

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

Injury No.: 06-078999

Employee: Randy Johnson  
Employer: Town & Country Supermarkets, Inc.  
Insurer: Zenith Insurance Company  
Date of Accident: July 29, 2006  
Place and County of Accident: Rolla, Phelps County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the entire 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 7, 2007, as supplemented herein, and awards no compensation in the above-captioned case.

#### I. Issue

The dispositive issue is whether or not employee sustained injury due to an accident arising out of and in the course of his employment. The injury occurred July 29, 2006, consequently, the Workers' Compensation Law as amended in 2005 governs the instant case.

#### II. Facts

The facts were accurately recounted in the award issued by the administrative law judge and in practicality were not in dispute. Repetition of the facts in the instant award is done so for special emphasis supporting the final conclusions.

In summary fashion, immediately preceding his injury, employee was on the premises of employer, during his normal work shift, fulfilling his work duties in behalf of his employer; while fulfilling his work duties, employee was requested by management to assist co-employees in retrieving grocery shopping carts from a retirement community proximally located; and while walking thru a grocery aisle towards the front of the grocery store, employee injured his right lower extremity.

In describing how the injury occurred the testimony of the employee was as follows: while walking in Aisle No. 2, I "stepped wrong"; my foot "rolled towards the ground"; employee admitted there was nothing on the floor that caused his right foot to roll; on cross-examination employee admitted that he was not sure what caused the accident; he apparently rolled his ankle; he described the injury occurring as walking down the aisle and his ankle rolled; and when he presented to the initial healthcare provider his history included a statement that he "misstepped and injured" his ankle. Employee admitted he did not slip, trip or stumble.

Robert Pearson, D.P.M., was the treating podiatrist; Dr. Pearson initially treated employee on August 1, 2006; the history received by Dr. Pearson was that employee misstepped and twisted his right foot; Dr. Pearson was of the opinion that the prevailing cause of injury was employee stepping wrong and twisting his foot and there was no other contributing factor; and on cross-examination Dr. Pearson indicated that employee's misstep was an inversion type injury; to his knowledge there was no floor defect present; and the event/trauma could have occurred anywhere.

### III. Relevant Statutes

As of the date of this accident § 286.120.1 RSMo, as amended in 2005, provided, in pertinent part, as follows:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, . . . .

The definitions of both accident and injury were significantly changed in the 2005 legislation. The definitions are set forth in § 287.020.2 RSMo and § 287.020.3 RSMo, and are as follows:

2. 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.

In addition to these definitions the legislature also provided the following additional legislation contained in § 287.020.10 which is as follows:

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.

### IV. Findings of Fact and Rulings of Law

Due to the extensive changes made to the Workers' Compensation Act by the General Assembly in 2005, the Commission is of the opinion that it is imperative that the basic premise of the Workers' Compensation Law be first considered, prior to reaching conclusions pertinent to the instant case.

Among its many features, the Workers' Compensation Act provides: (1) benefits to employees who sustain personal injury by accident arising out of and in the course of employment; and (2) negligence and fault are largely immaterial. Section 287.120.1 RSMo.

The construction of the phrase "arising out of and in the course of employment" historically has been broken in half, resulting in a two-prong test, with the "arising out of" portion construed to refer to causal origin, and the "course of employment" portion to the time, place and circumstances of the accident in relation to the employment. The substantive provisions of section 287.120.1 were not changed or amended by the 2005 enactment of the General Assembly.

Pursuant to this statute proof of a compensable injury requires not only establishing that it occurred at a particular place, and at a particular time (the in the course of component) the injury must also be causally connected to some risk or hazard of the job (the arising out of employment component).

The second prong of the above mentioned two-prong test, whether the injury arose "in the course of" employment, is not in dispute in the instant case. The injury occurred within the period of employment at a place where the employee could reasonably be expected and while engaged in the furtherance of the employer's business.

The first prong, "arising out of", the test primarily concerned with causal connection, is the dispositive issue in this case.

