

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

Injury No.: 06-093386

Employee: Erin Cooper  
Employer: Bank of America  
Insurer: Indemnity Insurance of North America  
c/o Gallagher Bassett

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 23, 2009. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued November 23, 2009, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

William F. Ringer, Chairman

---

Alice A. Bartlett, Member

---

John J. Hickey, Member

Attest:

---

Secretary

## FINAL AWARD

Employee: Erin Cooper

Injury No.: 06-093386

Dependents: N/A

Employer: Bank of America

Additional Party: N/A

Insurer: Indemnity Insurance of North America  
c/o Gallagher Bassett

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

Hearing Date: Friday, October 2, 2009

Checked by: KD/lsn

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 14, 2006
5. State location where accident occurred or occupational disease was contracted: St. Charles County, 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? Yes
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 is alleged to have occurred: Claimant was leaving her workplace at the end of her work day when she suffered a slip and fall while descending steps inside her employer's office building
12. Did accident or occupational disease cause death? No Date of death: N/A
13. Part(s) of body alleged to be injured by accident or occupational disease: left ankle
14. Nature and extent of any permanent disability: 40% permanent partial disability of the left lower extremity at the level of the ankle
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Erin Cooper

Injury Number 06-093386

- 17. Value necessary medical aid not furnished by employer/insurer? \$19,725.82; after adjustments to medical bills, the total due from employer and insurer is \$14,136.92; see award.
- 18. Employee's average weekly wages: \$580.37
- 19. Weekly compensation rate: \$386.91/\$376.55
- 20. Method wages computation: by agreement of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

For temporary total disability, from 9/15/06 through 11/13/06, 8 and 4/7 weeks at \$386.71 per week.....  
3,316.38  
For necessary past medical expense.....  
14,136.92  
For 40 % permanent partial disability of the left ankle, 60 weeks at \$376.55 per week.....  
22,593.00

Total due: \$ 40,046.30

22. Future requirements awarded: N/A

This award is subject to a lien in the amount of 25% thereof in favor of Christopher A. Wagner, Attorney at Law, for necessary legal services rendered.

This award is subject to interest as provided by law.

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

Employee: Erin Cooper

Injury No: 06-093386

Dependents: N/A

Employer: Bank of America

Additional Party: N/A

Insurer: Indemnity Insurance Co of North America  
c/o Gallagher Bassett

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

Checked by: KD/lsn

The claimant, Ms. Erin Cooper, appeared at hearing in person and by her counsel, Christopher A. Wagner. The employer, Bank of America, and its insurer, Indemnity Insurance Co. of North America, appeared by its counsel, Shelley A. Wilson. The claimant seeks a final award for benefits relating to an alleged compensable injury by accident on September 14, 2006. The employer and insurer dispute that the claimant suffered a compensable injury, and seek a final award denying any benefits. No claim has been pleaded as against the Second Injury Fund. The parties stipulated at hearing that the issues to be resolved in Injury Number 06-093386 are as follows:

Injury by accident arising out of and in the course of employment;  
Liability for past medical expense;  
Temporary total disability; and  
Permanent partial disability.

Ms. Cooper provided testimony on her own behalf. The claimant also submitted the deposition testimony of Ms. Stephanie Dickinson, and of Thomas F. Musich, M.D. The employer and insurer chose not to call any witnesses.

### **EXHIBITS**

Hearsay objection to the offer of Claimant's Exhibit K was sustained. The hearsay objection to Claimant's Exhibit N was overruled. The following exhibits are in evidence:

Employee: Erin Cooper

Injury Number 06-093386

Claimant's Exhibits

- A.- I. Series of photographs of stairs and building
- J. Compilation of medical records and billing statements
- K. Not admitted.
- L. Letter from Shelley A. Wilson to James W. McCartney
- M. Deposition of Thomas F. Musich, M.D., taken on 7/6/09
- N. Deposition of Stephanie Dickinson, taken on 9/22/09

Employer and Insurer's Exhibits

The employer and its insurer choose not to submit any exhibits.

**FINDINGS OF FACT AND RULINGS OF LAW**

The claimant, Ms. Erin Cooper, has been employed by Bank of America for four years, and currently works as a Home Service Specialist. The two story building where the claimant works with as many as three hundred other workers is not accessible to the public, and the claimant scans a badge to gain access through one of three entrances. The claimant then proceeds up an elevator, or climbs a flight of stairs to her desk located on the second floor.

