

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

Injury No.: 10-107564

Employee: Ann Hemenway
Employer: North American Montessori Childcare
d/b/a Casa Dia Montessori
Insurer: Missouri Employers Mutual Insurance Co.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the briefs, heard oral argument, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 ALJ dated December 12, 2011, as supplemented herein.

Preliminaries

On December 16, 2010, employee slipped and fell on an icy curb in employer's parking lot. Employee sustained injuries to her left elbow, right hand and wrist, and both knees. A hardship hearing was held on September 11, 2011.

The ALJ issued a final award denying employee's claim. The ALJ found that employee sustained an accident, but concluded that it did not arise out of and in the course of her employment. The ALJ further dismissed employee's argument for compensability under the "personal comfort" doctrine by citing *Johme v. St. John's Mercy Healthcare*, 2011 Mo. App. LEXIS 1412 (Mo. App. Oct. 25, 2011).

Employee appealed to the Commission, alleging the ALJ erred in suggesting that the personal comfort doctrine has been abrogated and incorrectly concluded that her accident did not arise out of and in the course of her employment.

Discussion

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Section 287.120 RSMo "requires employers to furnish compensation according to the provisions of the Worker's (sic) Compensation Law for personal injuries of employees caused by accidents arising out of and in the course of the employee's employment." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

¹ Statutory references are to the Revised Statutes of Missouri 2010 unless otherwise indicated.

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Section 287.020.3 RSMo provides, as follows:

(1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The primary issue in this case concerns whether employee's injury arose "in the course of" her employment. Injuries are deemed to have arisen 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." *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299, 305 (Mo. App. 2009), citing *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 610 (Mo. App. 2005). In this case, employee's accident occurred on the edge of employer's parking lot while she was "off the clock" and returning from her smoke break. For reasons further discussed below, we affirm the ALJ's award and find that employee's injuries did not arise in the course of her employment.

The facts of this case are similar to, but distinguishable from, the facts in *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012). In *Duever*, the claimant was the owner of a landscaping and snow and ice removal company. The claimant slipped and fell on a patch of black ice after a meeting on a parking lot, during which he demonstrated to employees the proper way to wire a trailer's tail-lights. *Id.* at 865. The claimant injured his left arm and shoulder when he fell. The fall occurred in a parking lot which employer had access to under the terms of a lease. *Id.*

The court found that the claimant in *Duever* sustained a compensable accident because he was in an unsafe location (an icy parking lot) as a direct function of his employment as the owner of a landscaping and ice removal company. The court held that the claimant "sustained an injury due to an unsafe condition (the ice itself) over which he had no control given that the owner of the parking lot had hired another company to remove ice on the lot." *Id.* Based upon the aforementioned, the court concluded that the claimant's injuries arose out of and in the course of his employment.

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In this case, similar to the claimant in *Duever*, employee sustained injuries due to a slip and fall on ice in a parking lot. However, a very important distinguishing fact in this case is that employee was not in the icy parking lot as a direct function of her employment as a lead teacher. Employee was in the icy parking lot as a direct function of taking an unpaid smoke break. Unlike the claimant in *Duever*, employee was not clocked in, nor was she fulfilling any of her duties of employment at the time of her accident. Employee's accident may have occurred on employer's property, but employee was not in the course of her employment at the time of the accident; therefore, her claim is denied.

Employee spends a great deal of time in her brief arguing that the ALJ erred in failing to find her claim compensable under the "personal comfort" doctrine. Specifically, employee argues that the ALJ improperly relied on *Johme v. St. John's Mercy Healthcare*, 2011 Mo. App. LEXIS 1412 (Mo. App. Oct. 25, 2011) in rejecting her personal comfort doctrine argument because at the time of the ALJ's award, that case was on transfer from the Missouri Court of Appeals for the Eastern District to the Missouri Supreme Court and was not final. Employee argues that the Missouri Supreme Court has since ruled on *Johme*² and held that the case did not deal with the personal comfort doctrine and, therefore, offered no precedential value with respect to whether the personal comfort doctrine survived the 2005 amendments to Missouri Workers' Compensation Law.

