

**TEMPORARY AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No. 11-090670

Employee: Paula Eberhard  
Employer: G4S/ Wackenhut Corporation  
Insurer: New Hampshire Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Injury arising out of and in the course of employment*

The administrative law judge determined that this travelling surveillance employee suffered an injury arising out of and in the course of her employment when, during a visit to a McDonald's restroom, a heavy toilet paper dispenser fell on her left shoulder and face. Employer correctly notes that the administrative law judge did not specifically analyze these facts under certain recent and controlling case law. We write this supplemental opinion to provide that analysis.

Section 287.020.3(2) RSMo provides, as follows:

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.

The courts have interpreted the foregoing language to involve a causal connection test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504,

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510-11 (Mo. 2012). The *Johme* court held that an employee who fell and suffered injuries when her foot slipped off her sandal while making coffee “failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life.” *Id.* at 512.

Here, we agree with the administrative law judge’s determination that employee’s injuries resulted from a risk related to and specific to her employment activities on November 3, 2011, and one to which she was not equally exposed in her normal non-employment life. This is because employee was required to use public restrooms owing to the unique nature of her work. Employer places much emphasis on the fact that employee exercised a personal choice to visit a McDonald’s restroom as opposed to some other restroom. We find this fact largely irrelevant.

We believe it obvious (and so find) that the use of public restrooms exposes one to risks greater than those associated with the use of private facilities. The high-volume use of public restrooms creates increased maintenance problems over which the visitor has no control and of which a visitor is less likely to be aware. This is evidenced by the specific facts of this case, in that the McDonald’s restaurant was very busy when employee visited, and the manager told employee she was aware of the faulty toilet paper dispenser, but had not had time to correct it. And, although workers would have some exposure to the risks associated with the use of public restrooms in normal, non-employment life, the duties of employee’s work for employer effectively necessitated an increased reliance upon the use of such facilities, in that employee did not report to an identified, regular, or established worksite to perform her duties; instead, the nature of her work involved travelling.

It would also appear (and we so find) that employee was attempting to mitigate the risks associated with the use of public restrooms by choosing one which, based on her experience, was more likely to be clean and well-maintained. Of course, to the extent employer’s emphasis on employee’s choice to visit McDonald’s amounts to an argument that employee was partially at fault in causing her injuries, such arguments are unavailing under a workers’ compensation system that specifically renders considerations of negligence irrelevant in determining employer’s liability. See § 287.120.1 RSMo.

Nor do we deem it particularly relevant that employee’s injuries came from a risk or hazard attendant to a condition of a premises other than employer’s. In 2005, the legislature deleted previous language in § 287.020.5 RSMo declaring the Missouri Workers’ Compensation Law did not cover workers “except while engaged in or about the premises where their duties are being performed,” with the result that there is no longer any requirement that injuries occur on or about an employer’s premises to be compensable. In both *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012) and *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. 2014), the courts held that injuries that were not sustained on the employer’s premises were nevertheless compensable. In both cases, the courts noted that although those employees were not on their employers’ premises, they sustained their injuries while “on the job.” *Duever*, 371 S.W.3d at 868; *Dorris*, 436 S.W.3d at 593. The same is true here, in that employee

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stopped to use the restroom at McDonald's during the approximately three-hour compensated trip from southeast Missouri back to St. Charles where she lived. It is uncontested that employer paid employee for all of her travel time and did not deduct pay for restroom or other breaks during the course of her travels. We find that employee was on the job when she sustained her injuries.

We note also that from an "unequal exposure" standpoint at least, the facts at issue herein may be compared to those in *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299 (Mo. App. 2009), and for this reason we agree with the administrative law judge's reliance on that decision. In *Harness*, the hazard resulting in injury (a motor vehicle accident) was not unique to the employment but rather a hazard to which almost all workers are regularly exposed in normal, non-employment life. Although the *Harness* court primarily addressed and directed its holding to the application of 2005 legislative amendments to § 287.020.5 RSMo which exclude compensation for certain injuries sustained in subsidized vehicles (a provision which is obviously not at issue in this matter) the court did ultimately hold that the employee's injuries "arose out of and in the course of employment," suggesting the court deemed the employee to have satisfied the requirements of § 287.020.3(2)(b). *Id.* at 306.

In light of the *Harness* decision, an employee need not establish that a risk or hazard resulting in injury was unique to an employment (or specific to a workplace) in order to meet the requirements of § 287.020.3(2)(b). Rather, the burden of proving unequal exposure may be sustained by a showing that the duties of an employment resulted in a greater *frequency* of exposure to a risk, even a common risk. Such analysis is in keeping with the Missouri Supreme Court's emphasis on unequal exposure (as opposed to the categorization of various hazards or risks) evident in *Johme and Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009).

We find that employee's injuries came from the risk or hazard of using public restrooms. We find that employee's work for employer exposed her to a greater frequency of using public restrooms, and the risks and hazards attendant thereto. We find that employee's injuries did not come from a hazard or risk unrelated to the employment to which workers would be equally exposed outside of and unrelated to the employment in normal non-employment life. We conclude, therefore, that employee's injuries arose out of and in the course of her employment for purposes of § 287.020.3(2)(b).

### **Decision**

We affirm and adopt the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion.