On 9/14/06 Ms. Cooper logged off of her computer at around 5:30 p.m.; proceeded to the coffee bar to dispose of her soda; returned to her desk to retrieve her purse and lunch bag; then proceeded to exit the building at the end of her work day, taking a route through doors to an enclosed stairwell consisting of a landing; ten or so steps; a second landing, and a second set of steps to the ground floor exit. After walking down approximately five steps, the claimant slipped, fell backward, and landed on her buttocks while striking her head. The claimant also noticed that her left ankle was severely dislocated, and had another worker summon an ambulance. Claimant was assisted down the stairs before being put on a stretcher and being transported to St. Luke's Hospital in Chesterfield, Missouri. Ms. Cooper described the stairs as being painted, and lacking any traction strips. Ms. Cooper further acknowledged that at the time of her fall she did not see any trash, water, or other debris on the steps. Photographs of the steps in issue confirm that the stairs were made of painted concrete, as described per the history of injury provided by Dr. Musich at his deposition.

Ms. Cooper provided a history of injury and of subsequent medical from Dr. Andrew M. Rouse that is consistent with the various medical records in evidence. Ms. Cooper suffered a fracture to her left ankle as a result of her slip on the stairs. On 9/15/06 Dr. Rouse performed an open surgery, repairing fractures of the fibula and of the medial malleolus, by attaching a metal plate and screws to the bone to reduce the fractures. The notes of Dr. Rouse dated 9/15/06 indicate that only the medial and lateral malleolus were fractured, with "significant comminution medially".

Employee: Erin Cooper

Injury Number 06-093386

Ms. Cooper had follow up treatment and evaluation with Dr. Rouse, including physical therapy, as she progressed to weight bearing status after x-rays confirmed the ankle was healing in good alignment. Ms. Cooper was released to return to regular work duty effective 11/13/06. On 3/21/07, some six months post injury, medical records document complaints of swelling and discomfort when claimant was on her feet for extended periods. The claimant suffered ongoing complaints related to the placement of the hardware in her ankle, and on 5/13/08 Dr. Rouse performed a surgery to remove that hardware (a plate, multiple screws, and a washer). Ms. Cooper suffered an allergic reaction to the glue and steri-strips used to close her wound post the hardware removal, and treated successfully with no adverse residual symptoms from the allergic reaction.

**INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF  
EMPLOYMENT**

Section 287.120 RSMo mandates that employers subject to the workers' compensation act shall be liable for compensation to an employee for personal injury or death by accident arising out of and in the course of employment. The employer and the employee stipulate that they are subject to the act; at issue is whether the employee suffered an injury compensable under the act.

Effective August 28, 2005, SB 1 & 130 changed the standard for determining whether an injury by traumatic event, cumulative trauma, or disease process was sufficiently work related as to come under the provisions of the workers' compensation act. In Lawson v. Ford Motor Co., 217 S.W.3d 345 (Mo.App. E.D., 2007), at pp. 348-349, the court notes as follows with respect to the change in the legal standard:

As Ford correctly notes, in 2005 the legislature amended several sections of the Workers' Compensation Act. In particular, portions of [section 287.067](#) and [287.020](#) were rewritten. Specifically, section 287.067.2 discusses when an injury by occupational disease is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it "is clearly work related and meets the requirements of an injury which is compensable as provided in [subsections 2 and 3 of section 287.020](#)." [Subsections 2 and 3 of section 287.020](#) previously contained definitions for "accident" and "injury." Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs \*349 if work was a "substantial factor" in the cause of the disability.

Section 287.020.3 as amended in 2005 defines "injury" and sets forth, as follows, 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* (emphasis added).
- (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

Employee: Erin Cooper

Injury Number 06-093386

*(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 Section 287.020.2 the term accident is defined as follows:

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.

Section 287.808 RSMo. Cum. Supp. 2008 provides that “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.” Further, Section 287.800 RSMo. Cum. Supp. 2008 provides as follows:

1. 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.
2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

The evidence as it relates to the circumstances of the slip and fall leading to the ankle injury is unequivocal, and the facts are found as follows:

1. At the time of her slip and fall on stairs, the claimant had concluded her work day and was attempting to leave the employer’s building by taking the stairs from her second floor desk to the first floor exit from the building.
2. There was an elevator, and also three different stairwells that the claimant could chose to take to exit the building, and the set of stairs chosen by the claimant was a customary route of ingress and egress for the claimant to and from her work desk.
3. The claimant slipped and fell on painted concrete steps within an enclosed stairwell, and there was no apparent water or debris on the steps at the time of the slip and fall.

