

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

Injury No.: 12-064760

Employee: Gregory Frazier  
Employer: Sullivan County Sheriff's Office  
Insurer: Missouri Association of Counties  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 25, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Vicky Ruth, issued March 25, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 3<sup>rd</sup> day of June 2014.

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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DISSENTING OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Gregory Frazier

### **DISSENTING OPINION**

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

On August 13, 2012, this sheriff's deputy was ascending a staircase at employer's premises when he fell and suffered serious injuries including herniated discs in his cervical spine. The parties have agreed that compensability in this case turns on whether employee, as he testified, received a dispatch call on his radio which caused him to take his eyes off the stairs and lose his footing. The administrative law judge and now the majority of this Commission have determined that employee was not truthful in his testimony, relying upon the absence of any mention of the dispatch call in the contemporaneous medical records. I disagree with this finding for a number of reasons.

Perhaps most importantly, the administrative law judge and the majority ignore the case law which holds that "[t]here is no requirement that the medical records report employment as the source of injury." *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 259 (Mo. App. 2010). There are many good reasons for this rule, the most compelling of which is that the unsworn statements of the oftentimes unidentified individuals within the healthcare system who create these records simply are not entitled to more weight than the sworn and cross-examined testimony of an employee before an administrative law judge. Even if employee didn't tell his healthcare providers that he fell because he received a radio dispatch, I fail to see how this impacts employee's credibility. Unless employee were a workers' compensation practitioner following the cutting edge of Missouri cases discussing whether various injuries may be deemed to arise out of and in the course of employment, he would have no reason to find such a detail important.

In a similar vein, I note that the administrative law judge and the employer fault employee for announcing his understanding, during his testimony, that if an employee falls at work, the employer is supposed to pay. So employee is clearly unaware of the holdings in cases such as *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (May 29, 2012) and *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009). But what does this have to do with the question whether employee is lying about receiving a radio dispatch? The answer is *nothing*. The answer is that the administrative law judge and majority are more interested in pondering questions of law than realistically asking themselves whether this sheriff's deputy is actually attempting to perpetrate workers' compensation fraud.

Employee has served as a sheriff's deputy for employer for about 9 years. Before that, he worked for various police departments and served in the United States armed forces as an active naval military policeman for 10 years. Claimant now works regularly as a bailiff in the Circuit Court of Sullivan County, providing security for judges and courtroom personnel and escorting prisoners from jail to the courthouse. Employer's own witness, Jackie Morris, who serves as the Sullivan County Clerk, testified that she has never known employee to be dishonest or unreliable, and that she has *no reason* to disbelieve employee's statement that he received a dispatch on his radio when he fell.

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Clearly, employee's professional history has required him to maintain a high level of honesty and integrity. Employee is regularly called upon to testify in court, and employer entrusts employee with the safety of judges and courtroom employees on a daily basis. Yet in order to avoid paying benefits on this claim, employer now depicts employee as a liar who will commit perjury. I am frankly astonished at this.

I am convinced that employee fell because he received a dispatch on his radio which distracted him and caused him to lose his footing. I would reverse the award of the administrative law judge and enter a temporary award ordering employer to provide employee with medical care, temporary total disability benefits, and all other benefits to which he is entitled under the Missouri Workers' Compensation Law. Because the majority has determined otherwise, I respectfully dissent from the Commission's decision.

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Curtis E. Chick, Jr., Member

**AWARD**

Employee: Gregory Frazier

Injury No. 12-064760

Dependents: N/A

Employer: Sullivan County Sheriff's Office

Before the  
**DIVISION OF WORKERS'  
 COMPENSATION**

Additional Party: Second Injury Fund

Department of Labor and Industrial  
 Relations of Missouri  
 Jefferson City, Missouri

Insurer: Missouri Association of Counties,  
 c/o Gallagher Bassett Services, Inc.

Hearing Date: December 19, 2012

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: August 13, 2012.
5. State location where accident occurred or occupational disease was contracted: Sullivan 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? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was walking up a flight of stairs when he missed a step and fell.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body allegedly injured by accident or occupational disease: body as a whole referable to the cervical spine.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: \$1,697.60.