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued May 2, 2014, is attached and incorporated by this reference.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

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

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of January 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**TEMPORARY OR PARTIAL AWARD**

Employee: Paula Eberhard Injury No. 11-090670  
Dependents: N/A  
Employer: G4S/Wackenhut Corporation  
Additional Party: Second Injury Fund (left open)  
Insurer: New Hampshire Insurance Company  
Appearances: Dean Christianson, attorney for the employee.  
Kevin Leahy, attorneys for the employer-insurer.  
Hearing Date: January 31, 2014 Checked by: LCK/rm

**SUMMARY OF FINDINGS**

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? November 3, 2011.
5. State location where accident occurred or occupational disease contracted: Scott 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 happened or occupational disease contracted: The employee was hit in the head and left shoulder by a defective dispenser.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Head and left shoulder.
14. Compensation paid-to date for temporary total disability: \$4,454.55.
15. Value necessary medical aid paid to date by employer-insurer? \$3,961.58.
16. Value necessary medical aid not furnished by employer-insurer? \$5,062.68.
17. Employee's average weekly wage: \$731.92.
18. Weekly compensation rate: \$487.95 for temporary total disability and \$425.19 for permanent partial disability.
19. Method wages computation: See Rulings of Law.
20. Amount of compensation payable:

Unpaid medical expenses: \$5,062.68.

Additional Medical Treatment as set forth in the Rulings of Law.

This award is only temporary and partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

**IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.**

## **FINDINGS OF FACT AND RULINGS OF LAW**

On January 31, 2014, the employee, Paula Eberhard, appeared in person and with her attorney, Dean Christianson, for a temporary or partial award. The employer-insurer was represented by their attorney, Kevin Leahy. The parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. The parties agreed to waive any potential venue issue and agreed that the case be heard in Cape Girardeau County.
2. G4S/Wackenhut Corporation was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self-insured employer/New Hampshire Insurance Company with its TPA Gallagher Bassett Services, Inc.
3. On or about November 3, 2011, Paula Eberhard was an employee of G4S/Wackenhut Corporation and was working under the Workers' Compensation Act.
4. The employer had notice of the employee's alleged accident.
5. The employee's claim was filed within the time allowed by law.
6. The employer-insurer paid \$3,961.58 in medical aid.
7. The employer-insurer paid \$4,454.55 in temporary disability benefits.
8. On or about February 1, 2012, all requests for past and future medical treatment were denied by the employer.

### **ISSUES:**

1. Accident.
2. Average Weekly Wage and Rate of Compensation.
3. Medical Causation.
4. Claim for previously incurred medical aid.
5. Claim for additional medical aid.

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

#### Employee's Exhibits

- A. May 14, 2013, medical report of Dr. Emanuel.
- B. Medical records of Metropolitan Neurology.
- C. Medical records of St. Peters Bone & Joint.
- D. Medical records of SSM Physical Therapy.
- E. Medical records of Concentra.
- F. Medical records of Dr. Peter.

- G. Medical records of Dr. Peter.
- H. Medical records of Endocrine Consultants.
- I. Medical records of Dr. Shereen.
- J. Medical bills.
- K. Letter requesting additional medical care.
- L. Employee Handbook.
- M. Incident Report.
- N. Earnings Statements for 2011.

Employer-Insurer's Exhibits:

- 1. Report of Dr. Rabenold.
- 2. Cross-examination testimony of Dr. Emanuel.
- 3. Medical records of Concentra.
- 4. Medical records of Endocrine Consultants.
- 5. Medical records of Dr. Peter.

Judicial notice of the contents of the Division's file for the employee was taken.

**WITNESS:**

Paula Eberhard, the employee.

**BRIEFS:**

The employer-insurer filed their proposed Award on March 4, 2014. The employee filed her proposed Award on March 5, 2014.

**FINDINGS OF FACT:**

The employee testified that she lives in St. Charles, Missouri and was born in November of 1953. Her current medications are Synthroid for Graves' disease which is prescribed for her thyroid by Dr. Matthew and Ambien for sleeping which is prescribed by Dr. Peter, her family doctor. Her Graves' disease, which is a thyroid disorder, ebbs and flows and can affect all body parts including joints. When she was diagnosed she received radiation treatment. She saw Dr. Shereen for muscle aches.

On February 14, 2011, the employee went to Dr. Peter due to increasing pain and swelling in the joints, and a stabbing pain. She wanted to discuss pain medications. The employee saw Dr. Bandlamudi at the St. Louis University Rheumatology Clinic on March 14 and March 31, 2011, for joint pain and swelling in her hands. X-rays of her feet, ankles, knees and shoulders were within normal limits. Hyperthyroidism was diagnosed. On July 12, 2011, the employee saw Dr. Matthew who diagnosed Graves' disease which is hyperthyroidism.

The employee testified that she is now on medication, and her thyroid condition has leveled out. She had an injury to her left shoulder from an automobile accident in 2003. She was driving a van and was rear ended by a truck. Her left shoulder was dislocated and the ambulance attendant popped it back in place on the way to St. Joseph's Hospital. She was at the hospital for a few hours and followed up with a doctor. She never had surgery.

On February 5, 2003, x-rays of the left shoulder and left scapula at St. Joseph Hospital were normal. X-rays of the cervical spine showed degenerative changes. On February 20, the employee saw Dr. Peter for left shoulder pain and tingling in the left hand. With neck flexion there was radicular pain to the right elbow. There was a limited range of motion of the cervical spine and full range of motion of the left shoulder. Dr. Peter diagnosed probable left shoulder dislocation, and prescribed Flexeril, Motrin and Vicodin. At the end of May, the employee saw Dr. Peter for neck and left shoulder pain with a lot of popping. He referred the employee to an orthopedic surgeon.