**STRICT CONSTRUCTION**

Employee: Erin Cooper

Injury Number 06-093386

We interpret the workers' compensation law according to the general rules of statutory construction. [Frazier v. Treasurer of Missouri as Custodian of the Second Injury Fund, 869 S.W.2d 152, 156 \(Mo.App.1993\)](#). We will not create an ambiguity in a statute, where none exists, in order to depart from a statute's plain and ordinary meaning. [Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County, 946 S.W.2d 234, 239 \(Mo. banc 1997\)](#). Our primary goal is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms used. [Frazier, 869 S.W.2d at 156](#). In determining legislative intent, we give an undefined word used in a statute its plain and ordinary meaning. [Hoffman v. Van Pak Corp., 16 S.W.3d 684 \(Mo.App.2000\)](#). Under traditional rules of construction, the word's dictionary definition supplies its plain and ordinary meaning. [Id.](#) Cited from [Motton v. Outsource International, 77 S.W.3d 669 \(Mo.App. ED 2002\)](#).

The proper interpretation of any provision within Chapter 287 begins with the acknowledgement that in 2005 the legislature deleted the directive that Chapter 287 be liberally construed, and provided in lieu thereof that the provisions of the Chapter are to be construed strictly, Section 287.800 RSMo. This amendment creates an anomaly, inasmuch as Chapter 287 is a remedial statute, not penal in nature, and historically it has been penal statutes that the courts have felt obliged to construe strictly, while remedial statutes have been construed liberally, each in a manner intended to ensure that the ends of the statutory language are being achieved.

In [Willis v. American Nat. Life Ins. Co., 287 S.W.2d 98, 103-104 \(Mo.App. 1956\)](#), the court states as follows on the subject of strict construction:

But the expression '**strict construction**' has been flung about rather loosely. A work horse definition given by Black's Law Dictionary, p. 1127:

'Construction of a statute or other instrument according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications.'

has been approved.<sup>FN4</sup> The penal provisions can be given 'no broader application than is warranted by its plain and unambiguous terms.'<sup>FN5</sup> The statute must be applied only to such cases as come clearly within its provisions \*104 and manifest spirit and intent.<sup>FN6</sup> '\* \* \* it is not to be regarded as including anything, not within its letter, as well as its spirit, which is not clearly and intelligibly described in the words of the statute, as well as manifestly intended by the Legislature.'<sup>FN7</sup> An expression which we believe worth quoting is:

[FN4. Priest v. Captain, 236 Mo. 446, 139 S.W. 204, 209.](#)

[FN5. City of Charleston ex rel. Brady v. McCutcheon, 360 Mo. 157, en banc, 227 S.W.2d 736, 738.](#)

[FN6. Eddington v. Western Union Tel. Co., 115 Mo.App. 93, loc. cit. 98, 91 S.W. 438; Cowan v. Western Union Telegraph Co., 149 Mo.App. 407, 129 S.W. 1066, 1067.](#)

[FN7. State ex inf. Collins v. St. Louis & S. F. R. Co., 238 Mo. 605, 142 S.W. 279, loc. cit. 281.](#)

'By the expression '**strict construction**' is meant that the scope of the **statute** shall not be extended by implication beyond the literal meaning of the terms employed, and not that the language of the terms shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal **statutes** by **construction**, but should give effect to the plain meaning of words and where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment.'<sup>FN8</sup>

[FN8. Moore v. Western Union Tel. Co., 164 Mo.App. 165, loc. cit. 171, 148 S.W. 157, loc. cit. 159; Abbott v. Western Union Telegraph Co., Mo.App., 210 S.W. 769](#)

Strict construction becomes a one-way street when the sovereign is applying the lash to the malefactor; in that situation '\* \* \* where there is fair room for doubt as to whether the thing complained of comes within the scope of its condemnation, such doubt is to be resolved in favor of the defendant.'<sup>FN9</sup> But in the ordinary case it 'limits the

Employee: Erin Cooper

Injury Number 06-093386

application of the statute by the words used. It places no greater burden on one party litigant than on the other; both must comply with the terms of the statute.<sup>FN10</sup> The Supreme Court, en banc, in [Cummins v. Kansas City Public Service Co.](#), 334 Mo. 672, 66 S.W.2d 920, gathered the expressions from the cases, the cumulative effect of which is to demonstrate that statutes may be partly remedial and partly penal, that the rule of 'strict construction' is not a precise but a relative expression and has lost much of its force and importance in recent times. This court concludes with the statement, 66 S.W.2d loc. cit. 925:

[FN9. City of St. Louis v. Triangle Fuel Co., Mo.App., 193 S.W.2d 914, 915.](#)

[FN10. Chrisman v. Terminal R. Ass'n of St. Louis, 237 Mo.App. 181, 157 S.W.2d 230, 234.](#)

'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the **statute**, considered historically,' is properly given consideration.' (Citing cases.)

Our conclusion is that there has been so much variety in the courts' interpretations of their own phrase, '**strict construction**,' that its meaning is not fixed and, as said in [In re Duren, 355 Mo. 1222, 200 S.W.2d 343, 353, 170 A.L.R. 391](#):

'\* \* \* our courts are not wedded to the doctrine of '**strict**' and '**liberal**' **construction** of **statutes**. They seek to arrive at the intention of the Legislature as disclosed, in part at least, by the objectives of the legislation.'