To the extent that employee's argument suggests that *Johme* offers no precedential value on the issue of the applicability of the personal comfort doctrine in post-2005 amendment cases, we agree. The courts have not yet affirmatively stated whether numerous case law doctrines created prior to the 2005 amendments, including the personal comfort doctrine, survive strict construction. We stand by our analysis as stated in *Sandy Johme*, Injury No. 08-069091 (LIRC, February 22, 2011) that the personal comfort doctrine is consistent with § 287.020.3(2) RSMo.

But, we still do not find employee's accident compensable. The court in *Kunce v. Junge Baking Co.*, 432 S.W.2d 602 (Mo. App. 1968) denied a factually similar pre-2005 amendment claim. In *Kunce*, the employee sustained injuries when he tripped and fell on the employer's premises while returning from a paid break. The employer allowed its workers to take off-premises breaks with no restrictions as to where they could go or what they could do, and the employees remained "on the clock" during these breaks. The claimant left the premises on foot to buy cigarettes and Christmas tinsel, as was permitted by the employer's break policy. His injury occurred when he returned to employer's premises and stepped on a "hoop," causing him to fall.

In *Kunce*, the court recognized the law provided that an injury arises "out of" the employment when there is a causal connection between the conditions of the work and the resulting injury, and arises "in the course of" the employment when the accident occurs within a period of the employment at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of the employment, or engaged in doing something "incidental thereto." *Id.* at 609, citing *Lampkin v. Harzfield's*, 407 S.W.2d 984 (Mo. App. 1967). In interpreting what was considered "incidental" to employment, the

² *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. App. 2012).

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court affirmed that risks and acts are considered an incident of the employment if they “constitute an inherent and component element of it.” *Kunce*, 432 S.W.2d at 609. The court explained this rationale provided the basis for various doctrines of compensability, including the personal comfort doctrine. *Id.* The court described what acts fall under the personal comfort doctrine:

The inevitable acts of human beings in ministering to their personal comfort while at work, such as seeking warmth and shelter, heeding a call of nature, satisfying thirst and hunger, washing, resting or sleeping, and preparing to begin or quit work, are held to be incidental to the employment under the personal comfort doctrine.

Id. (citations omitted).

The court also recognized that there are certain “incidents” or “fixtures” of employment that are not considered incidental to the work the employee is hired to perform and expose workers to hazards that are not necessarily associated with the work. The court cited obvious incidents or gratuities such as paid vacation and sick leave. *Id.* at 609-10.

In determining that the claimant’s injury did not arise out of or in the course of employment, the court held that when the claimant exercised the right to take an off-premises break with no restrictions, he was “partaking of a gratuity suffered and allowed by his employer,” and the departure from the bakery “constituted a definite and real lacuna in the employment and the employer’s right to control and direct.” *Id.* at 610. The court noted it was wholly the claimant’s decision to undertake the venture of taking a break to obtain cigarettes and Christmas tinsel. He was not engaged in any special employment tasks when he left the building (or returned), and the services for which he was hired did not require his presence at the place where he fell. The court concluded that the claimant was not in the course of employment when the accident occurred and the activity was not sufficient to invoke the personal comfort doctrine.

In this case, similar to *Kunce*, employer allowed its workers to take off-premises breaks with no restrictions as to where they could go or what they could do. Smoking was strictly prohibited on the employer’s premises, but employer did not restrict this activity off-premises. Employee’s injuries occurred while she was “partaking of a gratuity suffered and allowed by [her] employer.” Employee was not engaged in any special employment task, performing any service for the employer, and her employment did not require her presence at the place where this fall occurred. Employee even admitted that she would not have been on this portion of the employer’s property except for the circumstances of her leaving the premises to smoke.

Based upon the aforementioned, even assuming the personal comfort doctrine applies to post-2005 amendment cases, we do not find employee’s claim compensable. Employee’s injuries did not arise in the course of her employment because the accident did not occur at a place where employee was reasonably fulfilling the duties of her employment, or engaged in doing something incidental thereto.

