

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

Injury No. 10-066736

Employee: Bonnie Jensen-Price
Employer: Encompass Medical Group
Insurer: Farmington Casualty Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This 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, read the parties' briefs, and considered the whole record, we find that the award of the administrative law judge denying 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

Accident

The administrative law judge determined that employee failed to satisfy her burden of proving she suffered an accident, but did not provide any analysis specific to the relevant statutory definition set forth under § 287.020.2 RSMo:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

Employee unquestionably suffered an unexpected traumatic event when the maintenance worker's cart collided with her leg and caused her to fall; we so conclude. We also conclude that this event is identifiable by time and place of occurrence, and that it produced at the time objective symptoms of an injury caused by this specific event. We turn now to the question whether the event occurred during a "single work shift."

It is uncontested that employee was a salaried worker and did not "clock in" or "clock out, and in any event, an employee does not have to be "on the clock" to sustain an accident in Missouri. See *Henry v. Precision Apparatus, Inc.*, 309 S.W.3d 341, 342 (Mo. App. 2010), and *Leible v. TG Mo. Corp.*, Injury No. 06-094098 (LIRC, March 5, 2010), affirmed without opinion by *Leible v. TG Mo. Corp.*, 331 S.W.3d 732 (Mo. App. 2011). Accordingly, we are not persuaded that employee's "work shift" was necessarily ended the moment she stepped outside of employer's suite. Rather, because employee was carrying her laptop with her for the purpose of performing some work for employer at her home, employee was essentially engaged in the process of going from one worksite to another, and was thereby performing a work activity for employer at the time the maintenance worker's cart collided with her leg.

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Because employee was carrying work materials and was going from one worksite to another, and was thereby engaged in a work activity, we conclude that employee was still engaged in her “work shift” for employer when the maintenance worker’s cart collided with her leg.

All of the above statutory criteria are satisfied in this case. We conclude that employee sustained an “accident” as defined under § 287.020.2.

*Injury arising out of and in the course of the employment*¹

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 medical experts agree that the accident was the prevailing factor causing employee to suffer the injuries at issue. As a result, subsection (a) above is satisfied. We turn now to subsection (b).

The parties and the administrative law judge assumed that the compensability of this case turns on whether employee has satisfied the extension of premises doctrine. We disagree. The extension of premises doctrine was always an exception to the going/coming rule, and not applicable to cases where (as here) the worker is engaged in a work activity when injured. See, e.g., *Huffmaster v. Am. Rec. Prods.*, 180 S.W.3d 525 (Mo. App. 2006); *Roberts v. Parker-Banks Chevrolet*, 58 S.W.3d 66, 69 (Mo. App. 2001); and *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158 (U.S. 1928).

We acknowledge that prior cases involving injuries resulting from risks not created by the employer, such as robberies, e.g. *Jordan v. Farmers State Bank*, 791 S.W.2d 1 (Mo. App. 1990), flooding, e.g. *Lunn v. Columbian Steel Tank Co.*, 364 Mo. 1241 (Mo. 1955), or shooting, e.g. *Scullin Steel Co. v. Whiteside*, 682 S.W.2d 1 (Mo. App. 1984), were abrogated by the legislature in 2005 by way of § 287.020.10 RSMo. However, we view the simultaneous deletion in 2005 of the premises requirement under § 287.020.5 RSMo, along with the adoption of the unequal exposure definition of “arising out of and in the course of employment,” as a legislative endorsement of the reasoning and analysis in those cases:

¹ We acknowledge that the parties framed the issue as “whether the employee’s accident and injury occurred on premises owned or controlled by the employer.” *Transcript*, page 7. Because there is currently no requirement under Chapter 287 that an employee’s accident and/or injury occur on premises owned or controlled by the employer, the parties’ arguments on the topic are better addressed under the more general issue whether the employee’s injury arose out of and in the course of employment.

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namely, that if the circumstances of the employment involve an increased risk or hazard of the injury, the fact the injury occurs off-premises, or while engaged in an activity that is not a normal work duty, does not necessarily defeat the claim.

The recent case of *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. 2014) makes this clear. In *Dorris*, as here, the employee was not injured on employer's premises, but was injured while travelling from one workplace to another. *Id.* at 587-88. Rather than apply the extension of premises doctrine, the *Dorris* court determined compensability by applying the unequal exposure test under § 287.020.3(2)(b). *Id.* at 590-91. Applying *Dorris*, it would appear now to be well-settled in Missouri that accidents caused by defects or hazards encountered at the workplace—or during travel away from the workplace necessitated by work duties—are plainly compensable.

Here, though, there is no evidence that employee's accident was the product of a defect in the premises she encountered as a result of travel necessitated by her work duties. Accordingly, the question is whether, given the totality of the circumstances, employee has established that her employment exposed her to a greater risk of injury than faced in normal nonemployment life. We note that the unequal exposure test may be satisfied where the workplace exposure to the risk is only minimally increased. See *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315 (Mo. App. 2012)(holding that an employee's action of carrying a motorcycle helmet while descending stairs supported a finding that the employee was unequally exposed at work to the hazard or risk of sustaining injuries in a fall down the stairs).