It is apparent that the legislature, by amending Section 287.800 and incorporating strict construction within Chapter 287, intended to ensure that the words in the Chapter were given their plain meaning, and were interpreted literally without an expansion beyond the terms as used in their context within the statute.

### **"ARISING OUT OF" AND "IN THE COURSE OF" EMPLOYMENT**

Injury by accident "arising out of" and "in the course of" employment has historically required a two-part analysis as to compensable injury. An injury occurs "in the course of employment" if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment. [Abel v. Mike Russell's Standard Serv.](#), 924 S.W.2d 502, 503 (Mo banc 1996), citing [Shinn v. General Binding Corp.](#), 789 S.W.2d 230, 232 (Mo.App.1990).

The meaning of "arising out of" employment is nebulous, and the more difficult of the two tests to apply. At issue is that "something else" that is required, as a test of causation, to make an injury compensable once it is established that the injury occurred in the course of employment. An accident arises out of the employment relationship "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury". [Kloppenber v. Queen Size Shoes, Inc.](#), 704 S.W.2d 234,236 (Mo.banc 1986), as cited in [Abel](#), at. page 503. Injuries caused by conditions that are peculiar or innate to the individual, such as a fall related to a fainting spell, are deemed to be idiopathic in nature, and are not compensable, in the absence of a showing that a condition unique to the workplace or exacerbated by the workplace exists and contributes to cause the injury. [Abel](#), at p. 504.

In [Liebman v. Colonial Baking Company](#), 391 S.W.2d 948 (Mo.App.1965), Judge Cottey offered a very thoughtful analysis of causation as it relates to the test "arising out of". Judge Cottey noted that Missouri had rejected the "positional risk theory" which suggests that an accident is compensable if the employee's employment caused him to be at the place where the

Employee: Erin Cooper

Injury Number 06-093386

accident happened. In the context of assault cases, where the assault is irrational, unprovoked, and where the only connection to employment is that the employment afforded a convenient opportunity for the assault to take place, Judge Cottey concludes that the only rational relationship to employment is coincidence, not a cause. Liebman, at. pp. 952-953.

With respect to the “something else” that will make the injury compensable, Judge Cottey notes as follows:

The familiar rule is that an accident will be held to have arisen ‘out of’ the employment when, from a consideration of all the relevant circumstances, it appears that there was a direct causal connection between the employment and the injury (attributable either to the nature of the employee’s duties or to the conditions under which he was required to perform them) so that the accident can be fairly said to have been a rational consequence of some hazard connected with (or aggravated by) the employment. Toole v. Bechtel Corporation, Mo., 291 S.W.2d 874,879; Gregory v. Lewis Sales Co., Mo.App., 348 S.W.2d 743, 745-6; Scherr v. Siding & Roofing Sales Co., Mo.App., 305 S.W.2d 62, 65; Long v. Schultz Shoe Co., Mo.App., 257 S.W.2d 211,212; May v. Ozark Central Telephone Co., supra, 272 S.W.2d 849. That is the cardinal requirement for compensability in all cases in Missouri, no matter how or where the accident may have occurred and no matter in what category the causative risk may be classified. Its basic factors are ‘causal connection’ and ‘rational consequence’. When they are shown to exist, the test has been satisfied; otherwise, it is not. Liebman, at. p. 950.

Judge Cottey goes on to note that causal connection and rational consequence exist if the causative risk was ‘inherent in the particular conditions under which the employment was carried on’, citing Long v. Schultz Shoe Co., at p.213, and Graves v. Central Electric Power Co-op, Mo., 306 S.W.2d 500, 504. He concludes that inherency of the risk in the working environment is the causal link to employment. In other words, it is inherency of risk that distinguishes coincidence from cause. But Judge Coffey does not stop there. He further suggests that the inherent risk must be, to some extent, particular to the employment. “There is a rule that runs to the effect that where a risk is common to the public generally, it is incumbent on the claimant to prove that his employment increased his exposure to it beyond the common average, and thereby enhanced the likelihood of his being injured by it”, citing May v. Ozark Central Telephone, Co., and Schmidt v. Adams & Sons Grocer Co., Mo.App., 377 S.W.2d 564. An example of the application of this rule are those cases where a tornado or other “act of God” causes injury, and the injury is not deemed to arise out of the employment in the absence of a showing that the employment somehow exposed the claimant to a risk of harm greater than that of the general public. Williams v. Great Atlantic & Pacific Tea Co., 332 S.W.2d 296 (Mo.App.1960).