Historically, at a minimum, our courts have required a showing that the employee's injury was caused or due to a risk of employment. Missouri cases have uniformly held that an accident and resultant injury "arise out of" the employment when there is a causal connection between the conditions under which the work was required to be performed and the resulting injury. The injury "arises out of" the employment so long as the injury was a rational consequence of a hazard connected with the employment.

Generally speaking, all risks causing injury to an employee can be brought within three categories: risks distinctly associated with the employment; risks personal to the employee; and "neutral risks", i.e., risks having no particular employment or personal character. Harms from the first category are universally compensable; harms from the second are universally non-compensable; and harms from the third result in controversy.

Various lines of interpretation of the phrase "arising out of" have historically risen of which three are the increased risk doctrine, the actual risk doctrine and the positional risk doctrine.

The increased risk doctrine, in summary fashion, requires that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to the employment.

As to the actual risk doctrine, whether the risk was also common to the public is of no concern, if it were a risk of the employment. The employment subjected employee to the actual risk that caused the injury.

The positional risk doctrine determines that an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed employee in the position where he was injured.

Consequently, since risks distinctly associated with the employment fall readily within the increased risk doctrine, they are considered to arise out of the employment. As to risks personal to an employee, the origins of harm are personal and cannot possibly be attributable to employment.

However, neutral risks are defined as being neither distinctly employment nor distinctly personal in character. Furthermore, the cause is unknown, unexplainable or happenstance; known, but not associated with employment or the employee personally. In these types of risks, an award of benefits can only be justified by accepting the but for reasoning of the positional risk doctrine.

As previously mentioned, the legislature, in 2005, redefined the words accident and injury. Section 287.020.2 and section 287.020.3. In addition the legislature specifically abrogated certain earlier case law interpretations concerning the meaning of accident, as well as out of and in the course of employment. Section 287.020.10

RSMo. All three of the cases referred to in the statute that were abrogated have one component in common, i.e., it was difficult, or impossible, to ascertain where or if the employment subjected the employee to some risk or hazard greater than that to which an employee regularly experiences in everyday life. In other words, there was no rational connection between the employment and the injury.

In the instant case, the employee was walking down a grocery aisle, at a rapid pace, however, there was no evidence that the rapid pace at which he was walking was remotely connected to the fact that he misstepped causing his injury. According to Dr. Pearson, the misstep resulted in an inversion type injury, and there was no other contributing factor. As further opined by Dr. Pearson, the event/trauma could have occurred anywhere. From the record presented the Commission cannot conclude or find any unique condition of employment which contributed to the resultant injury. On the other hand, the evidence does lead to the conclusion that the injury resulted from a hazard or risk unrelated to the employment.

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be issued if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and as a part of the employment. It is not sufficient that the employment may simply have furnished an occasion for an injury from some unconnected source.

The Commission cannot establish a causal connection between the conditions under which the employee was performing his work and the resultant injury. An award of compensation, given the facts of the instant case, can only be justified by accepting the but for reasoning of the positional or actual risk doctrine, i.e., an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed employee in the position where he was injured.

In 2005, the legislature abrogated such earlier case law interpretations, and required proof greater than the fact that the conditions and obligations of the employment placed employee in the position where he was injured. An employee must satisfy the concept of causation, i.e., establishing some rational connection between his work and his injury. That is the element of proof employee's case is lacking.

## V. Conclusion

In conclusion, although the injury did occur in the course of employee's employment, employee failed to prove that the injury arose out of his employment since there was a failure of proof of a rational connection between the accident, the injury and the employment. Furthermore, it is clear from this record that the injury arose from a hazard or risk unrelated to his employment as the sole medical opinion in evidence was that the event/trauma could have occurred anywhere at anytime.

Accordingly, the award and decision of Administrative Law Judge Victorine R. Mahon, issued March 7, 2007, is affirmed and attached and incorporated by this reference, as this injury is not due to an accident arising out of and in the course of employment.

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. 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.