Certain facts surrounding employee's accident might support at least an *inference* of greater risk: the darkened elevator, the fact that employee was leaving work after hours (suggesting she might have been more likely to encounter a maintenance worker with a cleaning cart), or the fact that she was carrying work in a rolling briefcase, which may have affected her balance and her ability to keep herself from falling or from mitigating the consequences of her fall.

After careful consideration, however, we deem the record simply too vague to support affirmative findings as to any of these possible indicators of increased risk. This is because employee did not testify that pulling the rolling briefcase affected her balance, or that it was unusual for the elevator to be dark, or that she did not typically encounter maintenance workers (or their carts) during normal business hours. It was employee's burden to establish an increased risk, and we are concerned that if we were to infer an increased risk from the circumstances of which employee *did* testify, we would stray into the realm of advocacy.

In sum, we find the record insufficiently developed to support a finding that employee's injuries did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. For this reason, we conclude that employee's injuries did not arise out of and in the course of employment.

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All other issues are moot, and the claim is denied.

Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued February 19, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 24th day of February 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Bonnie Jensen-Price

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 agree with the Commission majority's conclusion that employee suffered an accident. However, I disagree with the majority's choice to deny the claim, because I am convinced that employee satisfied her burden of proof with respect to § 287.020.3(2).

There is no premises requirement under § 287.020.3(2) RSMo

As noted by the Commission majority, the parties and the administrative law judge appear to have assumed that § 287.020.3(2) includes an additional, unstated requirement, namely, that an employee's injuries must occur on premises owned or controlled by the employer. This is evident in the administrative law judge's assertion, at the outset of his analysis, that this is "a going to and from work case," *Award*, page 9, and in his discussion of the legislative changes, in 2005, affecting the extension of premises doctrine. I agree with the majority that this analysis is inappropriate, for the following reasons.

First, I note that in 2005, the legislature deleted previous language in § 287.020.5 RSMo declaring that 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. The absence of any such requirement after 2005 is evident in the recent cases of *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). In both cases, the courts held that injuries that were not sustained on the employer's premises were nevertheless compensable where they satisfied the "prevailing factor" and "unequal exposure" requirements of § 287.020.3(2).

Second, I note that the legislature in 2005 abrogated all prior case law interpretations on the meaning of or definition of the terms "arising out of" and "in the course of the employment." See § 287.020.10 RSMo. As a result, I cannot rely upon pre-2005 case law to categorize this matter, at the outset, as a "going to and from work case." To the contrary, the legislature has essentially provided us with a blank slate for applying the plain language of § 287.020.3(2). In doing so, it appears that the legislature recognized the wisdom inherent in the long-standing judicial admonition in Missouri that "every case involving this phrase [arising out of and in the course of the employment] should be decided upon its own particular facts and circumstances and not by reference to some formula." *Finley v. St. Louis Smelting & Refining Co.*, 361 Mo. 142, 144 (Mo. 1950). Accordingly, we need no longer engage in the categorization of cases based on particular factual scenarios, but may tailor our analysis to the particular circumstances before us.

Third, we must strictly construe the provisions of Chapter 287 by virtue of § 287.800.1 RSMo, and "a strict construction of a statute presumes nothing that is not expressed." *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009). Consistent with this mandate, I cannot presume that the legislature intended in 2005 to preserve some requirement that an employee's injuries occur on the employer's premises where the controlling test under § 287.020.3(2) is otherwise met, where that provision contains no

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premises requirement, and where the legislature deleted the pre-2005 premises requirement under § 287.020.5.

Fourth, if there were any lingering doubt, the highest court of our state has declared that “[t]he express terms of the workers’ compensation statutes as revised in 2005 instruct that section 287.020.3(2) **must control any determination** of whether [the employee’s] injury shall be deemed to have arisen out of and in the course of her employment.” *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 509-10 (Mo. 2012)(emphasis added). Applying this unequivocal language from the Supreme Court of Missouri, I conclude that we need not consider or apply the extended premises doctrine (to the extent it remains following the 2005 amendments to § 287.020.5) to either enhance or defeat an employee’s claim where the facts otherwise satisfy the plain and unambiguous requirements under § 287.020.3(2).

Employer’s argument, as I understand it, is that by abrogating certain aspects of the extension of premises doctrine in 2005, the legislature intended that an employee’s failure to satisfy the remaining aspects of that doctrine results in a complete bar to compensation, even where the unequal exposure test under § 287.020.3(2) is otherwise satisfied. It would appear, however, that the only way to reach that result is to apply the deleted pre-2005 premises requirement in conjunction with the body of pre-2005 case law abrogated by § 287.020.10. This is because each of the cases describing and defining the parameters of the extension of premises doctrine (including those denying compensation where the doctrine was not satisfied) did so in the context of interpreting the pre-2005 meaning or definition of the phrases “arising out of” and “in the course of employment.”

Again, pursuant to the mandate of strict construction, we cannot presume any requirement that the legislature does not express. Notably, the legislature made clear in the first sentence of § 287.020.5 that injuries sustained in company-owned or subsidized vehicles are, under certain conditions, “not compensable” following the 2005 amendments. If our legislators in 2005 intended to bar compensation whenever an employee fails to satisfy the remaining aspects of the extension of premises doctrine—notwithstanding any other provision of Chapter 287 to the contrary—they easily could have used the same language in the very next sentence. But they did not.