Claims that involve idiopathic causes are particularly instructive on interpretation of the concept “arising out of”. In Collins v. Combustion Engineering Co., 490 S.W.2d 394 (Mo.App. 1973), claimant suffered a dizzy spell and fell off a ladder from a height of four feet. The court of appeals noted that idiopathic falls were not compensable as a rule, but applied an exception that provided that recovery would be allowed if it could be shown that a hazard or special risk connected with the employment and not common to the general public contributed to the injuries. The court in Collins concluded that work on a ladder at a height of four feet was not a “greater hazard”, and that the injury did not arise out of the employment.

Employee: Erin Cooper

Injury Number 06-093386

The Missouri Supreme Court subsequently had before it a claim that, like Collins, involved injury that was precipitated by an idiopathic event. In Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525 (Mo. banc 1993), claimant was a tractor-trailer truck driver who became dizzy while standing on a platform behind the tractor-cab, uncoupling the trailer from the cab. The claimant fell from the platform to the ground below, a distance of about 4 and ½ feet, and suffered his injury.

The Court explicitly overruled Collins, noting that it was rejecting the ‘idiopathic fall/greater hazard’ doctrine therein. In the process of finding the injury to Mr. Alexander to be compensable, the Court noted its earlier finding in Wolfgeher v. Wagner Cartage Serv., Inc., 646 S.W.2d 781, 785 (Mo. banc 1983), where it declared that an injury would be compensable if “clearly job related”. The Court went on to note that “The test for a “causal connection” between the injury and the work to be performed is equivalent to the Wolfgeher test for “job relatedness”’, and that “It is well settled that an accident arises “out of” the employment “when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury”, Alexander, at. pp. 527-528, citing Kloppenburger v. Queen Size Shoes, Inc., 704 S.W.2d 234, 236 (Mo. banc 1986).

The Court, in the process of rejecting Collins, noted that “...the proper test of ‘causal connection’, simply put, is whether the conditions of employment caused or contributed to cause the accident”, and that “Recovery is not limited solely to accidents arising out of conditions of employment that constitute a “greater hazard” than normally encountered by the employee”. Alexander, at p. 528.

In Abel v. Mike Russell’s Standard Serv., 924 S.W.2d 502 (Mo. banc 1996), the Missouri Supreme Court had the opportunity to revisit the issue of causal connection as it relates to an idiopathic event giving rise to injury. The Court raised the question whether the intent behind the decision in Alexander was to adopt the positional risk theory, and to make compensable all injuries to employees occurring at their workplace. The Court rejected such an interpretation, and noted, “The *sine qua non* of recovery under Section 287.120 .1 and Alexander is a condition of the workplace that bears a causal connection to the employee’s injury. The condition of the workplace bears a causal connection to the injury only when the condition is unique to the workplace or is a common condition that is exacerbated by the requirements of employment”. Abel, at p. 504.

Citations to past case law as to the meaning of “arising out of” and “in the course of” employment provide an important general historical context, and provide certain guide posts as to the development of thinking on the subject of compensable injury by accident. Those cases cannot be considered in any way definitive, however, inasmuch as the definition of compensable injury by accident was significantly amended in 2005, and applicable case law is emerging. For example, in Drewes v. Trans World Airlines, Inc., 984 S.W.2d 512 (Mo banc 1999), the Missouri Supreme Court found an injury to be compensable, and to arise out of employment, when the injured employee suffered a fall while carrying her lunch on an unpaid 30 minute lunch break. The claimant suffered her fall in a break room that was on a floor that was not leased by the employer, but was nonetheless a common area for all tenants of the building, and the employer permitted its employees to use that particular break room. The court relied on the personal comfort doctrine, noting that lunch breaks are personal comforts incidental to employment, and cited the applicable reference in Section 287.020.3(1) RSMo 1993, where it states, “*The*

Employee: Erin Cooper

Injury Number 06-093386

*injury must be incidental to and not independent of the relation of employer and employee.”*

Not only did the legislature specifically abrogate the case law in Drewes and other cases interpreting “accident”, “arising out of”, and “in the course of the employment” (See Section 297.020.10), it also specifically deleted the aforementioned sentence in Section 287.020.3(1) that referenced injuries “incidental” to the relation of employer and employee. Further, the court in Drewes applied what at the time was subsection 5 of Section 287.020 RSMo 1993, stating as follows: “*Without otherwise affecting either the meaning or interpretation of the abridged clause, “personal injuries arising out of and in the course of such employment”, it is hereby declared 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.*” In Drewes, the Court determined that the claimant suffered her injury “in or about the premises”, even though the involved break room was not owned, rented, or controlled by the employer. The legislature, as a part of SB 1 & 130 as enacted into law in 2005, also deleted the aforementioned subsection 5 of Section 287.020 in its entirety, and in lieu thereof provided as follows:

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.