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Award

We affirm the award of the ALJ, as supplemented herein.

The award and decision of Administrative Law Judge Suzette Carlisle, issued December 12, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 5th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Ann Hemenway

Injury No.: 10-107564

Dependents: N/A

Employer: No. American Montessori Childcare¹

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

Additional Party: Second Injury Fund (Denied)

Insurer: Missouri Employers Mutual Ins. Co.

Hearing Date: September 27, 2011

Checked by: SC

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: December 16, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:
While on a smoke break, Claimant injured her right wrist when she slipped and fell on ice.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right wrist
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

¹ D/B/A Casa Dia Montessori.

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A²
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: Denied

TOTAL:

NONE

23. Future requirements awarded: N/A

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

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: James Kleinschmidt

² At the hearing, the parties did not stipulate to a wage rate.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Ann Hemenway	Injury No.: 10-107564
Dependents:	N/A	Before the
Employer:	No. American Montessori Childcare	Division of Workers'
		Compensation
Additional Party:	Second Injury Fund (Denied)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Missouri Employers Mutual Ins. Co.	

PRELIMINARIES

On September 27, 2011, Ann Hemenway (Claimant) appeared before the undersigned administrative law judge for a final award at the Division of Workers' Compensation (DWC). Attorney James Kleinschmidt represented the Claimant. Attorney Patrick McHugh represented Casa Dia Montessori (Employer) and Missouri Employers Mutual Insurance Company (Insurer).³ Claimant seeks medical treatment from Employer. Venue is proper and jurisdiction properly lies with the DWC. The record closed after presentation of the evidence. The Second Injury Fund (SIF) did not participate in the proceeding.

The parties stipulated that on or about December 16, 2010:

1. Claimant was employed by the Employer;
2. The Employer and Claimant operated under the Missouri Workers' Compensation Law;⁴
3. Venue is proper in St. Louis County, located in Missouri;
4. Employer's liability was fully insured;
5. The Employer had notice of the injury;
6. A Claim for Compensation was timely filed;
7. If the case is found to be compensable, the Employer agrees to send Claimant for an evaluation of her right wrist; and
8. If the claim is not compensable the parties request a final award

ISSUES

The parties identified the following issues for disposition:

1. Did Claimant sustain an accident?
2. If so, did the accident, arise out of and in the course of employment?
3. Is Claimant's attorney entitled to attorney's fees totaling \$1,810.00 incurred during preparation for the hardship hearing?

³ Any reference in this award to the Employer also includes the Insurer.

⁴ All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

EXHIBITS

Claimant's Exhibits A through E and Employer's Exhibit I and 3 were received into evidence without objection. Exhibit 2 was withdrawn and not admitted. Any objections contained in the exhibits but not expressly ruled on are now overruled. To the extent that marks and highlights are contained in the exhibits those were made prior to becoming part of this record and were not placed there by the undersigned administrative law judge.

FINDINGS OF FACT

All evidence was reviewed but only evidence which supports this award will be summarized below.

1. Claimant worked for Employer from April 2007 to December 2010, as an assistant teacher and later as a lead teacher.
2. As a lead teacher, Claimant prepared lesson plans, art work, children's activities, and communicated with parents. Claimant was responsible for children between the ages of 10 and 14 months old. The teacher student ratio was one teacher to four students. She supervised up to eight children at one time and one assistant.
3. Employees were required to clock out twice before a smoke break. Employees clocked out on line in their classroom, and then signed out in the office. Also, smokers were required to leave the property to smoke because Missouri law prohibits smoking on school property, including the building, parking lot and any cars parked on it. The "clock out" policy became effective two years ago to prevent extended break times. Approximately 15 employees smoked.
4. Employees were permitted to take smoke breaks at any time, provided the student-teacher ratio was met. Claimant averaged two smoke breaks per day, which lasted five to ten minutes each. Smoke breaks allowed Claimant to relieve stress.
5. The Employer did not instruct employees where to smoke, but management was aware employees smoked on the Goodwill parking lot next door. Ms. Angela Haffer, the school's director, provided a purple Easter basket on the Goodwill lot for employees to place cigarette butts.
6. On December 16, 2010, Claimant started work at 7:30 a.m. and took a mid-morning smoke break. She clocked out on the touch screen in the classroom, signed out in the office, and preceded across the parking lot to the Goodwill property next door.
7. Claimant finished her cigarette, and placed the butt in the butt can. Claimant stepped onto the curb and fell on her knees, left elbow, and right hand. Claimant was not performing work activities at the time she was injured. Claimant bruised her left elbow, had right arm pain, and her knees were black and blue. At the office, Claimant reported the accident, repeated the sign-in process and returned to her classroom.