The employee was treated at St. Peters Bone & Joint beginning on June 11, 2003. The employee was having neck and shoulder pain after a pickup truck rear ended her van on February 5, 2003. The employee had an anterior-inferior shoulder dislocation and initially had significant shoulder pain, which largely resolved with the exception of it being aggravated with movement of her cervical spine. The doctor assessed a left shoulder anterior-inferior dislocation and cervical spine strain with C7 radiculitis. A cervical MRI and left shoulder MRI were ordered. The June 23 left shoulder MRI showed a small collection of fluid below the supraspinatus which appeared to be post-traumatic. There was no evidence of a rotator cuff tear and the MRI was noted to be benign. The cervical MRI showed posterior spurs at C5-6 encroaching the foramen more on the left than right. At the end of June, the employee was diagnosed with cervical radiculitis secondary to C5-6 osteophyte. The employee was treated conservatively with the last treatment at the end of July of 2003.

The employee testified that a year after the auto accident, her shoulder was fine, and she had no problems from the motor vehicle accident. She had another motor vehicle accident around 2006, when a garbage truck backed into her parked car and hit the right front side. She did not have any medical treatment. Those are the only two motor vehicle accidents that she has had. The history contained in Dr. Emanuel's report that she had a motor vehicle accident in 2010 was wrong and the accident he mentioned was the 2003 motor vehicle accident. Prior to the 2011 accident, she had no other injuries to her left shoulder. The several years before her 2011 accident her left shoulder was fine.

The employee testified that she started working for G4S Compliance, aka Wackenhut Corporation in 2004. On November 3, 2011, she was a surveillance investigator. Traveling was part of her job. She was licensed and worked in Iowa, Kansas, Tennessee, Illinois and Missouri. 50% of her surveillance work involved traveling overnight. G4S paid for all the expenses. She used her own vehicle. When she traveled overnight, she slept in hotels and motels. The employer provided a credit card and she was limited to rooms from \$65.00 to \$85.00. When traveling overnight she was reimbursed \$20.00 for meals. She was not directed as to where she had her meals or where she stayed overnight as long as it was within the per diem. The company had no

policy on where to go to use restrooms. She would use the closest, cleanest establishment around. She generally would choose one close to an egress route, so if a person she was observing left their residence she could see them.

The employee testified that she got her work assignments remotely through her computer and would log in to the company site to get her schedule. A typical assignment was going to a person's residence and then finding a location to set up to watch the residence. She was assigned and scheduled specific days to perform the surveillance and in which order to perform surveillance. To get from her home to a job site she would drive her own vehicle and was not told the route to take. She was not told which route to take coming back home from an assignment. G4S used a GPS tracking device which tracked their employee's whereabouts, showed how fast they drove, the route they took, and the miles traveled. The employer never questioned her about the routes taken or the stops she made on the trips.

The employee testified that when she was traveling to or from a surveillance assignment and stopped to get something to eat it was billable time. She reported the hours she worked into her computer, and the computer picked a time for her lunch break. A lot of time she did not take lunch breaks, but the computer made her say she did. All of the time was recorded through the computer connected to the employer. When she turned time in each night, she did not subtract the time for restroom breaks or snack breaks. The time had to match GPS or the payroll was rejected. Her time was never rejected for not subtracting the time to use the restroom.

The employee testified that she worked from 30-70 hours a week. Her hourly rate in 2011 was \$17.00 an hour. She got overtime after 40 hours. When she on performing surveillance she was paid at \$17.00 an hour. When traveling or preparing reports she was paid at minimum wage. For her overtime rate, the two were weighted out. She was paid \$17.00 an hour for working 40 hours a week. If she worked 50 hours in a week, she was paid 40 hours at \$17.00 per hour and the other 10 hours would be paid on how many hours she was report writing or traveling. She had a flat salary if she did not work overtime, but if she worked overtime the hours were weighted out.

The employee testified that Exhibit N are the earnings statements and pay stubs for 2011. Each page covers the statements for two weeks. It shows regular pay at full time and regular pay for traveling. MJM office S is the monthly office allowance for papers and pens and is a \$25.00 allowance every two weeks. MJM Cell Pho is a monthly allowance for cell phone at \$50.00 a month. She used a company credit card for gasoline, but if the credit card did not work she used her credit card and was then reimbursed. MJM Car Allow was the \$350.00 for car allowance which was meant to cover insurance, maintenance, tires, oil changes, etc. The overnight \$60.00 was the daily \$20.00 meal allowance for three nights. The hotel charges were on the company credit card. She does not know what Overtime Pre is. The paid time off is a vacation day. She does not know what Contr Wage A is.

The employee testified that she stayed overnight on November 2, 2011, in Cape Girardeau. When she spent overnight in Cape Girardeau, she customary stayed with her sister. She does not know for sure if she stayed with her sister on November 2. She thought her sister

may have stayed out of town and she might have stayed at Victorian Inn. Her work took her to Southeast Missouri using Interstate 55 10-20 times a year.

The employee testified that on November 3, 2011, she was working for G4S outside the City of Sikeston, Missouri on a surveillance case, and was watching a person's home. The surveillance started at 6:00 a.m. and ended around noon when the surveillance was called due to no activity. From 6:00 a.m. to noon she took two breaks. She went to the restroom once and then went to a diner to get a sandwich to go around 9:00 a.m. She went to the restroom at McDonald's located next to Interstate 55. She was at the McDonald's for maybe five or ten minutes, and was at the diner for about 10-15 minutes. McDonald's was about three quarters of a mile from the surveillance site. She generally chose McDonald's due to cleaner restrooms. After she used the restroom, and the diner, she returned to the surveillance. When she finished the surveillance at noon, she stopped at the McDonald's to use the restroom before she traveled home. The route to return home was Interstate 55. McDonald's is about a block from Interstate 55. She went from the surveillance site to McDonald's, but did not get on the Interstate before going to McDonald's.