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- 16. Value necessary medical aid paid to date by employer/insurer? Amount not available at trial.
- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$575.00.
- 19. Weekly compensation rate: \$383.33/\$383.33.
- 20. Method of wages computation: By agreement.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable from employer: None.
- 22. Second Injury Fund liability: N/A.
- 23. Future requirements awarded: N/A.

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## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gregory Frazier

Injury No. 12-064760

Dependents: N/A

Employer: Sullivan County Sheriff's Office

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

Additional Party: Second Injury Fund

Insurer: Missouri Association of Counties,  
c/o Gallagher Bassett Services, Inc.

Hearing Date: December 19, 2012

On December 19, 2012, the claimant and the employer/insurer appeared for a temporary award hearing. The claimant, Gregory Frazier, was represented by attorney Joshua Perkins. The employer/insurer was represented by attorney Jared Vessell. The claimant testified in person at the trial. The parties submitted briefs on or about January 16, 2013, and the record closed at that time.

### STIPULATIONS

The parties stipulated to the following:

1. On or about August 13, 2012, the claimant was an employee of the Sullivan County Sheriff's Office.
2. The employer was operating subject to Missouri's Workers' Compensation Law.
3. The employer's liability for workers' compensation was insured by Missouri Association of Counties c/o Gallagher Bassett Services, Inc.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Adair County is proper. By agreement of the parties, venue for trial purposes is proper in Jefferson City, Missouri.
5. A Claim for Compensation was filed within the time prescribed by law.
6. At the time of the alleged occupational disease or accident, employee's average weekly wage was \$575.00, yielding a weekly compensation rate of \$383.33 for permanent total disability benefits and for temporary total disability benefits.
7. Medical aid was provided.
8. The employer has paid temporary total disability benefits in the amount of \$1,697.60, for a period of approximately 4 and 3/7 weeks.

### ISSUES

At the hearing, the parties agreed that the issue to be resolved by this proceeding is whether claimant sustained an accident arising out of and in the course and scope of employment (specifically, prevailing factor and equal exposure issues).

**EXHIBITS**

On behalf of the claimant, the following exhibits were admitted into evidence without objection:

Exhibit A	Call log of the Sullivan County Sheriff's Office.
Exhibit B	Journal prepared by claimant.
Exhibit C	Medical records from Dr. Bailey.
Exhibit D	Medical records from Milan Family Practice and Sullivan County Memorial Hospital.

On behalf of the employer/insurer, the following exhibits were admitted into the record without objection:

Exhibit 1	Sullivan County Incident Event Report.
Exhibit 2	Report of Injury.
Exhibit 3	Claim for Compensation (original).
Exhibit 4	Excerpt of deposition of claimant.
Exhibit 5	Photograph.
Exhibit 6	Photograph.

*Note: All marks, handwritten notations, highlighting, and tabs on the exhibits were present at the time the documents were admitted into evidence. The deposition was received subject to the objections contained therein.*

**FINDINGS OF FACT**

Based on the above exhibits and the testimony presented at the hearing, I make the following findings of fact:

1. The claimant is 43 years old; his date of birth is June 17, 1969. He lives in Milan, Missouri.
2. Claimant served in the military from 1987 to 1997 as an active naval military policeman. While in the military, he attended the first of three police academies in which he received training as a law enforcement officer.
3. After his release from the military, claimant served on the Milan Police Department from 1997 to 1998. He then served his first stint with the Sullivan County Sheriff's Department from 1999 to 2000. From 2000 to 2003, he was a Unionville Police Department officer. He was again employed with Sullivan County from 2003 to 2006.
4. In 2007, claimant returned to the Sullivan County Sheriff's Office (the employer). He is still employed with the employer as a sheriff's deputy. He is also a reserve police