The main question in this case is whether employee's foot injury arises out of and in the course of his employment. Employee testified that as he walked hurriedly down employer's aisle 2 on July 29, 2006, on his way to meet co-workers at the front of the store as directed, he misstepped and rolled his right foot, thereby fracturing his foot.

2005 Amendments to the Workers' Compensation Act

Section 287.800.1 RSMo (2005) provides that, "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo (2005) provides:

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.

"The language in section 287.020.10...serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020...[I]t appears from the plain language of the statute, the legislature ...intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. 2007).

Blank Slate

As to the phrases appearing in § 287.020.10, the legislature created a blank slate effective August 28, 2005.

The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.

*Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. banc 1991)(citations omitted).

In light of the directives of § 287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Workers' Compensation Act giving the words and phrases their ordinary and usual meaning.

Notwithstanding the legislature's specific abrogation of all earlier interpretations of the phrases "arising out of" and

“in the course of,” the majority errs by resorting to historical interpretations of these phrases. For that reason, the award and decision of the majority cannot stand. I conduct my analysis without so resorting, so as to apply the law in accordance with the legislature’s stated intention.

## Compensability

Section 287.120.1 RSMo provides:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

Employer is liable to employee for workers’ compensation benefits if 1) employee sustained personal injury; 2) by accident; 3) arising out of and in the course of his employment. The legislature enacted a two-part test for determining if an injury arises out of and in the course of employment. 287.020.3 RSMo (2005) provides that:

(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.

Before we can analyze § 287.020.3(2), we must know definitions of “injury” and “accident.” Both “injury” and “accident” are defined in § 287.020. The definition of each was modified by the 2005 changes to the Workers’

Compensation Act. [\[1\]](#)

## Accident

Section 287.020.2 defines “accident:”

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.

On July 29, 2006, employee placed his foot on the surface of the ground in an inaccurate anatomical position. Employee rolled his ankle, heard two “pops” in his foot, and felt immediate pain.

“unexpected traumatic event.” There can be little doubt that the event during which the employee’s ankle rolled was both unexpected and traumatic.

“identifiable by time and place of occurrence” and “caused by a specific event during a single work shift” Employee misstepped on July 29, 2006, at approximately 2 p.m., on aisle 2 of employer’s grocery store.

“producing at the time objective symptoms of an injury” Employee heard two “pops” and felt immediate pain.

Employee has established each element of “accident” as defined by 287.020.2.

## Injury

Section 287.020.3 defines “injury” and sets forth a two-part test for determining when an injury arises out of and in the course of employment.

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

and disability.

(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.

...

There is no dispute that employee misstepped in employer's store on July 29, 2006. Further, Dr. Pearson testified that the misstep was the prevailing factor in causing employee's foot injury (displaced fifth metatarsal base fracture). This satisfies the first prong (subparagraph (a)) of the 'arising out of and in the course of employment test.' Therefore, I need only concern myself with subparagraph (b) of the test. Employee's injury is compensable so long as it 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."

As always, definitions are in order:

- "Hazard" means "a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty."<sup>[2]</sup>
- "Risk" means, "someone or something that creates or suggests a hazard or adverse change: a dangerous element or factor."<sup>[3]</sup>
- "Equally" means, "to an equal degree."<sup>[4]</sup>
- "Exposed" means, "so situated as to invite or make likely an attack, injury, or other adverse development."<sup>[5]</sup>

Upon analyzing § 287.020.3(2)(b) in light of the dictionary definitions, I find it provides for four categories of hazards:

1. Hazards or risks related to employment with an equal degree of exposure<sup>[6]</sup>
2. Hazards or risks related to employment with an unequal degree of exposure
3. Hazards or risks unrelated to employment with an equal degree of exposure
4. Hazards or risks unrelated to employment with an unequal degree of exposure

Only injuries resultant from #3 -- a hazard or risk unrelated to employment to which workers have equal exposure in nonemployment life -- are denied compensability based upon the second prong of the 'arising out of and in the course of employment test.'