In sum, whatever may have been the legislature’s purpose in deleting the premises requirement under § 287.020.5, yet simultaneously leaving (partially) intact a judicial doctrine developed as an *exception* to that requirement, I am not persuaded that it was to render non-compensable a claim that otherwise satisfies the criteria for compensability under § 287.020.3(2).

Employee’s injuries resulted from a hazard or risk related to the employment

Employee worked for employer for 33 years as a nurse practitioner. Employee earned a salary, and it is uncontested that she did not “clock in” or “clock out.” Employee was originally to have worked a shift of 8:30 a.m. to 5:00 p.m., but after employer implemented electronic charting, employee’s work usually kept her at employer’s premises until 7:00 p.m. Employee also routinely worked at home for about eight hours each weekend.

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Employer rented an office suite on the fourth floor of a commercial building. In order for employees to access employer's suite, it was necessary to use either the stairs or the elevator. On August 6, 2010, at about 7:00 p.m., employee was waiting in the elevator lobby area outside employer's suite. It was a Friday, and employee had her laptop computer with her with the intention of performing some work for employer over the weekend. Employee was pulling the laptop computer in a rolling briefcase with one hand, and she held her purse in the other.

When the elevator door opened, it was dark inside, and employee could not see that there was a maintenance worker on the elevator with a cart. As employee approached the open door of the elevator, the maintenance worker suddenly pushed the cart out, and collided with employee. The cart struck employee in the lower part of her left leg with sufficient force that she lost her balance, stumbled backward, and fell to the floor.

In *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the Missouri Court of Appeals, Southern District, held that:

[T]he application of [§ 287.020.3(2)(b)] involves a two-step analysis. The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

Id. at 467.

I am convinced that there is a clear nexus between employee's work for employer and her injury, because all of the circumstances of employee's fall were a product of her work for employer. Employee was dragging a rolling suitcase with her work laptop, necessary to perform her weekend charting duties as a nurse practitioner. Employee worked long hours, and thus found herself in the elevator lobby area after the close of normal business. (Unlike the majority, I would not require employee to specifically testify that it was after normal business hours when she left, because this is frankly obvious from her testimony.) Employer's offices were located in a building in which maintenance workers pushed carts to accomplish maintenance tasks. Employee fell because one of these maintenance workers pushed a cart into her leg. I would conclude that employee has satisfied § 287.020.3(2), because her injuries did not come from a risk or hazard unrelated to her employment. Under the analysis in the *Pile* decision, her claim is compensable, and there is no need to proceed to the unequal exposure requirement.

I acknowledge that in the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012), the Supreme Court of Missouri focused on the unequal exposure

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requirement (or second step of the test under § 287.020.3(2)), but I do not read the *Johme* decision to diminish the precedential value of *Pile*, for several reasons.

First, our Supreme Court could have simply overruled *Pile* in the *Johme* decision if it had wished to do so, but it did not. That our highest court declined to overrule a decision which the Missouri Court of Appeals, Eastern District, discussed at length in its decision ordering a transfer, see *Johme v. St. John's Mercy Healthcare*, ED96497 (Oct. 25, 2011), and upon which the Commission expressly relied in its award, strongly suggests that the Court saw wisdom in the *Pile* approach, and wished to leave that precedent undisturbed.

Second, the *Johme* court did not purport to shift the analysis away from the first-step *Pile* question whether a risk is related or unrelated to employment, but rather exhorted us to take better care in identifying the actual risk at issue: the Commission had considered the *Johme* employee's activity of making coffee as the risk that caused her injuries, and analyzed whether making coffee was "related" to her work, but the Court defined the relevant risk as the employee's "turning and twisting her ankle and falling off her shoe." *Id.* at 508, 511. Having appropriately defined the risk, the Court proceeded to the unequal exposure analysis, as there was no need to discuss the first-step *Pile* question whether the employee's turning and twisting her ankle was integral to her work as a billing representative: it clearly was not.

In contrast, here we have a risk source—being struck by a cart pushed by a maintenance worker coming suddenly and unexpectedly off a darkened elevator after normal business hours—that was directly related to the specific circumstances of employee's work for employer. As a result, I conclude that employee's injury did not come from "a hazard or risk *unrelated* to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." § 287.020.3(2)(b). I conclude that her injuries are compensable because they arose out of and in the course of the employment.

Unequal exposure

Assuming for the sake of argument that the unequal exposure requirement is appropriately addressed as a separate and independent requirement in this case, I remain convinced that employee satisfied her burden of proof. This is because there is no evidence on this record to demonstrate that employee was equally exposed, in her life outside of her work for employer, to the risk of colliding with the maintenance worker's cart coming suddenly out of the darkened elevator after normal business hours.

