of the majority of the Commission.

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John J. Hickey, Member

## FINAL AWARD

Employee: **Jessica Brame** Injury No.: **05-109411**  
Dependents: **n/a** Before the  
Employer: **Applebee's** **Division of Workers'**  
Additional Party: **n/a** **Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Insurer: **Zurich American Insurance Co.**  
Hearing Date: **February 9, 2009** Checked by:

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? **No.**
2. Was the injury or occupational disease compensable under Chapter 287? **No.**
3. Was there an accident or incident of occupational disease under the Law? **Yes.**
4. Date of accident or onset of occupational disease: **October 10, 2005.**
5. State location where accident occurred or occupational disease was contracted: **St. Louis City**
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? **Yes.**
7. Did employer receive proper notice? **Yes.**
8. Did accident or occupational disease arise out of and in the course of the employment? **No.**
9. Was claim for compensation filed within time required by Law? **Yes.**
10. Was employer insured by above insurer? **Yes.**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Assault by coworker after work outside Claimant's home.**
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: **Head; Right wrist.**
14. Nature and extent of any permanent disability: **n/a**
15. Compensation paid to-date for temporary disability: **-0-**
16. Value necessary medical aid paid to date by employer/insurer? **-0-**
17. Value necessary medical aid not furnished by employer/insurer? **\$19,666.63.**
18. Employee's average weekly wages: **\$246.82**

19. Weekly compensation rate: **\$164.55 Temporary Total Disability**  
**\$164.55 Permanent Total Disability**

20. Method wages computation: **Stipulation**

**COMPENSATION PAYABLE**

21. Amount of compensation payable: **-0-**

Unpaid medical expenses: **\$19,666.63.**

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

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

22. Second Injury Fund liability: **No.**

0 weeks of permanent partial disability from Second Injury Fund

**TOTAL: NONE**

23. Future requirements awarded: **-0-**

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to 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: **Joseph V. Neill.**

## FINDINGS OF FACT and RULINGS OF LAW

Employee: **Jessica Brame** Injury No.: **05-109411**

Dependents: **n/a**

Employer: **Applebees**

Additional Party: **n/a**

Insurer: **Zurich American Insurance Co.**

Hearing Date: **February 9, 2009**

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

Checked by: JAT

### PRELIMINARIES

On February 9, 2009, the employee, **Claimant** appeared in person and by her attorney, Joseph V. Neill, for a hearing on her claim against the employer, **Applebee's** ("Employer). There is no claim against the Second Injury Fund for this injury. Applebee's and its insurer Zurich American Insurance Company were represented by attorney Maria W. Campbell.

At the time of the hearing the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

### STIPULATIONS

1. On or about October 10, 2005, Claimant sustained an injury when she was assaulted by a coworker.
2. Claimant was an employee of Employer as of the date of her injuries.
3. Venue is proper in the City of St. Louis
4. Employer received proper notice.
5. The Claim was filed within the time prescribed by the law.
6. Claimant's Average Weekly Wage is \$246.82.
7. Claimant's weekly Temporary Total Disability (TTD) rate is \$164.55.
8. Claimant's weekly Permanent Partial Disability (PPD) rate is \$164.55.
9. Employer has paid no TTD, PPD, or Medical benefits for her injuries.

### ISSUES

1. Did the injury arise out of and in the course of Claimant's employment?
2. If so, is Employer liable for TTD, PPD, or past medical expenses based on the injury from October 10, 2005?
3. Is Employer liable for past medical expenses?

4. What is the nature and extent of employer's liability for PPD, if any?

### **EXHIBITS**

The following exhibits were admitted into evidence:

#### **Joint Exhibits:**

- A-1 St. Louis Fire EMS Report from October 10, 2005.
- B-2 Barnes-Jewish Hospital Records from October 10, 2005.
- C-3 Barnes-Jewish Hospital Records from on or about October 20, 2005.
- D-4 Barnes-Jewish Hospital, Washington University Medical Records from October 27, 2005 through December 1, 2005.

#### **Claimant Exhibits:**

- E. Barnes-Jewish Hospital medical records (\$18,904.31)
- F. Ambulance Bill (\$425.00)
- G. Dr. Thomas Musich CV and IME.
- H. Medication/Prescription receipts from Walgreens (\$337.32)<sup>1</sup>
- I. Photographs (11)

#### **Employer Exhibits:**

- 5. Dr. Anthony Mikulec CV and IME.
- 6. Dr. Andrew Wayne CV and IME.

### **SUMMARY OF THE EVIDENCE**

All of the evidence was reviewed but only evidence supporting this award is discussed below.

1. Claimant, a twenty-one year old female, worked for Applebee's about one year as a server and food expediter. On October 10, 2005 she began work at 4:00 p.m. Her duties that day were to assist servers by working in the kitchen putting orders together.
2. Another employee, Kenyatta Wooden, also worked that evening as a server. During her shift Kenyatta decided to quit. Between 7:00 p.m. and 7:30 p.m. she told Jeannie a head server that she was quitting but would first finish serving her tables. The head server, who was not on duty but was there with her two year old child for other reasons, instructed her to leave.

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<sup>1</sup> Claimant's exhibit H was entered into evidence over objection by the employer.