The employee testified that McDonald's was really busy, and an attendant was cleaning the first stall. The employee used the bigger stall. After she used the restroom, when she attempted to get toilet paper, the dispenser sprung out of wall and hit her. She blacked out momentarily. The dispenser, which was not small, hit her on the side of the head and shoulder and the side of her face was cut. The dispenser was still hanging on the wall, and did not fall to the ground. She screamed for help, but the attendant did not respond. She gathered herself up and went out. She sat on a bench, and asked for the manager. The manager wrote out an incident report. The manager told the employee that she was aware that the dispenser was broken, did not have time to fix it, and apologized. After the incident report was written, she walked out to her car, and left McDonald's. She drove out of the parking lot, and got on Interstate 55 to return back to St. Charles. On the way home she got sick and nauseous, and had to pull over. She stopped at a gas station and threw up. She got back on Interstate 55 and continued back to St. Charles.

The employee testified that she spoke to the employer's Regional Manager, Steve Braden either on her way home, when she got home, or the next day. Claimant's Exhibit M is the incident report which is used when an accident happens. The incident report stated that she notified the employer on November 3. The title of person filling out the form was left blank. The employee did not know if she or Steve Braden typed it up. With regard to how the incident happened, it appears to be her words, but she does not know for sure if she completed it. The information in that document is correct. The pictures were taken by the employee and she thought they were taken when she got back home about three hours after the incident. The picture on the left is a picture of where the dispenser hit her left eye and cheekbone. It shows a mark like a blood blister cut. The second picture is the top of the eye where it turned blue. The third picture is the knot on the left shoulder. She sent the pictures to Steve Braden.

Exhibit M is the G4S Compliance and Investigations Incident Report. It shows the date of incident of November 3, 2011, and it happened at 2605 East Malone Avenue, Sikeston,

Missouri. The employer was notified about the accident on November 3, 2011. The body parts affected was left face and shoulder. It noted that Angie, the general manager for McDonald's was aware of the defaulted equipment and a report was made. The description of the incident was the employee stopped at McDonald's in Sikeston to use the restroom and obtain a drink. The employee went to the handicap stall since the cleaning lady was standing by the other stall. She sat down on the toilet seat and upon completion she went to retrieve toilet paper when the dispenser fell and struck her on the side of the face and shoulder. She momentarily blacked out and moved the steel dispenser to the side still hanging and went to get the manager. The employee's face had already started bruising and she had red marks from the impact. Her eye was swollen. Included are two pictures of the left side of the face and a picture of the left shoulder which was swollen.

The employee testified that she asked for medical care from the employer, but was not sent, so she went on her own to Dr. Peter, her long time family doctor.

The employee saw Dr. Peter on November 7, 2011. It was noted that on November 3, 2011, the employee was hit on the left side of the head by a toilet paper dispenser. She had loss of conscious for about ten seconds, was nauseated and had a headache. The employee had a headache with pain on the left side of the face, down into the neck, left shoulder and left arm. She had "buzzing" in her ears and difficulty sleeping. She had a burning sensation down the left arm. Dr. Peter's impression was head injury with whiplash type syndrome.

On November 15, 2011, the employee saw Dr. Peter with continued neck pain, a tingling feeling on both sides of her face, and she hurt worse when sitting or driving and turning her head. Current medication was Norco for pain. Dr. Peter ordered a cervical MRI which was performed on November 18, due to a history of neck pain and left shoulder pain with numbness and tingling in the left hand. The MRI showed degenerative changes of the cervical spine at C3-4, C4-5 and C5-6. On November 22, Dr. Peter noted that the employee's cervical MRI showed arthritis changes and wanted the employee to have a brain MRI and refer her to neurology.

The employee testified that the employer then sent her to Concentra Medical.

The employee went to Concentra medical on December 16, 2011. The patient information section noted that she was injured on the job on November 3, 2011, at 12:00 p.m. in Sikeston, Missouri. An approximate thirty pound toilet paper dispenser fell and hit her on the left side of her face, head and left shoulder. She noted a possible loss of consciousness for less than a minute. Dr. Breeden noted that the employee was seen for injuries to her head sustained on November 3, 2011, while in a restroom stall, when a toilet paper dispenser fell off the stall wall hitting the left side of her face and head. She thinks she lost consciousness for five seconds. The unit was mounted at or just above shoulder height. Her primary care doctor ordered an MRI of the cervical spine which showed degenerative disc disease at most levels with large osteophyte formation and no acute pathology. The employee has been off work due to blurred vision in the right eye. She had burning sensation in the left upper arm above the elbow. On examination, there was normal shoulder range of motion without pain. The employee had left arm numbness and tingling when the arms were raised over her head. She was diagnosed with a face/scalp

contusion with brief less than 10 second loss of consciousness, somatic dysfunction of the thoracic region, and blurred vision of the right eye. Dr. Breeden recommended over the counter Tylenol, ordered an MRI of the head, and the employee was to remain off work.

On December 16, 2011, an x-ray of the thoracic spine was performed which showed no acute fracture or malalignment detected. The MRI of the brain was performed on December 19, 2011, due to altered mental status with right sided blurred vision and tingling on the left side of the face. The MRI showed no abnormal findings.

On December 21, 2011, Dr. Breeden noted that the left shoulder was burning and she had double vision in the right eye. The left arm was tingling with brachial plexus pressure and raising arms above shoulder level. He returned her to regular duty, ordered physical therapy for her left shoulder and referred her to an ophthalmologist. Dr. Breeden diagnosed contusion of the face and scalp with brief loss of consciousness, somatic dysfunction and blurred vision of the right eye. On December 30, 2011, the therapist noted that the employee was in more pain since yesterday, and reported symptoms to the left elbow.