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- department employee with the Milan Police Department. At the time of the hearing in December 2012, claimant had not worked there during 2012.
5. Claimant testified that his position as a Sheriff's Deputy involves some administrative work, serving as a bailiff at court proceedings, and responding to calls. Claimant is required to wear a mobile radio on his belt while on duty. The microphone from this device is clipped to his right shoulder.
  6. As part of his duties, claimant was assigned the task of converting an old storage room in the basement of the courthouse into the Sheriff Department's new evidence room. This storage is accessible only by stairs. On the afternoon of August 13, 2012, claimant went to the storage room to see if the janitor had removed certain items (old files) as claimant had requested. After observing that the items had not yet been removed, claimant began his ascent up the stairs from the basement.
  7. At trial, claimant testified that as he walked up the stairs, a radio transmission came across his mobile radio device; whether or not this occurred is disputed by the parties. Claimant's position is that as the transmission came in, he turned his head to the left and lowered his right ear closer to the microphone on his right shoulder so that he could more clearly hear the call, and this caused him to miss a step and fall backwards. As claimant fell, he grabbed the stair railing to catch himself and did not fall completely to the floor. Claimant testified he immediately felt pain in his neck.
  8. Claimant testified there were no substances on the stairs and there were no light bulbs out in the stairwell. In his deposition, claimant was asked if he caught his toe on something on the stairs, and he replied "I don't recall. I think I just missed the step."<sup>1</sup>
  9. Claimant waited some time to gather his composure and then went to Dispatch and reported the incident. Claimant testified that he believes the radio transmission came in around 3:30 p.m.
  10. Although claimant testified that he went to the doctor on the date of the accident, **these records are not in evidence.**
  11. On August 14, 2012, claimant, on his own, completed an Incident Event Form that reads as follows:

I, Deputy Frazier, was coming up the stairs from the basement of the Couthouse (sic) when I missed a step and started to fall. I grabbed the rail and caught myself but I wrenched my back while catching myself. My back started hurting immediately after falling. I got back upstairs and tried to let it rest but it kept hurting. I went to the clinic at Sullivan County Memorial Hospital where I saw Dr. Williams. He gave me three prescriptions which I had filled at

<sup>1</sup> Exh. 4, pp. 55-56.

Owl Pharmacy. Dr. Williams said I would be able to work while taking the medicine.<sup>2</sup>

12. About a week later, on August 20, 2012, claimant saw Dr. Richards. The doctor noted that the mechanism of injury was “[f]ell up steps at court house on 8-13-12. Caught self with L arm, no direct trauma to head or neck. Pt. w/ positional radicular sx down L arm.”<sup>3</sup> Dr. Richards performed an osteopathic manipulation on that date.
13. Claimant underwent an MRI on August 21, 2012. The Radiology Report reflects the following findings: “No acute fracture is found. The spinal cord shows normal signal. The cervical cord is normal. There is left lateral disk herniation at C5-6 causing left foraminal stenosis. The herniated disk is touching the spinal cord on the left. There is also a small bulging disk at C6-7.”<sup>4</sup>
14. On August 21, 2012, claimant saw Dr. William, who recorded that the “patient fell at work and now has left arm pain, stiffness of the neck. Cervical radiculopathy.”<sup>5</sup> Dr. Williams reviewed the above MRI of the cervical spine and noted his impression as follows:
  - Disk herniation at C5-6 on the left causing left foraminal stenosis and pressure on the cord.
  - Bulging disk at C6-7.
  - No fracture.
  - There is mild degenerative arthritis of C4 through C7.
  - Spinal cord is normal.
  - Alignment is normal.
15. Dr. Essmyer’s August 23, 2012 records indicate that claimant was not feeling any better and that he still had pain continuing down his left arm. The diagnosis was cervical disc disease with myelopathy. The doctor noted that the next step was the get the opinion of a neurosurgeon.
16. On August 24, 2012, Dr. Essmyer wrote a letter stating that claimant “was unable to attend work form 8/20/12 to 9/23/12 due to cerv disc with meylopath and was under the care of Dale W. Essmyer, D.O. Please call my office if you have any questions or concerns.”<sup>6</sup>
17. On August 24, 2012, claimant signed a Report of Injury (Form 1). This form was prepared by Jackie Morris, County Clerk, and signed by claimant. The form indicates that the “specific activity the employee was engaged in when this accident . . .” occurred

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<sup>2</sup> Exh. 1.