3. Kenyatta kicked Jeannie in the leg and left.
4. Kenyatta spoke to Claimant outside the kitchen area and asked if she had seen the incident involving Jeannie. While Kenyatta was speaking with Claimant, Jeannie's daughter Theresa, also an employee on duty at the time approached Kenyatta and told her not to justify what she had just done to her mother.
5. Kenyatta then turned on Theresa and stepped toward her but Claimant stepped between Kenyatta and Theresa so that Kenyatta could not hit Theresa, sixteen year old. Claimant told Kenyatta that hitting a minor would be stupid because she could go to jail. A manager instructed Kenyatta to leave, which she did.
6. Claimant had no altercation with Kenyatta during the incident at work on October 10, 2005. Kenyatta did not threaten Claimant or attempt to assault her. There had been no prior incidents between the two employees who had gotten along well prior to the day of the incident.
7. After Kenyatta left the store Claimant continued to work until 9:30 p.m. She and Sean, another employee made plans to go out after work and left together with a third co-worker who was dropped off at home. Sean and Claimant went to Claimant's house to drop off her car and some food.
8. While en route to Claimant's home Kenyatta pulled in behind her and began following her. Claimant was unaware that the driver of the car behind her was Kenyatta. In fact she did not know who it was until she exited her car after parking in front of her house. Kenyatta stopped the car she was driving in the middle of the street and approached Claimant asking, "Are you ready to do this?"
9. No sooner was the question asked than the assault occurred. Claimant was struck in her eye and the two went to the ground fighting. The fight ended when Claimant got off Kenyatta and went to get her purse from her car. Kenyatta however was not done fighting and went to get in her car. Before Claimant could get out of the street Kenyatta hit her with the car. Claimant was knocked unconscious and does not recall anything else until coming to in the ambulance that took her to the hospital.
10. Claimant suffered a longitudinal fracture through the mastoid air cells that extends from the lateral surface and runs parallel into the posterior wall of

the external auditory canal. She suffered a fractured skull, a closed head fracture, and a fracture to the right wrist.

11. Claimant had surgery on her right wrist on October 20, 2005. She was subsequently released from the Barnes-Jewish Clinic and eventually returned to work in January, 2006. Claimant incurred medical expenses and aid not furnished by the employer in the amount of \$19,666.63.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **Claimant's injuries did not arise out of and in the course of her employment.**

Employers are liable to furnish compensation to an employee who suffers a personal injury by accident arising out of and in the course of employment. **Mo. Rev. Stat § 287.120.1.** An accident includes but is not limited to injury or death of the employee caused by the unprovoked violence or assault against the employee by any person. **Mo. Rev. Stat § 287.120.1.** Assaults resulting from private quarrels are the only assaults not compensable under §287.120. Accident is defined as “an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.” **Mo. Rev. Stat § 287.020.2.**

Missouri workers' compensation law recognizes three types of assault: 1) Assaults invited by the dangerous nature of the employee's duties or environment, or resulting from some risk directly attributable to the job; 2) Assaults that result from private quarrels that are purely personal to the participants; and 3) Assaults of “neutral” origin that are irrational, unexplained or accidental, which occur in the course of employment but cannot be attributed to the employment on any more rational basis than that the employment provided a convenient occasion for the attack to take place. **Thompson v. Delmar Gardens, Chesterfield, 885 S.W.2d 780, 782 (Mo.App. E.D. 1994).**

I find the assault which was the third type enumerated above. It did not result from the dangerous nature of the employee's duties, environment, or other risk of the job. There is no evidence that a private quarrel existed between the Claimant and her attacker on the night in question or at any time previous to this incident. There was nothing said or done between these two employees which indicates a problem of any type existed. Claimant considered Kenyatta at least a coworker and at best a friend. Likewise nothing was said during the attack at Claimant's home which shed any light on an existing quarrel.

While at work Claimant had intervened to prevent an altercation between Kenyatta and a minor. I find this act alone did not give rise to a quarrel or dispute between the participants. There is no indication of any other work related incidents which caused the attack on Claimant on October 10, 2005. Such neutral origin assaults occurring in the course of employment cannot be attributed to the employment on any more rational basis than that the employment provided a convenient occasion for the attack to take place. I find the employment did not provide a convenient occasion for the attack to take place as the attack did not take place until several hours after Kenyatta left work.

An injury arises ‘out of’ employment when there is a causal connection between the nature of the duties or conditions under which the employee is required to perform and the resulting injury. **Abel v. Mike Russell’s Standard Service, 924 S.W.2d 502 (Mo.banc 1996); Simmons v. Bob Mears Wholesale Florist, 167 S.W.3d 222 (Mo. 2005)**. I find no causal connection exists between the nature of the duties or conditions under which Claimant was required to perform at the restaurant and the resulting injury.

Likewise an injury is “in the course of” employment when it occurs within the period of employment at a location where the employee would reasonably be while engaged in fulfilling the duties of employment.” **Abel v. Mike Russell’s Standard Service, 924 S.W.2d 502 (Mo.banc 1996)**. The provisions of Chapter 287 are to be strictly construed by the administrative law judge. **Mo. Rev. Stat § 287.800**. I find an event that occurs after work at Claimant’s home did not arise out of and in the course of employment.

Having found that the assault did not arise out of and in the course of employment all other issues are moot.

### **CONCLUSION**

The injury to Claimant did not arise out of and in the course of employment. It is therefore not a compensable claim and the Employer is not liable for Claimant’s medical bills, temporary total disability benefits, or permanent partial disability benefits and none are therefore awarded.

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

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

**JOHN A. TACKES**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

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Naomi Pearson  
*Division of Workers' Compensation*