On January 5, 2012, Dr. Breeden noted that the employee was improved after having physical therapy five times. She had tingling to the left face and left arm. The vision was still blurry in her right eye. The employee had been evaluated by Dr. Clever an ophthalmologist who told her that her vision issues were chronic and not related to the injury. The current treatment was therapy for her cervical spine and left arm. Dr. Breeden stated that those symptoms are likely associated with somatic lesion of the left first rib and may not be associated with her injury. On examination, the employee had tingling to her left facial cheek and to the left arm which was recreated when raising her arms above her head. With regard to the left shoulder, the employee had full range of motion without crepitus or pain with negative impingement. Palpation of the thoracic spine was positive for pain at T1 and associated left rib recreates her left arm tingling. Dr. Breeden performed osteopathic manipulation for treating the somatic dysfunction. The employee noted improvement of her left face and arm symptoms. Dr. Breeden assessed somatic dysfunction in the cervical and thoracic region and noted that both may not be related to her acute injury. Her chronic right eye vision changes were unrelated to her work activity. Dr. Breeden continued the physical therapy and home exercise. He kept her on regular activity.

On January 6, 2012, the therapist noted that the doctor had adjusted her yesterday and the employee felt worse. She had a headache, resumed tingling in both sides of the face and left arm and pain in the neck and upper shoulder.

On January 10, 2012, Dr. Breeden noted that the employee's symptoms were improving, including the tingling to the left side of her face. Her left arm symptoms improved, but she continued to have some tingling. He noted that the symptoms improved with osteopathic manipulation, but returned after a couple of days and the pain radiated to her left arm and was exacerbated with raising her arms overhead. Dr. Breeden stated that her symptoms are related to thoracic outlet syndrome and not likely to be associated with her facial injury. With regard to her right eye vision issues, the employee saw an ophthalmologist which indicated that it was a

cataract that was unrelated to her left facial contusion. Dr. Breeden discharged the employee at maximum medical improvement without permanent impairment, but needed to follow up with her primary care physician for her non work related thoracic outlet syndrome.

The employee testified that the medical treatment she received was not helpful, she was still hurting and told that to Dr. Breeden. She was shocked when he discharged her because she was still having pain in her left shoulder. After being discharged, she sought medical treatment on own. The medical bills in Exhibit J are the medical bills for her medical treatment after being discharged by the physician at Concentra.

On February 1, 2012, the employee's attorney sent the employer- insurer's attorney a letter that the employee had apparently been discharged from care by the physicians at Concentra. The employee was having a great deal of complaints and requested that further treatment be provided.

The employee saw Dr. Wood, a neurologist, on March 28, 2012, after being referred by Dr. Peter for shoulder pain with arm numbness and tingling. The impression was neck pain and arm numbness with possible thoracic outlet syndrome. Ordered was a CT of the shoulder with EMG/NCV of the arms. The April 6, 2012 CT of the left shoulder showed no fracture or dislocation in the shoulder; and the AC and glenohumeral joint were intact. The EMG/Nerve Conduction Study performed by Dr. Pan on April 20, was consistent with left middle and lower cervical radiculopathy. Dr. Wood discussed the results of the tests with the employee over the phone and prescribed Soma and Relafen.

On May 4, 2012, Dr. Peter saw the employee with overall muscle/joint pain, muscle stiffness, and painful knots of the left thumb. He noted that the employee was recently diagnosed with Graves' disease and wanted to discuss the medication prescribed by Dr. Wood. Dr. Peter diagnosed neck and shoulder pain probably secondary to cervical disc disease; and he ordered physical therapy.

The employee started physical therapy at Select Physical Therapy beginning on May 15, 2012. The employee stated that on November 3, a 30 pound toilet paper dispenser fell and hit her in the head. She had seen different doctors with varying diagnoses of thoracic outlet syndrome, pinched nerve and shoulder pain. On exam she had loss of muscle strength in the left shoulder.

On June 12, 2012, the employee saw Dr. Peter with left shoulder pain and swelling with numbness down the left arm and the left side of the face. She periodically had twitching of the facial muscles. She finished therapy with no improvement in her symptoms. Dr. Peter wanted to refer her to a neurosurgeon for cervical disc disease.

On July 1, 2012, Dr. Matthew referred the employee to Dr. Shereen for further evaluation of her thyroid issues. On July 24, Dr. Shereen saw the employee due to generalized musculoskeletal pain and fatigue. It was noted she had similar symptoms at the time of diagnosis of Graves' disease about two years ago. Her symptoms had subsided and recurred for the last few

months. On August 6, 2012, Dr. Shereen stated that he thought her symptoms may very well be related to osteoarthritis, generalized deconditioning or to her thyroid disease. She was diagnosed with Graves' disease two years ago by Dr. Matthew and was currently under treatment with thyroid replacement, and hypothyroid myopathy can take a longer time to respond to the treatment.

The employee testified that she continued to work for the company until she resigned on January 20, 2013. Approximately three months ago she started working for ICS Merrill as insurance claim adjuster.

On January 23, 2013, the employee saw Dr. Matthew for her thyroid issues. It was noted that the employee was having left shoulder and neck pain that radiated down the left arm with numbness and tingling.