<sup>3</sup> Exh. D.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

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was "walking upstairs."<sup>7</sup> In the space designated for a description of how the event occurred, the notation reads "walking upstairs – tripped grabbed handrail to prevent falling, wrenched his back."<sup>8</sup>

- 18. On September 6, 2012, claimant saw Dr. Bailey at the request of the employer/insurer. The doctor noted the history to be as follows:

The patient is a pleasant 43-year-old gentleman who was injured on August 13, 2012, as he was walking on some steps, slipped, grabbed the handrail with his left arm and jerked his upper back, reported that day. He was sent to the health clinic....<sup>9</sup>

**There is no reference in Dr. Bailey's records to claimant turning his head or hearing a radio transmission and then slipping on the stairs.**

- 19. On September 18, 2012, the Division of Workers' Compensation received claimant's *Claim for Compensation* form. The form was signed by claimant and his attorney, Joshua Perkins. Paragraph 8 instructs claimant to describe what the employee was doing and how the injury occurred. The answer reads as follows:

Employee, during the course and scope of his employment, sustained an injury by accident when he slipped on a step and twisted his body causing injury to his neck, whereby the accident was the prevailing factor in causing both the resulting medical condition and the disability. Employee is entitled to and makes demand for medical treatment as injury to his neck, whereby the accident was the prevailing factor in causing both the resulting medical condition and the disability. Employee is entitled to and makes demand for temporary total disability and/or temporary partial disability benefits, pursuant . . . to Sections 287.160 and 287.170 RSMo. Supp. 1980.<sup>10</sup>

**Thus, the *Claim for Compensation* prepared by counsel does not mention claimant turning his head or hearing a radio transmission.**

- 20. The same *Claim for Compensation* form indicates claimant injured his neck and body as a whole in the accident.<sup>11</sup>

- 21. On October 18, 2012, claimant's deposition was taken.<sup>12</sup> During the deposition, claimant contended he fell because he turned his head to the left when a radio dispatch came in. **Prior to the deposition, all documentation – the employer's Incident Event**

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<sup>7</sup> Exh. 2.  
<sup>8</sup> *Id.*  
<sup>9</sup> Exh. C.  
<sup>10</sup> Exh. 3.  
<sup>11</sup> *Id.*  
<sup>12</sup> Exh. 4

**Report, the Report of Injury, and the Claim for Compensation, and all available medical evidence referred to claimant merely missing the step as he went up the stairs.** None of those records mention claimant turning his head or hearing a radio transmission as he climbed the stairs.

22. On more than one occasion during the hearing, claimant stated something to the effect of "if you fall at work, they are supposed to pay."

*Jackie Morris*

23. Jackie Morris, County Clerk for Sullivan County, testified that claimant never told her that there was a dispatch that caused him to be distracted and caused his call, nor did claimant ever tell her that he had turned his head to the left, causing him to fall.

### CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.<sup>13</sup> Proof is made only by competent and substantial evidence, and may not rest on speculation.<sup>14</sup> Medical causation not within lay understanding or experience requires expert medical evidence.<sup>15</sup> When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.<sup>16</sup> Where the condition presents itself as a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, proof of causation is not within the realm of lay understanding.<sup>17</sup>

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.<sup>18</sup> Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.<sup>19</sup>

Section 287.020.3 defines an "injury" to be one that "has arisen out of and in the course of employment." In addition, the "injury must be incidental to and not independent of the relation of the employer and employee. Ordinarily, gradual deterioration or progressive

<sup>13</sup> *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

<sup>14</sup> *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

<sup>15</sup> *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

<sup>16</sup> *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

<sup>17</sup> *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

<sup>18</sup> *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

<sup>19</sup> *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

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degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment."<sup>20</sup>