Historically, and as a general proposition, injuries suffered while going to and from work were not compensable, and did not arise out of and in the course of employment, Person v. Scullin Steel Co., 523 S.W.2d 801, 806 (Mo. banc 1975). In McClain v. Welsh Co., 748 S.W.2d 720, 725 (Mo. App. 1988), the court noted that “Going to or returning from employment is a personal act, akin to dressing, grooming and presenting oneself for work ... [and] bears no immediate relation to the actual services to be performed.”

An exception to this general proposition applied to injury on the premises owned or controlled by the employer, or by extension of the premises to areas “appropriated” by the employer. Kunce v. Junge Baking Company, 432 S.W.2d 602, 607 (Mo.App.1968); Cox v. Tyson Foods, Inc. 920 S.W.2d 534 (Mo. banc 1996).

By deleting the aforementioned statutory provisions relied upon in Drewes, and by mandating the abrogation of prior case law interpreting “accident”, “arising out of” and “in the course of the employment”, the legislature has made clear a desire to move away from any type of positional risk analysis in the context of an “in or about the premises” type of liability, and has chosen to focus more on the elements of causal relationship to the work actually performed by the employee, and to the nature of the risk or hazard to which the employee is exposed, relative to those risks and hazards to which the employee is otherwise exposed while engaged in activities in their nonemployment life. The legislature further narrowed the focus on work relatedness by defining “accident” in terms of specific event during a single work shift (287.020.2); by defining “accident” as the prevailing factor, or primary factor, compared to the prior standard, “a substantial

Employee: Erin Cooper

Injury Number 06-093386

factor”; [287.020.3(1)]; and by declaring injury both from direct and indirect idiopathic causes to be not compensable [287.020.3(3)].

The issue is whether the fall suffered by Ms. Cooper on the premises of the employer, while descending the stairs she regularly used as a means of ingress and egress to her second floor work desk, and while in the course of exiting the building after the close of her work day, is compensable under the law as amended in 2005. The legislature chose to specifically abrogate, in part, the extension of the premises doctrine as to injuries occurring on property not owned or controlled by the employer. By implication, the extension of the premises doctrine still applies to injuries to and from work on property owned or controlled by the employer. If the legislature had it in mind to render noncompensable those injuries by accident to and from work occurring on employer owned or controlled property, arguably it would have done so, but chose instead to effect a change specifically to the extension of the premises doctrine, and as to certain injuries in company owned vehicles.

The courts have provided some guidance as to the interpretation of accident and injury under the new law. Miller v. Missouri Highway and Transp Com’n, 287 S.W.3d 671 (Mo banc 2009); Bivins v. St. John’s Regional Health Center, 272 S.W. 3d 446 (Mo.App. S.D. 2008) . If the true test of “arising out of” is a matter of interpretation of causal connection and rational consequence, then query whether the act of walking down a flight of stairs from a second floor to a first floor on a series of painted concrete steps, under the circumstances applicable to Ms. Cooper, is an exposure to a work related risk compensable under the new law? In Bivins, at p.449, the court notes:

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 for some unconnected source.

In Bivins, at p.451, the court affirmed the finding that the claimant had failed to prove she suffered a compensable injury by accident, and noted that “... Like the employee in *Drewes*, claimant was not performing assigned duties at the time of her unexplained fall. Rather, she was walking down a common hallway intending to clock in for purposes of commencing work.” Bivins also cited the provisions of the new law that provide that it is not enough that employment serves as a triggering or precipitating factor, and noted that the Commission had found that the claimant had failed to show that she was exposed to an unusual risk of injury that was not shared by the general public.

In Miller, the Missouri Supreme Court affirmed the denial of a claim of compensable injury by accident, noting that by walking on an even road surface at the time of his injury, the claimant’s work was not the prevailing factor, and the involved risk inherent in walking was the same risk to which the claimant was exposed in everyday life.

Both Bivins and Miller involved injuries that occurred during the act of walking on a level surface. The injury suffered by Ms. Cooper is distinguishable from those cases to

Employee: Erin Cooper

Injury Number 06-093386

the extent that the inherency of the risk of walking steps is itself greater than the risk of walking on a level surface.

To the extent that walking steps is a measured risk that every individual is generally exposed to in the course of their everyday life, the question as to causal connection, rational consequence, and greater risk appears to turn on the specific facts of the case. On the continuum of possible exposure to the risk of harm from injury on steps at work, it is apparent that the steps and stairwell utilized by the employees of Bank of America to enter and exit the facility were the same painted concrete stairs that are found in any number of multilevel schools, office buildings, industrial plants, and the like. The steps in issue were not accessible to the general public, to the extent that access to the building was limited; claimant carried a badge that gained employees access to the facility. There was an elevator that served as an alternative to the stairwell, so Ms. Cooper was not obliged to walk the stairs as the only means of accessing her second floor work desk.