The employee testified that she had stopped at other fast food restaurants other than McDonald's to eat and take restroom breaks both while on the job and off the job. When she was on the road for work she used public restrooms including McDonald's, Hardees, and Quick Trips. In her personal life she has gone to McDonald's restaurants, but never to the one in Sikeston. She was the person that got hit when she reached out to pull on the toilet paper dispenser but it could have been any other person.

The employee saw Dr. Emanuel on May 14, 2013. Dr. Emanuel is a board-certified orthopedic surgeon who specializes in treatment of shoulders. On examination, the employee had signs of bursitis impingement with active abduction. The speeds test and Yergason tests were positive. There was crepitus in the subacromial space and signs of bursitis impingement. There were no signs of thoracic outlet syndrome. Dr. Emanuel took an x-ray which showed a spur off the anterior acromion, and some early arthritic changes of the acromioclavicular joint. Dr. Emanuel reviewed the prior medical treatment records. Dr. Emanuel diagnosed subacromial bursitis with impingement in the left shoulder and a bone spur. He found the employee to be very truthful and forthright. He noted that the employee had a pre-existing 2003 left shoulder injury with a possible left shoulder dislocation that was questionable with normal x-rays on the date of that injury. The employee had no complaints to her shoulder leading up to the accident of November 3, 2011.

It was Dr. Emanuel's opinion that the accident of November 3, 2011, is the prevailing factor in the development of subacromial bursitis resulting in impingement that has not been diagnosed or treated. He recommended treatment in the form of anti-inflammatory medication, ice, physical therapy, and a cortisone injection. If all that failed he would recommend arthroscopy of the shoulder with subacromial decompression. He put restrictions of no lifting greater than 50 pounds from floor to waist, 25 pounds waist to shoulder, and 5 pounds above shoulder height.

On November 25, 2013, the employer-insurer took the cross examination testimony of Dr. Emanuel by deposition. Dr. Emanuel stated that his diagnosis was based upon the clinical exam findings and the objective findings by x-ray that he ordered. The spur and arthritis was pre-existent to the injury. It was Dr. Emanuel's opinion that the employee had complaints of

shoulder pain after the dispenser injury that was really never diagnosed; she had persistent complaints and her subjective complaints matched her physical exam; and up to that time had not been fully diagnosed. Dr. Emanuel's recommendation of treatment was based upon her left shoulder symptoms. He stated that he would order an MRI of the shoulder prior to any type of surgical intervention.

The employee saw Dr. Rabenold on December 30, 2013. Dr. Rabenold stated that there are inconsistencies in the testimony and history to confirm whether her left shoulder was actually struck during the accident of November 3, 2011. Dr. Rabenold, on examination noted significant discomfort with passive range of motion and the strength of the rotator cuff is limited due to pain. She had mild to moderate tenderness about the shoulder, the AC joint, and biceps tendon. Dr. Rabenold diagnosed adhesive capsulitis, bursitis and tendinitis of the left shoulder. It was his opinion that based upon the medical and physical therapy records, and his findings on exam, that no additional medical treatment is required related to the accident of November 3, 2011, and there was not any permanent partial disability related to the 2011 accident. Any further treatment would be managed as a non work-related injury.

The employee testified that she has continued problems with the left shoulder from the accident at McDonald's. Her head and face are doing fine and there is no scarring. Her left shoulder is doing horrible. She cannot lift her left arm higher than less than horizontal level. She has trouble sleeping. She is taking Motrin. She has problems taking off her jacket, combing her hair, and with sleeping. Her left arm feels heavy, she has pain with movement, and she cannot swim. The employee is requesting the treatment, including surgery, recommended by Dr. Emanuel.

## **RULINGS OF LAW:**

### ***Issue 1. Accident***

The employer-insurer disputed that on or about November 3, 2011, the employee sustained an accident arising out of and in the course of her employment.

Prior to August 28, 2005, the general rule was that an employee does not suffer injury arising out of and in the course of employment if hurt while journeying to or returning from the place of work. There was an exception to this general rule where the employer, because of the distance to the job site or for the convenience of the employer, either furnished the employee's transportation, or compensated the employee for use of their own vehicle, or paid the employee for travel time. In those situations because a specific nexus was established between the work to be done and the physical movement of the employee from point to point, any injury that the employee suffered by accident while traveling arises out of and in the course of employment and is compensable. See *Garrett v. Industrial Commission*, 600 S.W.2d 516, 519 (Mo. App. 1980). This exception was known as the *Reneau* doctrine, which was based on the ruling by the Missouri Supreme Court in *Reneau v. Bales Electric Company*, 303 S.W.2d 75, 79 (Mo. 1957).

The exception to this general rule applied in cases for employees whose work entails travel away from the employer's primary premises and in those situations it was held to be in the course of employment during the trip, except when on a distinct personal errand. See *Baldridge v. Drainage Dist. of Missouri*, 645 S.W.2d 139, 140-141 (Mo.App.1982).

The Court of Appeals in *Smith v. District II A & B*, 59 S.W.3d 558 (Mo. App. 2001) held that in the case of a traveling employee, the employee is considered to be in the course of employment continuously during the trip, except when a distinct departure on a personal errand is shown. In the case of a traveling employee, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home to perform the employer's purposes are usually compensable. The Court held that Mr. Smith was a traveling employee and the injuries he sustained arose out of the necessity of sleeping in a hotel away from home to perform his employer's purposes and were compensable.

In 2005, the Missouri legislature amended the workers' compensation law and changed the interpretation of the law to strict construction. It also amended Section 287.020.5 RSMo to state in relevant part:

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.

In *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299 (Mo. App. 2009), the Southern District Court of Appeals held that an injury arises out of employment if it is a natural and reasonable incident thereof and is in the course of employment if the action occurs within a period of employment at a place where the employee may reasonably be fulfilling the duties of employment. Generally an accident occurring while an employee is going to and from the work is not compensable, but an exception exists where the employer, because of the distance to the job site or for the convenience of the employer, furnishes the employee's transportation, compensates the employee for use of their own vehicle or pays the employee for travel time. This exception known as the *Reneau* doctrine is generally interpreted to mean that an employee whose work entails travel away from the employer's primary premises is held to be in the course of employment during the trip except when on a distinct personal errand. Traveling employees would be in the course of employment until the trip ended.

The Court of Appeals held that the 2005 amendment to Section 287.020.5 abrogated the *Reneau* doctrine to the extent that injuries in a company owned or subsidized automobile are not compensable when traveling from (1) the employee's home to the employer's principal place of business; or (2) from the employer's principal place of business to employee's home. The Southern District further held that unless one of these exceptions applies, the *Reneau* doctrine remains in effect to allow compensation.

On November 3, 2011, the employee, Ms. Eberhard was performing her job duties in the Sikeston, Missouri area. The employer was paying her wages for her surveillance job duties and

for her time traveling from St. Charles, Missouri to the job site in Sikeston, Missouri and back to St. Charles which was approximately a three hour trip each way. The employer paid for the gasoline for the travel and the employee was furnished a monthly car allowance for the use of her motor vehicle. The employee was injured as she was starting to return to St. Charles from work. She was being paid wages at the time of the injury. I find that the employee was a traveling employee and the *Reneau* doctrine applies. The exceptions to the *Reneau* doctrine do not apply in this case because the employee was not injured 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.

I find that the employee was in Sikeston, Missouri due to her employment with the employer. She was assigned to perform surveillance on that particular date and that particular time in that particular location. The employee's injury occurred due to being subjected to the hazards of an improperly maintained and defective dispenser in the McDonald's restaurant in Sikeston, Missouri. The cause of her injury is not one in which she would have been equally exposed to that hazard outside of her workplace in her normal non-employment life. She was only in this particular location because of her employment with the employer. She never went to the Sikeston, Missouri McDonald's in her non-employment life. I find that the injury resulted from a hazard or risk to which the employee would not be equally exposed in her normal non-employment life.

I find that the employee was in the course of employment continuously during the trip from St. Charles Missouri to Sikeston Missouri and back; and she was not injured during a distinct departure on a personal errand. I find that there was a specific nexus between the work to be done in the Sikeston Missouri area and the physical movement of the employee from St. Charles Missouri to Sikeston Missouri and back to St. Charles. I find that the injuries that the employee sustained arose out of the necessity of being away from home in order to perform the employer's purposes. I find that the employee suffered an injury by accident while traveling which was arose out of and in the course of her employment and was compensable. I find that on November 3, 2011, the employee sustained a compensable accident and injury arising out of and in the course of her employment.

### ***Issue 2. Average Weekly Wage and Rate of Compensation***

Under Section 287.250.2 RSMo money paid by the employer to the employee to cover any special expenses incurred by the employee because of the nature of the employment shall not be included in wages. Based on that section, the office supplies, cell phone, gas reimbursement, car allowance, and other special expenses shall not be included in the wages.

Exhibit N is a copy of the earnings statements of the employee for the calendar year 2011. The employee was paid every two weeks and there were 7 pay periods totaling 14 weeks immediately preceding the week in which the employee was injured. The 14 pay periods were from July 25, 2011 through October 30, 2011. The wages for those periods are as follows:

- 10/17/11--10/30/11: \$1,423.27
- 10/3/11--10/16/11: \$1,565.59
- 9/19/11--10/2/11: \$1,423.12
- 9/5/11--9/18/11: \$1,565.60
- 8/22/11--9/4/11: \$1,423.12
- 8/8/11--8/21/11: \$1,423.11
- 7/25/11--8/7/11: \$1,423.10

The total of these fourteen weeks is \$10,246.91. In order to determine the employee's average weekly wage, the \$10,246.91 in wages shall be divided by fourteen weeks. I find the employee's average weekly wage was \$731.92. The rate of compensation for temporary total disability is \$487.95 and for permanent partial disability is \$425.19.

### ***Issue 3. Medical Causation***

The employer-insurer is disputing that the employee's left shoulder injury was medically causally related to the accident.

It was Dr. Breeden's opinion that the employee's symptoms are related to thoracic outlet syndrome and not likely to be associated with her injury.

It was Dr. Rabenold's opinion that there were inconsistencies in the testimony and history to confirm whether her left shoulder was actually struck during the accident of November 3, 2011. Dr. Rabenold diagnosed adhesive capsulitis, bursitis and tendinitis of the left shoulder. It was his opinion that no additional medical treatment is required related to the accident of November 3, 2011, and there was no permanent partial disability related to the 2011 accident. Any further treatment would be as a non work-related injury.

It was Dr. Emanuel's opinion that that the accident of November 3, 2011, is the prevailing factor in the development of subacromial bursitis resulting in impingement that has not been diagnosed or treated; and that the employee needs to have further treatment to the left shoulder.

The employee's credible testimony was that prior to November 3, 2011, she did not have left shoulder problems, and on that date was struck by the dispenser on the left side of her face and left shoulder. The incident report completed the day of the accident was that she was struck on the side of the face and shoulder. The pictures in the incident report include a picture of the left shoulder. When she saw Dr. Peter on November 7, 2011, the employee was having left shoulder pain. The history on the November 18, 2011 cervical MRI showed neck and left shoulder pain. When the employee started treating with Dr. Breeden on December 16, 2011, the patient information sheet noted the employee was hit on the left shoulder. The employee continued to have left shoulder pain while being treated by Dr. Breeden, Dr. Wood, and Dr. Peter in 2012. The employee's credible testimony was that since the November 3, 2011 accident she continued to have left shoulder pain.

Based on a review of all the evidence, I find that the opinion of Dr. Emanuel is very persuasive and is more persuasive than the opinions of Dr. Breeden and Dr. Rabenold on the issue of medical causation and whether the accident was the prevailing factor in causing the left shoulder injury and need for treatment.

I find that the employee's November 3, 2011 work accident was the prevailing factor in causing the resulting left shoulder injury, resulting medical condition, disability and the need for treatment. I find that the injury to the left shoulder, the resulting medical condition and disability, and need for treatment are medically causally related to the November 3, 2011 work accident.

***Issue 4. Claim for previously incurred medical aid.***

The employee is claiming \$5,651.44 in previously incurred medical aid for treatment from St. Joseph Health Center, Radiologic Imaging Consultants, Metropolitan Neurology, Dr. Peter, Select Rehab St. Louis, Dr. Stanley Martin, and Dr. Shereen.

The employer-insurer is disputing those medical bills and treatment with regard to the issues of authorization, reasonableness, necessity, and causal relationship.

With regard to the issue of authorization, under Section 287.140 RSMo., the employer has the right to select the treating physician, but waives that right by failing or neglecting to provide necessary medical aid. See *Banks v. Springfield Park Care Center*, 981 S.W.2d 161 (Mo. App. 1998).

The employer-insurer provided medical treatment until January 10, 2012, when Dr. Breeden discharged her and stated she was at maximum medical improvement. On February 1, 2012, the employee's attorney requested that further treatment be provided by the employer-insurer. The parties stipulated that on or about February 1, 2012, all requests for past and future medical treatment were denied by the employer. The employee then sought medical treatment on her own. I find that after February 1, 2012, the employer denied additional medical treatment and waived its right to select the treating physician by failing or neglecting to provide necessary medical aid. The defense of authorization after February 1, 2012 is not valid.

The employee is requesting the payment of a \$223.00 medical bill from Dr. Stanley Martin for treatment on June 26, 2012. The corresponding medical records of Dr. Martin are not in evidence. I find that the medical bill for this treatment is not recoverable because the corresponding medical records are not in evidence. See *Martin v. Mid-America Farm Lines, Inc.* 769 S.W. 2d 105 (Mo. Banc 1989).

I find that the July 24, 2012 treatment by Dr. Shereen and Radiologic Imaging Consultants was for treatment of the employee's thyroid issues, and were not causally related to the November 3, 2011 accident. The employer-insurer is therefore not responsible for the \$300.00 bill for Dr. Shereen and the \$44.76 bill for Radiologic Consultants.

Based on my ruling on medical causation in Issue 1, I find that the remaining bills are medically causally related to the accident and injury that the employee sustained on November 3, 2011.

A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. See *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989). In *Martin*, the employer-insurer did not show that the medical bills were not reasonable, and the Court of Appeals awarded the medical bills to be paid by the employer-insurer.

In Ms. Eberhard's case, the medical bills and corresponding medical records were admitted into evidence, and she testified that she received these bills as a result of the treatment for her shoulder injury after the employer-insurer refused additional treatment. I find that the medical treatment was necessary and caused by the November 3, 2011 accident and injury; and the amount of medical bills for that treatment are reasonable.

I therefore find that the employer-insurer is responsible for and is directed to pay the employee the sum of \$5,062.68 for the following previously incurred medical bills:

St. Joseph Health Center	\$1,725.00
Radiologic Imaging Consultants	\$ 146.08
Metropolitan Neurology, Ltd.	\$1,290.00
Dr. David Peter	\$ 187.00
Select Rehab St. Louis LLC	\$1,714.60

***Issue 5. Claim for additional medical aid.***

The employee is requesting additional medical aid. Under Section 287.140 RSMo the employee is entitled to receive all medical treatment that is reasonably required to cure and relieve her from the effects of the injury. In *Landers v. Chrysler Corporation*, 963 S.W.2d 275 (Mo. App. 1997), the Court held that it is sufficient to award medical benefits if the employee shows by "reasonable probability" that he is in need of additional medical treatment by reason of her work related accident.

Dr. Breeden discharged the employee at maximum medical improvement, but stated that she needed to follow up with her primary care physician for her non work related thoracic outlet syndrome. Dr. Rabenold diagnosed the employee with adhesive capsulitis, bursitis and tendinitis of the left shoulder. It was his opinion that no additional medical treatment is required related to the accident of November 3, 2011, and any further treatment would be for a non work-related injury.

It was Dr. Emanuel's opinion that as a result of the November 3, 2011 accident, the employee needed treatment in the form of anti-inflammatory medication, ice, physical therapy,

and cortisone injection. If the conservative failed he would recommend an MRI and arthroscopy of the shoulder with subacromial decompression.

I find that the opinion of Dr. Emanuel is very persuasive and is more persuasive than the opinions of Dr. Breeden and Dr. Rabenold on the issue of future medical aid. I find that the employee is in need of future medical aid and treatment to cure and relieve her from the effects of her work related left shoulder injury. The employer-insurer is therefore ordered to provide the employee with all of the medical care that is reasonable and necessary to cure and relieve her from the effects of the work related injury to her left shoulder pursuant to Section 287.140 RSMo including, but not limited to, the treatment recommended by Dr. Emanuel.

**ATTORNEY'S FEE:**

Dean Christianson, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Made by:

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Lawrence C. Kasten  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*