I find claimant was not a credible witness; as such, his testimony is afforded little weight and I find that he has failed to meet his burden of proof. The credible initial and contemporaneous evidence demonstrates claimant was walking up the flight of stairs when he "just missed a step" and fell. On August 14, 2012, the day after the fall, claimant reported in the Incident Event Form that he was coming up the stairs from the basement and "missed a step and started to fall."<sup>21</sup> Jackie Morris testified credibly that claimant never told her that he slipped on the stairs because he was listening to a radio transmission and turned his head. Likewise, the Report of Injury form, dated August 24, 2012, that Ms. Morris prepared and claimant signed did not mention a radio transmission or claimant turning his head.<sup>22</sup> The initial medical records from August 2012 do not mention a radio transmission or claimant turning his head. The *Claim for Compensation*, signed on or about September 18, 2012, by claimant and his attorney does not mention a radio transmission or claimant turning his head slightly, causing the fall. In fact, the *Claim for Compensation* details how claimant sustained the accident "when he slipped on a step and twisted his body causing injury to his neck, whereby the accident was the prevailing factor in causing both the resulting medical condition and the disability."<sup>23</sup> If claimant's counsel had been told that claimant turned his head to hear the radio transmission, which thereby caused claimant to miss a step and fall, it is likely that claimant would have included that information on the form. Claimant first mentions the alleged radio transmission and turning his head on October 18, 2012; I find claimant's testimony on this matter to be self-serving and not credible. I also find claimant's allegation that he started the journal on or about August 24, 2012 to be not credible.

In addition, claimant has contradicted himself not only on the description of the cause of the fall, but on the recollection of the dispatch. At trial, four months after the fall, he is now able to recall that the dispatch was a female voice. However, at his deposition, two months after the fall, he could not recall anything about the dispatch. It isn't until after he reviewed the actual calls that came in during the window of his fall that he is able to recall specifics of the dispatch. This circular, after-the-fact recollection is suspect based on all the facts of the case and based on claimant's demeanor at trial. I find that claimant's contradictory statements and testimony is not persuasive on this matter. Thus, I find that claimant was walking up the stairs at work when he simply fell. When asked whether he "caught his toe on something. . ." while walking up the step, he relied "I don't recall. I think I just missed the step."<sup>24</sup> And I find that is exactly what happened: claimant was walking up the stairs, he missed a step, and he fell. I find that claimant was not distracted by a radio transmission and that, consequently, claimant did not fall because he was distracted by a radio transmission.

The burden is on the claimant to prove the injury to the employee arose out of and in the course of employment.<sup>25</sup> Section 287.020.3(2), Revised Statutes of Missouri, provides as

<sup>20</sup> Section 287.020.3, RSMo.

<sup>21</sup> Exh. 1.

<sup>22</sup> A

<sup>23</sup> Exh. 3.

<sup>24</sup> Exh. 4, pp. 55-56.

<sup>25</sup> *McClain v. Welsh Co.*, 748 S.W.2d 720, 724 (Mo. App. 1988).

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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." Part (b) is commonly referred to as "the equal exposure doctrine."

Claimant's injury is compensable in workers' compensation only if it arose out of and in the course of his employment pursuant to section 287.020.3(2). The express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether claimant's injury shall be deemed to have arisen out of and in the course of his employment.<sup>26</sup> The legislature has also provided that the provisions of section 287.020.3(2) are to be construed strictly.<sup>27</sup>

In claimant's case, there is no issue regarding whether his fall at the Sullivan County Courthouse was the prevailing factor in causing the injury for which he seeks workers' compensation; it was the prevailing factor in causing his injury. The issue in this case is confined to the application of subsection 287.020.3(2)(b), which instructs that claimant's injury "shall be deemed to arise out of and in the course of his employment *only if ... it [did] not come from a hazard or risk unrelated to [his] employment to which [he] would have been equally exposed outside of and unrelated to [his] employment in [his] normal nonemployment life.*"<sup>28</sup> [Emphasis added.] Section 287.020.10 expressly abrogated cases that permitted recovery of workers' compensation benefits for injuries caused by risks to which the employee would have been exposed equally outside of work.<sup>29</sup>

The question in this case is whether the risk source of claimant's injury — walking up stairs — was a risk to which he was exposed equally in his "normal nonemployment life." The court in *Miller v. Missouri Highway & Transportation Commission* instructs that it is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is **only compensable** if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in "normal nonemployment life."

In the case of *Johme v. St. John's Mercy Healthcare*, the Missouri Supreme Court stated the following: "the assessment of *Johme's* case necessitated consideration of whether her risk from injury from **turning, twisting her ankle, or falling off her shoe** was a risk to which she would have been equally exposed in her "normal non-employment life." In her case, no evidence showed that she was not equally exposed to the cause of her injury — **turning, twisting**

<sup>26</sup> See § 287.020.10 (expressly noting the legislature's intent to abrogate prior case law definitions applicable to workers' compensation, including case law interpretations for the definitions of "arising out of" and "in the course of the employment").

<sup>27</sup> Section 287.800., which provides that the "courts shall construe the provisions of [chapter 287] strictly")

<sup>28</sup> Section 287.020.3(2)(b); see also *Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671, 673 (Mo. banc 2009) ("Section 287.020.3(2)(b) states that an injury shall be deemed to arise out of employment only if '[i]t 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 non-employment life.'")

<sup>29</sup> *Miller* at 674, n. 2., and *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (2012).

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**her ankle, or falling off her shoe** – while in her workplace making coffee than she would have been when she was outside of her workplace in her “normal non-employment life.”<sup>30</sup> [Emphasis added.]

In this stair case, the risk that the claimant was exposed to was climbing steps.<sup>31</sup> That being said, if we take the risk of climbing steps and replace those terms from the *Johme* case, turning, twisting her ankle, or falling off her shoe, the end result is the same as *Johme*. Essentially it would read as follows: “the assessment of claimant’s case necessitated consideration of whether his risk of injury from climbing steps was a risk to which he would have been equally exposed in her normal, non-employment life. In his case, no evidence shows that he was not equally exposed to the cause of his injury – climbing steps - while in his workplace. When you replace the risk of injury in claimant’s case with the risk of injury in Ms. Johme’s case, the conclusion is that this is a risk that he was equally exposed to outside of his “normal, non-employment life.” The burden is on the claimant to prove the injury to the employee arose out of and in the course of employment.<sup>32</sup> I find that claimant has failed to meet this burden of proof.

In *Pope v. Gateway to the West Harley Davidson*, SC93021 (Mo. filed December 13, 2012), a case pending before The Supreme Court of Missouri, Mr. Pope worked as an entry-level technician for Gateway to the West Harley Davidson. On March 17, 2010 Pope descended a small staircase wearing his work boots and carrying a motorcycle helmet when he fell fracturing his ankle. The Labor and Industrial Commission awarded the claimant benefits, concluding that the activity in question (walking down steps while wearing boots and carrying a helmet) created a clear connection between the hazard and the injury. The Eastern District of Missouri Court of Appeals agreed and affirmed the Commission’s decision. The Court explained that one must look at the risk source of the injury (walking down steps wearing boots and carrying a helmet) and determine if this is a risk the claimant is equally exposed in his non-employment life. The Court found that there was a casual connection to the employment and that the claimant was not equally exposed to the hazard in his non-employment life. The Court distinguished this case from *Miller and Johme*, explaining that Pope was injured at work because he was performing work activities.<sup>33</sup>

In the current case, claimant has failed to satisfy his burden that the risk factor alleged is something he was not equally exposed to in his normal life. I have found that claimant simply missed a step and slipped while walking up the steps. The risk factor of walking up stairs is something he would be equally exposed to outside of his employment. Claimant did not provide evidence that he was not equally exposed to falling while walking up stairs outside of work. Thus, he has also failed to meet his burden under the analysis found in *Pope*.

<sup>30</sup> 366 S.W.3d 504 (2012).

<sup>31</sup> If, while walking up the stair, claimant had turned his head to hear a radio transmission, this very well may have lead to a different result as to compensability. However, I have found that claimant did not turn his head to hear a radio transmission and this did not distract him and cause him to fall.

<sup>32</sup> *McClain v. Welsh Co.*, 748 S.W.2d 720, 724 (Mo. App. 1988).

<sup>33</sup> Transfer has been requested to the Missouri Supreme Court.

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Gregory Frazier

Injury No. 12-064760

I find that claimant did not sustain a compensable injury within the course and scope of his employment. As such, claimant's Claim for Compensation fails and no benefits are awarded against the employer/insurer or the Second Injury Fund. I also find that as claimant did not meet his burden of proof that he sustained a compensable injury, this Award shall be issued as a Final Award.

Any pending objections not expressly ruled on in this award are overruled.

I certify that on 3/25/13, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By MP

Made by: Vicky Ruth  
Vicky Ruth  
Administrative Law Judge  
Division of Workers' Compensation