The findings and conclusions of law in Bivins are somewhat applicable and instructive. As in Bivins, the claimant (Ms. Cooper) was not performing any assigned duties at the time of the fall. In Bivins the claimant was walking down a common hallway to clock in for work, whereas Ms. Cooper had logged off of her telephone and her computer at the end of her work day, and was leaving work via one of the three stairwells available between the first and second floors. Ms. Bivins was found to have suffered an “unexplained fall” where she “just fell”. Is the nature of the risk inherent in walking a flight of painted concrete steps sufficient to distinguish the injury of Ms. Cooper from that of Ms. Bivins, for purposes of determining compensability? Is the fact that Ms. Cooper slipped on the stairs, leading to her fall, sufficient to conclude that her fall was not “unexplained”, as in the case of Ms. Bivins?

It is compelling that the legislature chose not to abrogate the prior law relating to injuries occurring to and from work on premises under the control of the employer. To the extent Ms. Cooper was obliged to walk the 20 or so steps to and from her work station (the elevator option notwithstanding) to perform her work duties, and suffered a slip and fall on those same stairs, her fall is not unexplained. Conditions of the workplace are found to have contributed to her slip and fall. The claimant is found to have suffered a compensable injury by accident arising out of and in the course of her employment on September 14, 2006, when she slipped and fell on stairs. The requisite causal connection and rational consequence as to the work performed by Ms. Cooper is found to exist, as well as an inherency of risk that is sufficiently peculiar to her employment to merit the award of compensation per sections 287.020 and 287.120 RSMo. The issue as to injury by accident arising out of and in the course of employment is found in favor of Ms. Cooper.

### **TEMPORARY TOTAL DISABILITY**

Medical records indicate that after her surgery on 9/15/06, Ms. Cooper remained on nonweight bearing restriction until 11/13/06. As of 12/4/06 Ms. Cooper was to wean herself out of the removable boot she was wearing. Dr. Rouse wrote an off duty slip on

Employee: Erin Cooper

Injury Number 06-093386

9/25/06 advising that the claimant remain off duty for 4 weeks. On 10/23/06 Dr. Rouse wrote a second note, advising that the claimant could return to regular duty on 11/13/06.

Ms. Cooper provided credible testimony to support the conclusion that from 9/15/06 through 11/13/06 she was under the care of Dr. Rouse and missed work while recovering from her ankle injury. The claimant was unable to work and was under off of work restrictions due to her injury from 9/15/06 through 11/13/06 (On 11/13/06 Ms. Cooper attended an appointment with Dr. Rouse, and was advised to weightbear), a period of 8 and 4/7 weeks. At the stipulated rate of \$386.91 per week, the total due from the employer and insurer for temporary total disability is for 8 and 4/7 weeks, or \$3,316.38.

### **PAST MEDICAL EXPENSE**

The issue as to the requisite proof needed to support a claim for medical expense was addressed in Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105, 111-112 (Mo banc 1989). The Court stated:

In this case, Martin testified that her visits to the hospital and various doctors were the product of her fall. She further stated that the bills she received were the result of those visits. We believe that when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation. The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. In this age of soaring medical costs it no longer serves the purposes of the Act to assume that medical bills paid by an injured worker are presumed reasonable (because they were paid), while those which remain unpaid, very probably because of lack of means, must be proved reasonable and fair.

It is further apparent that there must be medical records in evidence that correspond to the bills put in evidence. See Meyer v. Superior Insulating Tape, 882 S.W.2d 735 (Mo.App. E.D. 1994).

The employee has provided medical bills and corresponding medical records in evidence to document a total of \$19,725.82 in medical expense provided and billed to cure and relieve of the effects of the involved injury, prior to adjustments. The claimant, in her written brief, has broken down the medical expense in terms of expense paid by the employee; expense paid by group insurance; amounts adjusted; and amounts still owed. To the extent that the claimant is not to receive a windfall as a result of any adjustments, the amount in medical due is calculated after determining the total of adjustments. See Lenzini v. Columbia Foods, 829 S.W.2d 482, 487 (Mo. app. 1992); Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 882 (Mo. banc 2003).