8. Ms. Haffer instructed Claimant to leave early. The next day, Claimant returned to work, and notified Ms. Haffer she was going to the doctor. She did not request treatment and Ms. Haffer did not refer Claimant to a physician. Claimant had no knowledge of the Employer's responsibilities for work injuries.
9. Claimant treated with Dr. Roethemeyer, her primary care physician, who prescribed x-rays and referred Claimant to Dr. Hauelsen. However, Claimant did not see Dr. Hauelsen because she had no medical insurance. Claimant would like Employer to pay for medical treatment.
10. Prior to the fall, Claimant notified the Employer that she accepted different employment. Claimant did not resign because of the fall.
11. Several months after the accident, Claimant began to have right arm tremors and a tingling sensation up her right shoulder. She has not sought treatment because she cannot afford it.
12. Exhibit I depicts the area where employees were authorized to smoked on the Goodwill parking lot. An "X" marked the location of the butt can; however, it was not present in the photograph. Also Exhibit 1 does not reflect the snow and ice which were present when the accident occurred. Another "X" marked the location of the accident which occurred on the Employer's property.
13. Ms. Haffer told Claimant that she would be reimbursed by Rick, the school's owner. However Claimant received no reimbursement. Claimant received an insurance card but did not use it.
14. **Ken Buchholz** testified on behalf of the Employer. Mr. Buchholz has been the Assistant Director of the daycare since July 9, 2001. He reports to Ms. Angela Haffer. Mr. Buchholz opens the school each morning, collects payments from parents, and reviews employee sign in/out sheets and computer time sheets for payroll.
15. The Employer used a dual recording system to record time worked. Employees also recorded time on the time clock. The time clock was in Mr. Buchholz's office. Employees signed in beneath the clock when they arrived for work, took breaks, and signed out at the end of the day.
16. Mr. Buchholz sat near the front of the building where everyone passed by his office. His office contained two viewing windows that permitted him to see everyone that entered the building. He can also see people as they approach the building.
17. In December 2010, St. Louis County ordinances prohibited smoking in childcare buildings or any part of the property, which included the parking lot and the playground. The center complied with the county ordinance. However, the Employer did not tell employees where to smoke. Employees were not paid for smoke breaks. The policy manual requires employees to clock out any time they leave the building.

18. In December 2010, 45 people worked at the center, but Claimant was the only person who took two to three smoke breaks per day. Two other employees occasionally clocked out to smoke. Goodwill Industries is located next door to Employer. Goodwill complained because employees smoked in their parking and dropped cigarette butts on the ground. To be a good neighbor, Ms. Haffer placed a bucket on Goodwill's property for employee's to deposit cigarette butts.
19. Three months before the accident, Claimant informed the Employer that she did not plan to work past December 2010. Claimant's last day at work was December 23, 2010.
20. Claimant informed Mr. Buchholz that she had; "[D]one something stupid, (Claimant said she) slipped on the ice outside. And that's all she said and she was kind of laughing when she said it and she went back to her room." Therefore, Mr. Buchholz did not think Claimant was seriously hurt.
21. Employees were permitted to "de-stress" if needed in the Director's office or their lounge. Employees were not required to clock out in order to distress.
22. Exhibit 3 is a print out of Claimant's time worked from August of 2010 through December 23, 2010 using the updated fingerprint scan. The record accurately reflects the hours Claimant worked.
23. Claimant treated with Dr. Janelle A. Rotthemeyer's office on two occasions. On January 3, 2011, Dr. Roethemeyer referred Claimant to Dr. Hausen for right wrist evaluation.