As recently made clear by the court in *Young v. Boone Elec. Coop.*, 462 S.W.3d 783, 790 Fn.9 (Mo. App. 2015):

A claimant is not required to prove both that the hazard from which her injury arose was related to her employment *and* that the hazard was one which she was not equally exposed to in her nonemployment life. Rather, the claimant has the burden of proving that her injury "was caused by [a] risk related to her employment activity *as opposed to* a risk to which she

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was equally exposed in her 'normal nonemployment life.'" *Johme*, 366 S.W.3d at 512 (emphasis added). Meaning, implicit in a finding that the claimant was exposed to the risk from which her injury arose *because* of her employment, is a finding that the claimant could have avoided the risk outside of her employment.

(emphasis in original).

Here, there is no evidence to suggest that employee had any reason to be on employer's floor, waiting outside the elevator after normal work hours, other than the fact that she was performing her duties for employer. Consequently, the evidence compels a finding that employee was more likely to encounter the maintenance worker coming suddenly out of the darkened elevator at work than anywhere else. In other words, employee unquestionably was exposed to the risk of colliding with the maintenance worker's cart *because* of her employment; it necessarily follows that employee could have avoided this risk outside of her employment. Consistent with the court's reasoning in *Young*, I find that employee's work for employer exposed her to this hazard or risk to a greater degree than that faced in normal, nonemployment life. Once again, I conclude that the claim is compensable.

The majority decision reveals a misunderstanding of applicable law and precedent

The Commission majority cites *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315 (Mo. App. 2012) for the proposition that employee only needed to prove a minimally increased risk, as if to criticize her for failing to satisfy such a low bar. The irony here is that nothing in the *Pope* decision suggests that the employee in that case specifically testified that carrying a motorcycle helmet down his employer's stairs played any role in his fall or in his ability to mitigate his injuries. Instead, the *court* concluded that, based on the totality of the circumstances, the employee's act of carrying the motorcycle helmet provided the requisite unequal exposure to the injury-causing hazard or risk. *Id.* at 321. Likewise, in *Gleason v. Treasurer of the State*, 455 S.W.3d 494 (Mo. App. 2015), the court specifically declared that it was "not necessary for [the employee] to establish **why** he fell" where the employee otherwise demonstrated that his injuries came from a risk or hazard to which he was not equally exposed in his normal, nonemployment life. *Id.* at 502 (emphasis in original).

The majority believes employee needed to specifically testify as to the various risks that led up to her workplace fall. Properly read, however, both *Pope* and *Gleason* stand for the proposition that simply identifying the circumstances surrounding a fall is enough, and that it is thereafter the role of the fact-finder to consider whether those circumstances involved an unequal exposure to the injury-causing risk or hazard. Remarkably, the majority—following *Pope*—feels comfortable identifying a number of permissible inferences that it would be inclined to draw from employee's testimony, and even goes so far as to indicate that these inferences might support an award in her favor. Yet, the majority stops short at making any factual findings based on those inferences.

Unfortunately, these discussions can become so convoluted and academic that we ultimately lose sight of *what actually happened to the employee*. Quite simply, a

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maintenance worker pushed a cart suddenly and unexpectedly off an elevator that employee was boarding as a condition of her employment, that cart hit employee, and as a result she stumbled backward and fell, suffering very serious injuries. I am convinced that she suffered these injuries *because* of her work, not merely *while* she was at work. For this reason, the administrative law judge's award should be reversed.

I would enter an award ordering employer to pay to employee her past medical expenses, future treatment, and permanent total disability benefits. Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

FINAL AWARD

Employee: Bonnie Jensen-Price Injury No. 10-066736
Dependents: N/A
Employer: Encompass Medical Group
Insurer: Farmington Casualty Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: December 19, 2014; Briefs filed February 2, 2015 Checked by: KJC/pd

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 6, 2010
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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? N/A based on findings in award
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, a nurse practitioner, had gotten off work and left her employer's premises and was in a common hallway of the building when she was struck by a cleaning cart as she was getting into an elevator to go home.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Alleged low back, head and body as a whole
14. Nature and extent of any permanent disability: None (See additional findings of fact and rulings of law.)
15. Compensation paid to date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: By agreement
19. Weekly compensation rate: \$799.11/ \$418.58 per week
20. Method wages computation: Maximum and by agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None
Unpaid medical expenses: None
Weeks for permanent partial disability: None
Weeks for temporary total (temporary partial disability): None
Weeks for permanent total disability: None
Weeks for disfigurement: None
22. Second Injury Liability: None

TOTAL: None

23. Future requirements awarded: None

The compensation awarded to the Claimant shall be subject to a lien in the amount of N/A percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mr. Mav Mirfasihi

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Bonnie Jensen-Price Injury No. 10-066736
Dependents: N/A
Employer: Encompass Medical Group
Insurer: Farmington Casualty Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: December 19, 2014; briefs filed February 2, 2015 Checked by: KJC/pd

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- 1) Accident;
- 2) Whether the employee's alleged accident occurred on premises either owned or controlled by the employer;
- 3) Whether the limitation period had expired prior to the filing of the claim as to the Second Injury Fund;
- 4) The nature and extent of the disability sustained by the employee;
- 5) Liability of the employer for past medical aid in the amount of \$77,703.13;
- 6) Liability of the employer for future medical aid; and
- 7) Liability of the Second Injury Fund for compensation.

At the hearing, Ms. Bonnie Jensen-Price (hereinafter referred to as Claimant) testified that she was born on February 26, 1948 and that she was 66 years old. She stated that she obtained her RN degree in 1970. She stated that she completed her nurse practitioner studies in 1976.

Claimant testified that she worked as a nurse practitioner from 1976 to 2010. She stated that her duties as a nurse practitioner were to evaluate, diagnose and treat patients and to recommend and order lab and test results. She stated that she worked on a computer for two or three hours per day. She stated that she was on her feet during the remainder of the day.

Claimant testified that she worked a 10 hour day, 5 days per week on her job with Encompass. She stated that she took work home every weekend.

Claimant testified that her accident occurred on Friday, August 6, 2010 at approximately 7:00 p.m. as she was leaving work for the day. She stated that she had her laptop computer with her as she left work. She stated that her injuries occurred when the elevator door opened and a housekeeping cart "bumped" her as she started to get into the elevator. She stated that she lost her balance when the cart "bumped" her and that she fell and landed on the concrete floor which

was covered by carpet. She indicated that she was taking the laptop computer home to do some work that weekend.

Claimant initially testified that the elevator was located in the suite where she worked.¹ Later, after going off the record and then reopening the record, Claimant admitted that the elevators were located in the hallway. She stated that the elevators were 5 or 6 feet from the suite where she worked.² She stated that the only way to get to the suite was to take the elevator or the stairs.

Claimant testified that she injured her back, hip and head in her fall as she was getting into the elevator. She stated that she was diagnosed with a fractured vertebrae and a disk protrusion in her back. She attributed some periods of dizziness and her alleged balance problems to the fall.

Claimant testified that she had back surgery due to her injuries in the fall at work. She stated that she developed a pulmonary embolus as a result of the back surgery. She also stated that the back surgery did not relieve her pain. She rated her pain as a 6 on a scale of 1 to 10. She stated that she still takes medication for her back pain.

Claimant complained of difficulty with sleeping due to her back pain. She complained of a need to lie down to relieve her pain. She complained of difficulty in walking, sitting and standing. She complained that she used a cane to climb stairs.

Claimant testified that her employer refused to provide treatment for her injuries. She stated that her medical bills for the treatment she had to obtain on her own amounted to \$77,703.13.

Claimant admitted that she had some "sporadic" back pain prior to August 2010. She admitted that she was on pain medication for her back prior to August 2010. She admitted that she had bilateral hip replacements prior to August 2010. She alleged, however, that none of those injuries or impairments had affected her ability to work.

In addition to her preexisting impairments, Claimant admitted that she had a myocardial infarction after August 2010. She stated that she had intended to attempt to return to work after her fall in August 2010, but her employer terminated her employment when she refused to retire.

On cross-examination by her employer, Claimant admitted that the elevators in the building where she worked were in the common areas and that they were not in the suite where she worked. She admitted that she had to walk down the common hallway to get to the suite where she worked when she exited the elevator. She admitted that the hallway was used by everyone who came to that floor in the building, whether they were going to the suite where worked or to one of the other suites on that floor.

¹ At that point we went off the record. I explained that we needed to clarify the record because I had personal knowledge as to the location of the elevators in the building and on the floor where Claimant worked. I explained that the elevators were located in the hallways and not in the suites.

² In the diagram of the 4th floor of the building contained in Employer's Exhibit 1 the elevators are located a lot further down the hallway than 5 or 6 feet from suite 400 where Claimant worked.

On cross-examination by the Second Injury Fund, Claimant testified that her bilateral hip replacements had not hindered her ability to do her job prior to August 2010. She stated that although she had some sciatica flare-ups and missed time from work prior to August 2010, she was able to manage her pain and she had no limitations on how long she could sit, stand or walk.

Later, however, Claimant admitted that she had been prescribed a handicapped parking permit prior to August 2010. She admitted that Dr. Bohn her treating orthopedic surgeon for her bilateral hip replacements had mentioned that she might have fibromyalgia prior to August 2010. She stated that she was actually diagnosed with the condition after August 2010.

Employer's Witness

Ms. Rebecca Allison testified at the hearing for Claimant's employer. She stated that she had worked for Encompass and its predecessors for 30 years. She stated that she was the Chief Operating Officer for the company. She stated that her job was to see oversee operations at the company and at the clinics. She stated that she was in charge of human resources.

Ms. Allison testified that Claimant reported the August 2010 injury to her by phone. She stated that Claimant told her that the accident occurred when she was waiting on an elevator and her heel caught on something and she turned and fell and struck her head and "bottom." She stated that if Claimant had told her that a cleaning cart struck her; that she would have written that down.

Ms. Allison testified that she completed the injury report contemporaneously with Claimant reporting the injury to her. Ms. Allison testified that there were other tenants on the floor the building where Claimant worked. She stated that all the tenants on the fourth floor shared the common hallway and access to the elevators and stairwells in the building. She stated that Encompass had no control over the hallway. She stated that Encompass had no control over the space outside the elevator's doors.

Ms. Allison testified that Highlands, the lessor, had control over the building. She stated that Highlands provided security for the building. She stated that Highlands maintained the elevators. She stated that Highland was responsible for the cleaning services for the building.

Finally, Ms. Allison testified that Claimant was still getting long term disability benefits. She stated that Encompass paid the entire premiums for the insurance policy providing the long term disability benefits. She stated that employees did not pay any of the insurance premiums.

On cross-examination by Claimant, Ms. Allison testified that Claimant was terminated because Claimant was not able to return to work after her injuries. She stated that Encompass had not paid any of Claimant's medical bills.

On rebuttal, Claimant testified that she received the long term disability benefits from the UNAM Company until she turned 66 years old. She stated that when she was approved for social security disability benefits she received a lump sum payment which she had to sign over to UNAM.

Medical Evidence

Claimant offered into evidence the deposition testimony of P. Brent Koprivica, M.D., and numerous medical reports and records. Dr. Koprivica testified that he examined Claimant on December 5, 2011, August 29, 2012 and March 18, 2013. He noted that Claimant provided a history of sustaining injuries at work on August 6, 2010. He noted that according to Claimant's history her injuries occurred after she had gotten off work and was standing in the hall waiting for the elevator. He noted that Claimant indicated that when the elevator arrived she reached out to hold the elevator door open and that she was surprised to see someone with a service cart getting off of it and that she "basically became off balance and stumbled backwards and fell."

Dr. Koprivica testified that CT scan results showed that Claimant had a compression fracture at L1, spondylolisthesis at L4-5 with multi-level degenerative disease and severe stenosis at L4-L5 with a left sided disk herniation. He stated that Dr. Gillen's surgery on Claimant's low back involved a decompression of the L4-5 nerve root, an L1 Kyphoplasty and the removal of three herniated disk fragments.

Dr. Koprivica testified that Claimant developed a blood clot in her leg and a pulmonary embolus as a complication from the Kyphoplasty. He stated that she had a significant wound infection problem. He also stated that she developed some problems with atrial fibrillations associated with the stresses of the infection and the pulmonary embolus.

Dr. Koprivica noted Claimant's significant preexisting medical problems and her subsequent heart attack which he considered to be a complicating factor. He noted that prior to August 2010 Claimant had coronary artery disease, "significant" problems with fibromyalgia, chronic back pain which had required pain management and multiple epidural injections, including one three months prior to August 2010, bilateral hip replacements and problems with deep vein thrombosis. He characterized her preexisting low back problems as "extreme."

Dr. Koprivica diagnosed Claimant's injuries from the August 2010 fall at work as failed back syndrome, deep vein thrombosis in the right lower extremity with the development of a pulmonary embolus, a mild closed head injury with a negative CT scan and some persistent dizziness resulting from the mild closed head injury. He concluded that Claimant's failed back syndrome had resulted in a permanent partial disability of 50 percent to her body as a whole, while her dizziness had resulted in a permanent partial disability of 10 percent to her body as a whole, and her deep vein thrombosis had resulted in a permanent partial disability of 10 percent to her body as a whole.

Finally, Dr. Koprivica concluded that Claimant was permanently and totally disabled, but noted that she had an advanced education which had to be considered. He noted that although Claimant had the skills to do sedentary work; that her complaints about limitations in sitting, standing and walking, dizziness and her need to use a cane and to recline unpredictably were factors in her permanent total disability. He also concluded that Claimant needed future medical treatment and that she needed to be maintained on anti-coagulants and monitored for her chronic pain. He stated that a pain psychologist should be considered.

On cross-examination, Dr. Koprivica admitted that he worked for Claimants in 98 to 99 percent of his cases. He admitted that Claimant's medical records showed that the history she

provided to emergency room physicians on August 6, 2010 of her August 2010 fall at work differed from the history she provided to him. He admitted that the emergency room record stated that Claimant was outdoors and walking to her car when she fell and struck the concrete surface.

Dr. Koprivica admitted that he believed that Claimant's preexisting low back impairment had resulted in a permanent partial disability of 15 percent to her body as a whole. He admitted that he believed that Claimant's preexisting bilateral hip replacements had resulted in a permanent partial disability of 35 percent of each of her lower extremities at the hip or 207 week level. He admitted that he believed that Claimant's preexisting fibromyalgia had resulted in a permanent partial disability of 12.5 percent to her body as a whole. He admitted that he believed that Claimant's preexisting impairments had resulted in a permanent partial disability of 73 percent to her body as a whole when he applied a "loading" factor for her bilateral hip replacements.³

Dr. Koprivica admitted that Claimant had self-limited as she performed some of the tests during his evaluation of her. He admitted that he had noted in his report that Claimant was moaning and groaning while doing some of the tests.

Medical Records

Claimant offered numerous medical records into evidence. Most were cumulative of the other evidence. Records from Johnson County Orthopedics and Sports Medicine, however, noted on January 28, 2010 that Claimant had fallen and landed on her left hip about a month earlier. She provided a history of increased left hip pain with weight bearing. She complained that her pain radiated to her knee and sometimes into her calf. She also complained of low back pain.

In June 2000, Claimant was treated at Johnson County Orthopedics for a fractured right elbow after falling. Claimant denied any "significant" hip pain at that time. She did complain of difficulty with climbing stairs.

In May 2000 Claimant was diagnosed with severe osteoarthritis in her left hip.

Vocational Evidence

Claimant's Exhibit AA was the deposition testimony of Michael J. Dreiling. Mr. Dreiling testified that he evaluated Claimant on November 19, 2013. He noted that he had done no vocational testing on Claimant due to her age, her educational background and her "significant" work restrictions. He concluded, however, that Claimant had no transferable work skills.

Mr. Dreiling concluded that Claimant could not compete for work in the open labor market. He concluded that no employer in the ordinary course of business would be reasonably

³ Dr. Koprivica did not explain how Claimant's injuries had resulted in a permanent partial disability of 143 percent to her body as a whole. (70 percent to her body as a whole from the August 2010 accident and 73 percent to her body as a whole pre-existing the accident).

expected to employ Claimant in her present physical condition. He concluded that Claimant was not employable as a result of her August 6, 2010 fall.

On cross-examination by Claimant's employer, Mr. Dreiling admitted that he had relied strictly on the restrictions and limitation contained in Dr. Koprivica's report in reaching his conclusion about Claimant's ability to work.

Employer's Evidence

Employer's Exhibit 1 was the lease agreement between Encompass Medical Group ("Tenant") and Cadle's Highland Professional Tower, LLC (Landlord). The lease terms in effect at the time of Claimant's injuries covered the 36 month period from July 1, 2009 to June 30, 2012. The original lease on October 8, 2003 provided that Encompass had leased 4,180 square feet of office space designated at Suite 400 in the Highland Professional Tower.

The lease provided that the landlord was to furnish to the tenant elevator service "in common with other tenants in the building," janitorial and maintenances services as reasonably required and ordinary maintenance and repairs to the building as reasonably necessary to maintain the exterior and mechanical systems of the building and the common areas. The tenant was required to maintain insurance covering the tenant's property located in the leased premises.

The lease specifically defined "Common Areas" to be the hallways, walkways, driveways, parking and landscaped areas and other parts of the building for use by the public and other tenants. Schedule 1 attached to the lease was a diagram of the 4th floor of the building showing Suite 400, the premises leased by Encompass Medical Group, and the common areas located outside the suite which included the hallways in the building and the elevators and stairs.

Schedule 2 of the lease provided that the Tenant would not obstruct the entrances, lobbies, passages, corridors, stairways, or common areas of the building and that the tenant would not use the common areas for any purposes other than access to the leased premises. The lease provided that the landlord reserved the right to regulate the use of the common areas of the building by the tenant and its invitees. It provided that the landlord reserved the right to regulate the hours in which deliveries could be made to the tenant. It provided that the tenant could place no "showcases or other article" in the common areas without the landlord's prior written consent. The lease provided that "The Tenant will not throw or sweep anything into the Common Areas of the Building."

Employer's Exhibit 3 was the workers' compensation telephone reporting worksheet completed by Ms. Allison. The worksheet stated that the accident occurred when Claimant was waiting for the elevator and her heel caught on something and she lost her balance and fell.

Law

After considering all the evidence, including the medical reports and records, Dr. Koprivica's deposition testimony, the other exhibits and after observing the appearances and demeanor of Claimant and Ms. Allison, I find and believe that Claimant did not prove that she sustained an accident as defined by Missouri law. Therefore, compensation must be denied and all other issues raised at the hearing were rendered moot.

Burden of Proof

Claimant had the burden of proving all material elements of her claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2nd 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3rd 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant did not meet her burden of proving that she sustained an accident as defined by Missouri law.

Accident and Whether the Alleged Accident Occurred on Premises Owned or Controlled by the Employer

Claimant's case is a going to and from work case. She admitted that her alleged accident occurred on a Friday after she had gotten off work. She admitted that she had left the suite where she worked and that she had walked down the common hallway in the building to the elevators when the alleged accident occurred. She testified that as she began to step into the elevator a cleaning cart bumped her and that she fell to the floor and sustained injuries.

Prior to the 2005 amendments to the statute, Missouri Courts recognized the extended premises doctrine as an exception to the general rule that accidents going to and from work were not compensable. See Cox v. Tyson Foods, Inc. 920 S.W.2d 534 (Mo. banc 1996) where the Missouri Supreme Court noted the general rule and that the extended premises doctrine was an exception to the general rule. See also Person v. Scullin Steel Co., 523 S.W.2d 801 (Mo. banc 1975). The Cox court noted that an exception to the going to and from work rule allowed recovery if the injury producing accident occurred on premises which were owned or controlled by the employer or on premises which were not actually owned or controlled by the employer but which had been so appropriated by the employer or so situate, designed and used by the employer and its employees incidental to their work as to make them, for all practicable intents and purposes, a part and parcel of the employer's premises and operation, or that if the accident occurred on the customary, expressly or impliedly approved, permitted, usual and acceptable route or means used by workers to get to and depart from their workplace. See also Kunce v. Junge Baking Co., 432 S.W.2d 602 (Mo. App. 1968).

In 2005 the Missouri legislature amended the statute to allow recovery in the going to and from work cases if the accident occurred on premises either owned or controlled by the employer. The legislature in the 2005 amendments also overruled the extended premises doctrine as set out in Cox and in those cases prior to 2005 where recovery was allowed for accidents going to and from work which did not occur on premises either owned or controlled by the employer. The 2005 statute pertaining to accident provides as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

4. "Death" when mentioned as a basis for the right to compensation means only death resulting from such violence and its resultant effects occurring within three hundred weeks after the accident; except that in cases of occupational disease, the limitation of three hundred weeks shall not be applicable.

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

6. The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. . .

10. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the

course of the employment" to include, but not be limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

§ 287.020 RSMo. 2005.

As the Court noted in Hager v. Syberg's Westport, 304 S.W.3d 771 (Mo. App. E.D. 2010), § 287.020.5 RSMo. 2005 expressly limits the application of the extended premises doctrine to those cases where the accident occurred on property either owned or controlled by the employer. In Hager the accident occurred in a parking lot and not on property owned or controlled by the employer and compensation was denied. Thus, because in Claimant's case she was going home from work when her alleged fall occurred and she had left the premises where her employer leased office space; the issue is whether her alleged fall occurred on premises either owned or controlled by her employer.

Employer Exhibit 1 showed that Claimant's employer did not own the building where Claimant's fall occurred. It showed that Claimant's employer leased office space in the building. The evidence further showed that Claimant's fall occurred in the common hallway in the building where Claimant was standing and waiting to get on an elevator used by all the tenants in the building and the tenants' invitees.

In Scholastic, Inc. v. David Viley, WD77546 (Mo. App. October 28, 2014) the Western District noted that in determining whether the employer which did not own the property controlled the premises or area where the accident occurred the terms of the lease were important. In Scholastic unlike Hager, the employer had exclusive use of the north and south parking lots for its employees to park their vehicles. The Court in Scholastic noted that the Dictionary definition of "Exclusive" was defined as "excluding or having power to exclude" and "limiting or limited to possession, control, or use by a single individual or group." See Merriam-Webster's Collegiate Dictionary 404 (10th ed. 1994).

The Scholastic the Court noted that by granting "exclusive use of the north and south parking lots in the lease to the employer, those parking lots were no longer common facilities because they were no longer "provided for the common or joint use of the employer, landlord or other tenants". Thus, the Court found that the lease in granting Scholastic "exclusive use" of the parking lots established control for purposes of the extended premises doctrine.

In Hager, the employee was also injured in the parking lot, but as the Scholastic Court noted, the Hager lease merely granted the right to use the parking facilities in accordance with the provisions of the lease. The Court in Scholastic noted that nothing in Hager provided that the employer was granted "exclusive use" of the parking lot.

Thus, while neither the Scholastic nor Hager Courts specifically required exclusive use language in the lease to establish control of the premises by the employer, both recognized that the employee had to prove ownership or control of the area where the accident occurred to establish a compensable case. In Claimant's case the lease, as noted above, was admitted into evidence. The lease did not grant Claimant's employer exclusive control of the hallway or the elevators to the fourth floor where Claimant's accident occurred as she was leaving work.

The lease in Claimant's case specifically provided that the landlord was to furnish elevator service to Claimant's employer "in common with other tenants in the building." The

lease defined common areas to be the hallways, walkways, driveways, parking and landscaped areas and other parts of the building for use by the public and other tenants. Claimant's accident occurred in the hallway which was specifically defined in the lease as a common area of the building.

The lease did not give Claimant's employer any control over the common areas in the building. The lease was very specific in noting that the tenant could not obstruct the corridors, passages, stairways or common areas of the building. The lease provided that the tenant could not use the common areas of the building for any purposes other than access to the leased premises. The lease provided that the landlord reserved the right to regulate the use of the common areas of the building by the tenant and the tenant's invitees. It provided that the tenant could not place any "showcases" or other articles in the common areas without prior written consent of the landlord. The lease provided that the tenant "will not throw or sweep anything into the common areas of the building.

Thus, it was clear in Claimant's case that her employer had no control over the common areas of the building which included the hallway where Claimant sustained her injuries as she was waiting to get into the elevator. The lease did not grant Claimant's employer any control of the elevator. There was "no exclusive use" by Claimant's employer of the area where Claimant sustained her injury as existed in the Scholastic case. Claimant's employer's lease was detailed, specific and explicit. It provided the landlord with the exclusive right to regulate the use of the common areas and it granted Claimant's employer no control so as to meet the statutory requirement that the injury must occur on premises either owned or controlled by the employer. Id.

As the Court noted in Hager, the right to use does not equate to control. Id. As in Hager, Claimant's employer had the right to use the common area but it had no right to exercise power or influence or control over the common area.

Finally, Claimant did testify that she had her laptop computer with her in a rolling cart when she fell. She did not testify whether she or her employer owned the laptop computer. Regardless, ownership of property or intent to work at home on a weekend is not relevant. The 2005 statute provides that accidents going to or from work in a company owned or subsidized vehicle are not compensable. Id. An accident going to and from work must occur on the employer's premises or on property owned or controlled by the employer to be compensable. Claimant's did not. Her case is not compensable and all other issues raised at the hearing were rendered moot.

Made by: _____

Kenneth J. Cain
Administrative Law Judge
Division of Workers' Compensation