Payments for medical expense, and adjustments to billings are shown in the following chart, and in her brief the claimant acknowledged the following group insurance payments were made:

<u>Provider</u>	<u>Total bill</u>	<u>adjustment</u>	<u>paid by group</u>	<u>paid by ee</u>	<u>amt owed</u>
-----------------	-------------------	-------------------	----------------------	-------------------	-----------------

Employee: Erin Cooper

Injury Number 06-093386

St. Charles Ambulance District	588.00	(paid by employee and group insurance)			0
St. Luke's 9/14-16/06	12,423.52	2,484.70	2,951.42	0	6,987.40
Comprehensive Anesthesia Care	840.00	332.60	456.66	50.74	0
Dr. Andrew Rouse	2,292.00	1,192.60	1,099.40	0	0
St. John's Mercy Home Care	711.50	0	0	0	711.50
City Place Surgery Center	2,646.00	1,579.00	1,017.00	50.00	0
St. Luke's 5/26/08	112.40	(paid by employee and group insurance)			
St. Luke's 5/31/08	112.40	(paid by employee and group insurance)			
Total Bill:	19,725.82				
Adjustments:	5,588.90				
Paid by group or ee:	6,438.02				
Amount unpaid:	7,698.90				

With a total adjustment of \$5,588.90, the amount of past medical expense in issue is \$19,725.82 - \$5,588.90 = \$14,136.92.

Payments from another source are generally not to be credited on workers' compensation benefits. Further, to the extent the burden is on the employer to prove an entitlement to a credit, no such proof has been made by the employer and its insurer with respect to the past medical expense in issue.

The employer and insurer are found liable for the amount of medical necessary to cure and relieve of the effects of the injury. The claimant has made the necessary proof that the cost of the requisite medical care was a total of \$19,725.82. After the adjustments noted by the claimant in her written brief, made a part of the legal file in this proceeding by this notice, the amount due from the employer and insurer for past medical expense is \$14,136.92.

**PERMANENT PARTIAL DISABILITY**

Employee: Erin Cooper

Injury Number 06-093386

At the request of the claimant's counsel, Dr. Thomas F. Musich, a licensed family practitioner in the state of Missouri, performed disability evaluations of Ms. Cooper on 10/19/07 and on 6/5/09. Dr. Musich notes that the claimant finished treating for what he describes as "a severe left ankle fracture", with the history of hardware removal and treatment for allergic reaction. Dr. Musich noted complaints of soft tissue pain; diminished range of motion; and of chronic soft tissue swelling.

The testimony of the claimant at trial, and that of Dr. Musich based on his observations, supports the conclusion that as a result of her ankle injury the claimant suffers left ankle pain when standing over ten minutes; after walking over one half of a mile; pain from cold and damp weather; and pain that waxes and wanes from a level of 0 to 8 on a 10 point scale, depending on her activity. The testimony of the witness further persuades that the claimant was asymptomatic as to her left ankle prior to her injury on 9/14/06, and that the injury has caused some loss of range of motion. The claimant acknowledges that she returned to work on 11/14/06 after remaining off of work for about eight weeks post injury. Ms. Cooper appeared to walk about the hearing room with a normal gait. There are no specific work restrictions or limitations to be found in the various medical records, but Dr. Musich cautions that the claimant should "refrain from activities that severely and adversely affect her post-traumatic complaints". Ms. Cooper testified that she no longer is able to roller blade, ice skate, or snow ski, and that she is limited from standing or walking for any prolonged periods of time. The employer and insurer did not offer any expert medical testimony to refute the conclusion reached by Dr. Musich that the involved ankle fracture caused Ms. Cooper to suffer a permanent loss of use of that ankle.

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. Phelps v. Jeff Wolk Construction Co., 803 S.W.2d 641,646 (Mo.App.1991)(overruled in part). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. Banner Iron Works v. Mordis, 663 S.W.2d 770,773 (Mo.App. 1983) (overruled in part). The determination of disability involves medical determinations, but is also a legal conclusion, and the Commission is not bound by the exact percentage of disability estimated by the medical experts. Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, (Mo.App. 1986).

The testimony of Ms. Cooper, in conjunction with the expert medical opinion of Dr. Musich, persuades that the claimant did not suffer any permanent disability to her ankle prior to the fracture suffered on 9/14/06. Further, the testimony of Ms. Cooper as to her limitations with respect to her ankle, in conjunction with the documentation as to her loss of use of the ankle and the expert medical evaluation by Dr. Musich, persuades that as a result of her work injury the claimant suffered a 40% permanent partial disability of the left lower extremity at the level of the ankle. The total number of weeks of benefits due for permanent partial disability is  $150 \times .40 = 60$ , multiplied by the stipulated compensation rate of \$376.55 per week, for a total due of \$22,593.00.

### **FINAL AWARD**

This fact finder means for this award to be a final determination of the issues raised at hearing on this claim for workers' compensation benefits, and to be ripe for appeal under the act.

Employee: Erin Cooper

Injury Number 06-093386

**ATTORNEY'S FEES**

This award is subject to a lien in favor of Christopher A. Wagner, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

Made by: /s/ KEVIN DINWIDDIE  
KEVIN DINWIDDIE  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to this 23<sup>rd</sup> day of November, 2009.

/s/ Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*