ADDITIONAL FINDINGS of FACT and RULINGS OF LAW

Claimant did not sustain a compensable accident

At the hearing, the parties identified accident as an issue. Claimant asserts she sustained a work related accident that arose out of and in the course of employment. Employer contends the incident did not arise out of and in the course of employment.

Claimant has the burden to establish that she sustained an injury by accident arising out of and in the course of her employment, and the accident resulted in the alleged injuries. ***Choate v. Lily Tulip, Inc.***, 809 S. W. 2d 102, 105 (Mo. App. 1991) (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, .121 S.W.3d 220, 223 (Mo banc 2003)).⁵ Section 287.808 requires proof the facts are "more likely true than not true."

Section 287.020.2 RSMo (2005) defines accident as "...an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event *during a single work shift*. (Emphasis added) An injury is not compensable because work was a triggering or precipitating factor."

⁵ Several cases herein were overruled by the ***Hampton*** case on grounds other than those for which the cases are cited. No further reference will be made to ***Hampton***.

Section 287.020.10 states that when applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. 2002); *Kaslv. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

I find Claimant to be generally credible. I further find the accident was not caused by a specific event during Claimant's work shift. At the time of the accident, Claimant had clocked out twice and was on a smoke break. She was not engaged in any work related activity. Claimant's duties as a lead teacher did not cause her fall or her injuries. Also, the accident was not caused by a condition of Claimant's employment. Claimant testified her job duties included preparing lesson plans and class schedules, communicating with parents, and facilitating art work and activities for children. The Employer prohibited smoking on the premises, and it was not related to any teaching activities Claimant performed during her work shift.

Claimant's accident did not arise out of and in the course of her employment

I find Claimant sustained an accident but it did not arise out of and in the course of her employment for the following reasons. Section 287.020.3(2) states: 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.

An injury 'arises out' of employment if it is a natural and reasonable incident of employment; the injury occurs 'in the course of employment' if the accident occurs within the period of employment at a place where the employee may reasonably be fulfilling the duties of employment." *Davison v. Florsheim Shoe Company*, 750 S.W.2d 481, 483 (Mo.App. 1988). The tests are separate and both must be met before an employee is entitled to compensation. *Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502, (Mo. banc 1996). "In the course of employment" refers to the time, place and circumstances under which the injury occurs. *Auto Club Inter-Insurance Exch. v. Bevel*, 663 S.W.2d 242, 245 (Mo. 1984).

I find the accident did not arise out of Claimant's employment because a smoke break was not an integral part of Claimant's job to supervise and care for children. Claimant's work did not require activity on Employer's parking lot or the Good will property. Claimant was free to go where she chose during her break. Employer had no control over her activities, and Claimant did not perform work duties. In fact, State law required Claimant to leave the premises to smoke. Although the accident occurred at work, Claimant was not 'in the course of her employment' because she was not fulfilling her teaching responsibilities at the time of the accident.

Furthermore, Claimant could have fallen on an ice-covered parking lot anywhere, so the injury comes from a hazard or risk unrelated to her employment. Based upon Claimant's testimony, and relevant legal authority, I find the accident occurred on the Employer's premises, but Claimant did not prove she sustained a compensable work accident as defined by Section 287.020.2.

Extended premises and personal comfort doctrines

I find the extended premises doctrine does not apply because Claimant did not sustain an injury that arose out of and in the course of employment as required by Section 287.020.3(1). Moreover, Claimant's reliance on the personal comfort doctrine is misplaced based on *Johme v. St. John's Mercy Healthcare*, ___ S.W.3d ___, 2011 WL 5056300, (Mo.App. 2011).

Based on Claimant's testimony and relevant statutory and case law, I find Claimant did not meet her burden to prove she sustained an accident that arose out of and in the course of employment. All other issues are moot.

CONCLUSION

The Claimant did not sustain an accident that arose out of and in the course of employment. The Second Injury Fund case is denied.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation