

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

Injury No.: 05-112561

Employee: Clarence Carter  
Employer: Terminix  
Insurer: Zurich (An American Insurance Company)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 26, 2005  
Place and County of Accident: St. Louis County, 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, heard oral argument, read the briefs, 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 November 30, 2007, as supplemented herein.

#### Preliminaries

The issues stipulated at trial were whether employee was injured while traveling in a company owned or subsidized automobile from his home to employer's principal place of business; and whether the injury arose out of and in the course of employment.

The administrative law judge concluded that employee failed to meet his burden of proof that his injuries arose out of and in the course of employment, and as a result, denied his claim for workers' compensation benefits. Employee, through his attorney, filed a timely Application for Review with the Commission alleging that the administrative law judge erred in finding that employee was driving an "automobile" to work as defined in §287.020.5 RSMo; and that employee should be awarded medical, lost time, and permanent partial disability as a result of the accident on October 26, 2005. We disagree and affirm the award of the administrative law judge.

#### Factual Summary

The findings of fact were accurately recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

Employee worked for employer as a pest control and termite technician. Employee drove a company owned vehicle, Ford 350 pick-up truck, equipped with a 250 gallon pest control tank on the back. Employee

normally drove the company vehicle from home to work in Fenton, Missouri and from the Fenton office back home. Employee's daily routine included traveling from his home to the Fenton office where he would clock in and pick up his job assignment for the day. Employee would complete his assignments and typically return to the Fenton office, clock out and go home. Employee was not paid for mileage to and from his place of residence and the Fenton office.

On October 26, 2005, employee was driving his company vehicle from his home to the Fenton office on I-270 when he encountered a stalled vehicle in his lane. Employee braked and swerved to avoid the stopped vehicle, but was unable to do so, hitting the back of the vehicle causing his vehicle to become airborne and roll over. Employee was taken to the hospital where he received medical treatment for injuries to his head and neck. Employee was discharged from his doctor's care on November 22, 2005 and was released to return to work on November 28, 2005.

## Discussion

As of the date of this accident §287.120.1 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, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Pursuant to §287.120.1 RSMo, to be compensable under workers' compensation law, an employee's injury must arise out of and in the course of his employment. The construction of the phrase "arising out of and in the course of employment" historically has been evaluated in two parts, addressing the terms "arising out of" and the "in the course of" separately. The term "arising out of" has been construed to refer to causal origin, and the term "in course of employment," to the time, place and circumstances of the accident in relation to the employment. The substantive provisions of §287.120.1 were not changed or amended by the 2005 enactment of the General Assembly.

The legislature in 2005 amended the law in §287.020.5 RSMo, to provide:

Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

The legislature provided the following additional legislation contained in §287.800.1 RSMo, which provides:

Administrative 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.

Construing these statutory sections, in order for an employee to prove a compensable case, the employee must prove he or she sustained an injury due to an accident arising out of and in the course of employment. The statutory changes speak specifically to employees traveling in company owned or subsidized automobiles. Injuries sustained in accidents that occur while traveling in company automobiles between an employee's home and an employer's principal place of business are specifically excluded from coverage under §287.020.5. The statutory language is exact in its exclusion of such accidents from coverage.

Furthermore, the provision is subject to strict construction under §287.800.1.

In this instance, employee was injured while he was traveling in a company owned automobile from his home to employer's principal place of business. There is no dispute that at the time of his accident employee was traveling in a company owned vehicle from his home in North St. Louis County to work at the Fenton office. Employee claims that the company-owned vehicle, Ford 350 truck, he was driving at the time of his collision does not fall within the definition of an automobile. We are not persuaded by this argument. We agree with the administrative law judge that the company owned vehicle, Ford 350 truck, is an automobile for purposes of applying §287.020.5.

In addition, the evidence supports that employer's office in Fenton, Missouri was employer's principal place of business. Employee testified that his daily work routine involved driving the company vehicle to work at the Fenton office in order to clock in and receive his daily work assignment. After completing his assignments employee would return to the Fenton office to clock out and drive home in the company vehicle. Employer's business was clearly conducted by or through its office in Fenton, Missouri.

Employee was en route from his home to the Fenton location in a company automobile when he sustained his injury by accident. As such, employee has not established that his accident arose out of and in the course of his employment.

Although we agree with the conclusion of the administrative law judge that employee's injury by accident did not arise out of and in the course of his employment, we specifically want to address administrative law judge's comments with regard to the intent of the legislature in making the 2005 amendments to the Workers' Compensation Law. The administrative law judge provided his opinion as to the intent or purpose of the legislature in enacting changes to the Workers' Compensation Act. The administrative law judge stated:

The legislature has commanded that the law be strictly interpreted *so as to exclude as many persons as possible from coverage* by strict interpretation of terms so as to effectuate the legislature's desire to restrict the scope of the Act and narrow the class of persons entitled to compensation. (Emphasis added).

We agree that the law is to be strictly construed, but disagree that the purpose is to exclude as many persons as possible from coverage. The administrative law judge's opinion in that regard is not maintained by this Commission.

We are bound by strict interpretation of Chapter 287. Applying the plain meaning of the relevant statutory language to the facts in the instant case, employee is excluded from coverage under the law and is not entitled to compensation.

#### Conclusion

The Commission agrees with the ultimate conclusion reached by the administrative law judge that employee failed to meet his burden of proof that he sustained an injury that arose out of and in the course of employment. Employee's injuries are not compensable as they were sustained in an accident that occurred while traveling in a company owned automobile from employee's home to the employer's principal place of business. Therefore, employee's claim for benefits is denied.

The award and decision of Administrative Law Judge Mathew D. Vacca, issued November 30, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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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.

Introduction

Employer owned a Ford F-350 pickup truck, fitted with a 250 gallon tank in the bed. The purpose of the tank was to transport water and pest control chemicals to job sites in furtherance of employer's business of pest control. Employer required employee to drive the truck to and from work. On most mornings, employee drove the truck to employer's Fenton location to clock in and get his work assignment for the day. Sometimes, employee got his work assignment a day early. On those occasions, employee would drive directly from his home to the job site the following morning.

On the morning of October 26, 2005, employee was driving employer's pickup truck on a route from his home to employer's office in Fenton to clock in and get his work assignment for the day. The tank carried an unknown quantity of liquid. While driving on the highway, employee came upon a stalled vehicle in his lane. Employee maneuvered the truck in an effort to avoid the stalled car. The liquid in the tank sloshed making the truck difficult to control. The truck hit the stalled car and rolled over. Employee suffered injuries including a closed head injury.

Employee missed work from October 26, 2005, through November 27, 2005, due to his injuries. Employee incurred medical bills in the amount of \$8,286.11 for the treatment of his injuries. Dr. Margolis opined that employee sustained a permanent partial disability of 15% due to his post-concussive headaches.

Issues for Determination

- Was employee injured while traveling between his home and his employer's principal place of business in an employer-owned or employer-subsidized automobile?
- Did the injury arise out of and in the course of employee's employment?
  - Was the accident the prevailing factor in causing the injury?
  - Did the injury 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?

Legislative Intent?

Because the claimed injury occurred on October 26, 2005, the 2005 amendments to the Workers' Compensation Law (Law) apply. [1] This Commission has seen many theories regarding the legislature's goals in enacting the new Law. The administrative law judge in this case offers his:

Now, the legislature has commanded that the law be strictly interpreted so as to exclude as many persons as possible from coverage by strict interpretation of terms so as to effectuate the legislature's desire to restrict the scope of the Act and narrow the class of persons entitled to compensation.

I searched in vain for the legislative commandment that I must exclude as many persons as possible from coverage under the Law. I found no expressed legislative desire to narrow the class of persons entitled to workers' compensation.

Employee's injury is not denied compensation under §287.020.5 [2]

I will first dispense with the administrative law judge's primary ruling and then proceed with my analysis of the claim. The administrative law judge ruled:

Claimant has failed to establish that he has sustained an accident that arose out of and in the course of his employment with Employer. His accident is barred as occurring in a company provided "automobile" while traveling to or from work. § 287.020.5 RSMo.Cum.Supp. 2005.

Award p. 4

The administrative law judge's ruling clearly misstates the language of the statute. Section 287.020.5 RSMo provides:

Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable.

The plain language of the statute says §287.020.5 only applies to trips between employee's home and employer's principal place of business. The administrative law judge has impermissibly substituted the word "work" for the legislature's chosen phrase. "Principal place of business" is a concept used extensively in legal matters as evidenced by its appearance in more than 100 Missouri statutes. The administrative law judge's simplistic substitution is contrary to the Law and cannot stand.

Fortunately, I need not determine the meaning of the phrase in the context of the Workers' Compensation Law to resolve this claim because employer failed to offer any evidence to establish the §287.020.5 defense. The employer admitted this point with emphasis in its brief. "[T]here is *nothing* in the evidence regarding which St. Louis area location is Employer's 'principal place of business.'" The employer's emphasis of this point suggests to me that employer is unaware it was employer's burden to prove the elements of the defense.

Section 287.808 RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or

defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

(Emphasis added).

Employer did not establish what the phrase “employer’s principal place of business” means in the context of the Workers’ Compensation Law. Further, employer offered no evidence to establish that the office in Fenton fits within any such definition such as to qualify the office as the “employer’s principal place of business.” Having offered no evidence on the point, the employer surely cannot be said to have established that the proposition is more likely to be true than not true. The defense of §287.020.5 is not available to employer in this case.

Although the defense has already failed, I will note that employer also has not established that employee was in an “automobile.” Employee offered the only evidence on this point. “Automobile” means, “usually 4-wheeled automotive vehicle designed for passenger transportation on streets and roadways and commonly propelled by an internal-combustion engine using a volatile fuel (as gasoline) -- called also *car* or especially Brit. *motorcar*.”<sup>[3]</sup> Employer argues that employer’s truck fits this definition of “automobile” because it *can* carry passengers. Simply because it *can* carry a passenger does not mean it was *designed* for passenger transportation.

It is said 7 *Am. Jur. 2d, Automobiles and Highway Traffic* § 1, p. 599, that "for many purposes the courts have recognized the use of the word 'automobiles' in a particular sense as inclusive of only such motor vehicles as are intended for the carriage of persons only"; and that "These courts have held the term 'motor vehicle' to be different from and broader than the term 'automobile.'" We so held in *State v. Ridinger*, 364 Mo. 684, 266 S.W.2d 626, 631, 42 A.L.R.2d 617 (1954), saying: "The term 'motor vehicle' is different from and is broader than the word automobile." Webster's Third New International Dictionary 1961 states the usual definition of automobile to be "4-wheeled automotive vehicle designed for passenger transportation on streets and roadways and commonly propelled by an internal combustion engine using a volatile fuel (as gasoline)."

*Cape Girardeau v. Harris Truck & Trailer Sales, Inc.*, 521 S.W.2d 425, 427 (Mo. 1975) (citations omitted).

### Compensability

Having dispensed with the administrative law judge’s faulty reasoning regarding the §287.020.5 defense, I begin my analysis where all compensability determinations should begin. Section 287.120.1 RSMo, provides the basic right to workers’ compensation:

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.

Thus, proof of four elements is necessary to establish the compensability of the claim: personal injury; by accident; arising out of the employment; and arising in the course of the employment. The meaning of each of these was modified by the 2005 changes.<sup>[4]</sup> Further, by the enactment of §287.020.10, the legislature erased 90 years of case law interpreting these central elements:

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.

Not only did the legislature abrogate all case law interpreting arising out of and in the course of employment, the legislature changed the threshold causation inquiry 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”).

The legislature did not stop there. The legislature stripped the Law of many other provisions demanding proof of a causal nexus between the employment and the injury. Section 287.020 RSMo, (2000) 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. In addition, the legislature removed the declared legislative intent that Law is not to cover workers except while engaged in or about the premises where their duties are being performed, or where their services require their presence as a part of such service. That explicit declaration had appeared in the Law since its inception.

It is little wonder that commissioners, administrative law judges, and practitioners alike are struggling to make sense of the Law. Before the changes to the Law, the meaning of the phrase “arising out of in the course of employment” was intuitive. We became conditioned to denying compensation for accidental injuries absent a showing that the employment somehow caused the injury. Now, we ignore intuition and look only to the words of the statute.

## 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.

On October 26, 2005, employee was involved in the motor vehicle rollover accident described above. Among other bodily impacts, employee hit his head and knee on the interior of the truck cab and glass embedded in his skull. Employee suffered immediate cuts, bumps and bruises and ongoing head and neck complaints.

“unexpected traumatic event” There can be little doubt that the event during which the truck collided with another vehicle and rolled over was both unexpected and traumatic.

“identifiable by time and place of occurrence” The rollover accident happened on I-270 on October 26, 2005, shortly after 6:00 a.m.

“producing at the time objective symptoms of an injury” Employee suffered cuts, bumps, and bruises.

“caused by a specific event” Each of the symptoms of which employee complained were the result of the rollover accident.

“during a single work shift” Employer required employee to drive employer’s truck to and from work. Therefore, employee was performing a work duty at the time of the rollover accident. The rollover accident occurred during employee’s October 26, 2005, work shift.

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

### Injury/Arising out of the Employment/In the Course of the Employment

The legislature has rolled the concepts of injury, arising out of the employment, and in the course of employment into one definition. Section 287.020.3 provides:

(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.

In the instant case, there is no dispute regarding subparagraph (a). The accident was the *only* factor causing employee’s injuries and disability so it was necessarily the primary factor causing them. This is in accord with the opinion of Dr. Margolis.

Under subparagraph (b), employee’s injuries are compensable so long as they 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.”

For a proper analysis, 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.”[\[5\]](#)
- “Risk” means, “someone or something that creates or suggests a hazard or adverse change: a dangerous element or factor.”[\[6\]](#)
- “Equally” means, “to an equal degree.”[\[7\]](#)
- “Exposed” means, “so situated as to invite or make likely an attack, injury, or other adverse development.”[\[8\]](#)

Upon analyzing §287.020.3(2)(b) in light of the dictionary definitions, I find it provides for four categories of hazards:

1. Hazards or risks related to employment with an equal degree of exposure[\[9\]](#)
2. Hazards or risks related to employment with an unequal degree of exposure
3. Hazards or risks unrelated to employment with an equal degree of exposure
4. Hazards or risks unrelated to employment with an unequal degree of exposure

Only injuries resultant from #3 – a hazard or risk unrelated to employment to which workers have equal exposure in nonemployment life – are denied compensability based upon the second prong of the ‘arising out

of and in the course of employment test.'

Employee proved that his injury came from hazards or risks related to employment. Employee was required to drive employer's truck for work exposing him to the hazards of the highways. The truck had a sloshing tank in the back that impeded safely maneuvering the truck during an emergency. The risks associated with driving and the risks associated with driving a shifting load were clearly related to the employment. They are risks to which workers are not exposed in their normal nonemployment life. Such injuries are never denied compensability under subparagraph (b). Of course, by proving that his injury came from a hazard or risk related to employment, employee necessarily proved that his injury did not come from a hazard or risk unrelated to employment.

Employee has satisfied his burden under each prong of §287.020.3(2). His injury must be judged to have arisen out of and in the course of employment.[\[10\]](#)

### Conclusion

Based upon the foregoing, I conclude that employee has established that he suffered 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. I would award past medical expenses, temporary total disability benefits and permanent partial disability benefits.

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John J. Hickey, Member

## AWARD

Employee:	Clarence Carter	Injury No.:	05-112561
Dependents:	N/A		
Employer:	Terminix		
Additional Party:	Second Injury Fund (to remain open)		
Insurer:	Zurich (An American Insurance Company)		
Hearing Date:	September 25, 2007	Checked by:	MDV: ms

### 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: October 26, 2005
5. State location where accident occurred or occupational disease was contracted: Saint Louis County, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No
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: N/A
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: N/A
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

Employee: Clarence Carter

Injury No.: 05112561

17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: N/A
20. Method wages computation: N/A

#### COMPENSATION PAYABLE

21. Amount of compensation payable: \$0

22. Second Injury Fund liability: Dismissed

Total: \$0

23. Future requirements awarded: None

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

# FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Clarence Carter	Injury No.:	05-112561
Dependents:	N/A		Before the
Employer:	Terminix		Division of Workers'
			Compensation
			Department of Labor and Industrial
Additional Party:	Second Injury Fund (to remain open)		Relations of Missouri
			Jefferson City, Missouri
Insurer:	Zurich (An American Insurance Company)	Checked by:	MDV: ms

## ISSUES

The issues presented for resolution by way of this hearing are accident, arising out of and in the course of employment, the definition of "automobile" under 287.020.5 RSMo., (Cum.Supp.2005), and the nature and extent of any permanent partial disability.

## FINDING OF FACTS

1. Claimant is fifty years old, born July 18, 1957. He has worked for the past three years at Terminix as a Pest Control and Termite technician making \$13.50 per hour.
2. Claimant would normally drive a Terminix vehicle to work. He would leave his home at 6:00 a.m. in North St. Louis County and drive to the Fenton location.
3. On the date of the accident, October 26, 2005, Claimant was heading southbound on I-270 in the inside lane when he rapidly approached a stopped vehicle. Claimant braked, swerved to the right, and his vehicle rolled over and was launched into the air.
4. At that time, Claimant was driving a Ford 350 pickup, with a 250 gallon pest control chemical tank on the back. The vehicle became airborne, and the tank was torn off the back of the truck.
5. Claimant testified that by virtue of the tank on the back of the truck, his ability to swerve was impaired. In his opinion, the accident would not have happened if he were in a normal vehicle rather than the truck in which he was traveling, because the maneuverability was affected by the sloshing liquid in the 250 gallon tank.
6. Claimant sustained injuries to his scalp and head, he hit his head on the roof of the interior of the vehicle, and sustained glass fragments in the back of his head. He was conveyed to the hospital where he underwent a CT scan of his head and neck. A staple was placed in the scalp to close it. Claimant also underwent x-rays of his elbow and followed up with his own physician. He was off work from the date of the incident until November 28, 2005. The employer paid no temporary total disability benefits or medical benefits. Claimant still experiences residual pain in the back of his head, but returned to work full duty experiencing headaches on an occasional basis that he rates at eight out of ten on a pain scale of ten. He also complained of a tender scalp.
7. Claimant's typical routine was to travel from his home to the Fenton office. His start time was 7:00 a.m.

There he would clock in for the day and pick up his job assignments, which required him to leave his house at 6:00 - 6:15 a.m. He did not have any set hours *per se*, but worked until he finished his assignments. His supervisor would normally give him his assignments for the day and no mileage was paid from his home to Fenton. The record does not disclose whether mileage was paid from the office in Fenton to work locations, how that mileage was paid, whether it was reimbursed or gasoline was provided at the Fenton office. The record does not disclose whether claimant was allowed to drive the truck for personal errands after finishing the company's work or, if so, how the gas and mileage costs were apportioned or reimbursed.

8. Claimant testified that he was "required" to drive the truck home, and could not leave it at the Fenton office. He testified he usually went back to the Fenton office at the close of the day to clock out, although sometimes he had to leave from his last job or pick something up for the employer. The Terminix logo was on the truck.

9. Claimant was suspended from driving the truck home for one year after the accident. This testimony seems at odds with the testimony he was "required" to drive the truck. This testimony indicates driving the truck was a privilege or "perk" of the job. The "perk" was taken away due to the accident. It was part of the employees' job duties to keep the trucks clean.

10. Claimant offers into evidence Webster's Third New International Unabridged Dictionary definition of automobile "a usu. 4-wheeled automotive vehicle designed for passenger transportation on streets and roadways and commonly propelled by an internal-combustion engine using a volatile fuel (as gasoline) - called also "car" or esp. Brit. 'motor car'". (Exhibit E).

#### RULINGS OF LAW

1. Claimant has failed to establish that he has sustained an accident that arose out of and in the course of his employment with Employer. His accident is barred as occurring in a company provided "automobile" while traveling to or from work. § 287.020.5 RSMo.Cum.Supp. 2005.

2. The Claim against the Second Injury fund is dismissed. The remaining issues, if any, are rendered moot.

#### DISCUSSION

Claimant asserts this claim turns on definition of the word "automobile". His argument is that since he was traveling in a "truck" rather than in an "automobile", that §287.020.5 does not apply to him and that his claim is covered by The Act. I find to the contrary.

§287.020.5 RSMo., (Cum.Supp.2005) provides:

Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. The "extension of premises" doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

Claimant was traveling to work in the employer's owned vehicle solely for transportation purposes at the time of his accident. I think it's clear that the legislature intended to exempt from the Act accidents that occur in

company vehicles while coming and going to work, regardless of whether that transportation is in an automobile or a truck.

The purpose of Workers' Compensation Law is to “place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment and, consequently, the law should be liberally construed so as to effectuate its purpose and humane design.” The law must be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Therefore, [a]ny question as to the right of an employee to compensation must be resolved in favor of the injured employee.

Custer v. Hartford Ins. Co., 174 S.W.3d 602, 610, (Mo.App. W.D.2005). (citations omitted).

Nevertheless, §287.800.1 RSMo., (Cum.Supp.2005) changed the above-quoted standard of construction of the Workers' Compensation Act from a liberal construction to a strict construction.

We note that the legislature has enacted significant changes to the Workers' Compensation Act in Senate Bill 1, which become effective August 28, 2005 relevant to the way the provisions of the Workers' Compensation Act are construed. The new § 287.800 provides that the provisions of the Workers' Compensation Act are to be “construed strictly” by the ALJ, the commission, and “any reviewing” court.

Custer v. Hartford Ins. Co., 174 S.W.3d 602, 610, fn.3 (Mo.App. W.D.2005).

The import of cases regarding strict versus liberal construction do not pertain to the burden of proof, rather they relate to the ambit or extent of the law itself. Prior to SB1, the Act was broadly construed so as to include as many persons as possible within the protection of the Act. By broadly construing terms such as accident, employee, employer, etc., questions regarding the “right to compensation” were resolved ‘in favor of’ including the injured employee in the class of people entitled to compensation. Now, the legislature has commanded that the law be strictly interpreted so as to exclude as many persons as possible from coverage by strict interpretation of terms so as to effectuate the legislature’s desire to restrict the scope of the Act and narrow the class of persons entitled to compensation.

Consistent with that directive, I construe § 287.020.5 RSMo., (Cum.Supp.2005) and its term “automobile” to mean any employer provided or subsidized vehicle provided to an employee to allow them to travel back and forth to work. The restrictive intent of the amendment is not to distinguish between pick-up trucks and sedans, or internal combustion versus solar powered vehicles, but rather to exclude from coverage the entire field of traveling back and forth to work in company owned or subsidized vehicles.

Employee’s offered Webster’s definition of automobile could very well exclude an automobile accident while traveling on a “highway” because employee’s definition of automobile only includes those traveling on “streets and roadways”. I certainly would not embrace such a holding because it would clearly counter legislative intent. Likewise, I think it is clear the Legislature intended to allow employers to provide company provided or assisted transportation without also extending workers’ compensation coverage to individuals who experience accidents during these time periods. That Legislative intent does not turn on the word “automobile”.

Section 287.800 RSMo., (Cum.Supp.2005) requires “provisions” of the Act be strictly construed, not isolated words. There is no requirement of giving isolated words literal definition, but it is important to read provisions together as a whole to effectuate the intent of the Legislative. A similar Labor Commission case involved whether all drivers were included under definitions in the Employment Security law or just the drivers enumerated in the statute:

[Party] claims that the rule of statutory construction *expressio unius est exclusio alterius* should be followed

... [S]ince the section expressly mentions commission-drivers who distribute meat, vegetables, fruits, bakery products, beverages, laundry, and drycleaning, it follows that commission-drivers who deliver baggage or who drive limousines to transport passengers are not covered. This court discussed that rule of statutory construction in City of Lexington ex rel. Menefee v. Commercial Bank, 130 Mo.App. 687, 108 S.W. 1095, 1096 (1908).

The maxim that the expression of one thing is the exclusion of others not expressed is not to be accepted as a hard and fast canon of statutory construction, but as a guide to point to the legislative intent which, when ascertained, should dominate the construction to be placed on the enactment. McFarland v. Railway, 94 Mo.App. It has been said, if there is some special reason for mentioning one and none for mentioning the other, the absence of any mention of the latter will operate as an exclusion, and that the maxim does not apply to a statute in which mention is made by way of example, or made in affirmance of existing law or to remove doubts, or when the context shows a different intention. To ascertain the intention of a statute it should be read in view of all the surrounding facts and circumstances under which it was enacted, and, it may be added, "common sense and good faith are the leading and principal characteristics of all interpretation."

Thus, a determination of whether [Employer's] drivers are exempted by virtue of the fact that they are not mentioned in § 288.034.6 requires an examination of the circumstances under which that section was enacted to determine if the examples provided therein are exclusive or merely exemplary.

The Missouri legislature added subsection 6 to § 288.34 in 1972 in response to a change in the Federal Unemployment Compensation Law which Congress adopted in the Employment Security Amendments of 1970, Pub.L. No. 91-373, S 102, 84 Stat. 695 (1970). There, Congress amended the law's definition of "employee" to conform to the meaning contained in 26 U.S.C. § 3121(d), individuals who are not employees under common law rules, such as agent-drivers and outside salesmen." 1970 U.S.Code Cong. & Ad.News 3606, 3608.

The Missouri legislature added subsection 6 to insure that the Missouri employment security law was in compliance with the federal law. Because the Missouri legislature derived the enumeration of drivers which appears in subsection 6 directly from the federal Employment Security Amendments of 1970, the legislative history of that amendment is the appropriate source for determining the intended inclusiveness of the enumeration contained in subsection 6. That legislative history reveals that the operative intent of the amendment's framers was to extend the law's coverage to include agent drivers. There is no indication that the amendment's framers intended to include only agent drivers engaged in delivering the listed products. (emphasis mine)

This intent in combination with the common-sense meaning of subsection 6 of § 288.034 lead this court to the conclusion that the Missouri legislature intended that the drivers of the products named in subsection 6 be viewed as exemplary rather than exclusive. Applying that conclusion to this case, baggage drivers and limousine drivers would be covered by the employment security law, regardless of the fact that they are not specifically enumerated in subsection 6.

Koontz Aviation, Inc. v. Labor & Indus. Relations Com'n 650 S.W.2d 331 (Mo.App. W.D. 1983).

Applying the logic of the Koontz case to the instant controversy, it is plain to me that the entire endeavor of traveling to and from work has been exempted from coverage under Chapter 287 by the amendments contained in SB1. This is so whether the traveling takes place in a company provided truck, sedan, compact car or other mode of transportation.

Finally, the Missouri Supreme Court recently affirmed the legislature's exemption of traveling to and from

work from Chapter 287. "Missouri law is clear that accidents occurring while going to or from work do not provide a basis for recovery under workers' compensation law. Going to or returning from employment is a personal act...and...an inevitable circumstance with which every employee is confronted and which ordinarily bears no immediate relation to the actual services."

Harris v. Westin Management Company East, 230 S.W.3d 1 (Mo. banc 2007). Wells v. Brown, 33 S.W.3d 190, 192 (Mo. Banc 2000).

Again, it is clear to me that the framers of SB1 intended to exempt the entire activity of traveling back and forth to work from the Act, not just specific persons in specific vehicles. The intent was to constrict or restrict the scope of the law, not to broaden it.

The remaining issues are moot and the claim against The Second Injury Fund, being contingent on the primary claim, is hereby dismissed.

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

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

Matthew D. Vacca  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
Director  
Division of Workers' Compensation

[1] SB1 & SB130, Truly Agreed and Finally Passed, effective August 28, 2005.

[2] All references are to the Revised Statutes of Missouri (Cum. Supp. 2005) unless otherwise indicated.

[3] Webster's Third New International Dictionary 148 (2002).

[4] The definition of "personal injury" was not directly modified. Rather, the change to the meaning of "arising out of and in the course of" necessarily changed the meaning of "injury" in §287.020.3 RSMo.

[5] Webster's Third New International Dictionary 1041 (2002).

[6] Webster's Third New International Dictionary 2432 (2002).

[7] Webster's Third New International Dictionary 767 (2002).

[8] Webster's Third New International Dictionary 802 (2002).

[9] Comparison of employee's work-related exposure to a hazard or risk against the exposure to the same hazard or risk of workers in general in their nonemployment life.

[10] "Deem" means, "to consider, think, or judge." Black's Law Dictionary 446 (8th ed. 2004).