The evidence shows that employee stepped incorrectly, so some thing or condition operated against his safety. That is, some hazard or risk gave rise to his injury. How do we define the hazard? The legislature gave us no direction in this regard. In the instant case, any of the following phrases describe a possible source of danger or difficulty faced by employee: walking quickly on a commercial tile floor to comply with a supervisor's directive; walking quickly on a commercial tile floor; walking on a commercial tile floor; walking quickly to comply with a supervisor's directive; walking quickly; walking to comply with a supervisor's directive; walking.

People walk on many types of surfaces and at many different paces. Therefore, "walking" does not adequately define the hazards posed by every surface or every speed. At the temporary hearing, no evidence was presented regarding negative characteristics of the commercial tile floor upon which employee sustained injury. Therefore, the type of walking surface will not bear on the definition of the hazard in this case. Employee was walking quickly

to comply with his supervisor's directive in order to avoid the negative employment consequences of failing to comply. A risk employee faced by engaging in the hazard of walking quickly was that he might misstep. Employee, in fact, did misstep. I conclude that the hazard employee faced was "walking quickly to comply with his supervisor's directive."

Employee proved that his injury came from a hazard or risk related to employment – walking quickly to comply with a supervisor's directive. Such injuries are never denied compensability under subparagraph (b). Of course, by proving that his injury came from a hazard or risk related to employment, employee necessarily proved that his injury did not come from a hazard or risk unrelated to employment. Employee has satisfied his burden under each prong of § 287.020.3(2). His injury must be judged to have arisen out of and in the course of employment. [7]

Below is a sampling of burdens the majority erroneously imposes on employee. The phrases in italics are found nowhere in the plain language of the Workers' Compensation Act as amended in 2005. "The burden rests upon the employee to show *some direct causal connection* between the injury and the employment. An award of compensation may be issued if the injury were a *rational consequence of some hazard connected with the employment*...[T]he employment must in some way expose the employee to an *unusual risk or injury* from such agency which is not shared by the general public. The injury must have been a rational consequence of the hazard to which the employee has been exposed and *which exists because of and as a part of the employment*...."

I empathize with the majority's inclination to impose such standards regarding proof of work-relatedness. I am so inclined myself after years of determining claims under the Workers' Compensation Act as it read before the 2005 amendments. Section 287.020 of the old Act provided, among other things, that: an injury is compensable if it is clearly work related; the injury must be incidental to and not independent of the relation of employer and employee; it is reasonably apparent...that the employment is a substantial factor in causing the injury; the injury can be seen to have followed as a natural incident of the work; the injury can be fairly traced to the employment as a proximate cause.

But the legislature removed those phrases and commanded that we stick to the words of the new Act as written. The new Act changed the primary focus away from whether the *employment* caused the injury ("the *employment* is a substantial factor in causing the injury") to whether the *accident* caused the injury ("the *accident* is the prevailing factor in causing" the injury). This is a change of which the insurer may wish to take note. [8] Because the majority misapplies the Workers' Compensation Act as amended in 2005, I respectfully assert that the majority decision should not stand.

Employee's Foot Injury is Compensable under 287.120.1 RSMo.  
Based upon the foregoing, I conclude that employee has established that he suffered a personal injury by accident arising out of and in the course of employment. Section 287.120.1 dictates that employer is liable to employee for workers' compensation benefits, including treatment of his foot injury and other temporary benefits. I would issue a temporary award of same.

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John J. Hickey, Member

## AWARD

Employee: Randy K. Johnson

Injury No. 06-078999

Dependents: N/A

Employer: Town & Country Supermarkets, Inc.

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

Additional Party: N/A

Insurer: Zenith Insurance Company

**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: Alleged July 29, 2006.
5. State location where accident occurred or occupational disease was contracted: Alleged to have occurred in Rolla, Phelps 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 to the front of the supermarket.
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 right foot.
14. Nature and extent of any permanent disability: None.
15. Compensation paid-to-date for temporary disability: None.
16. Value of necessary medical aid paid to date by employer/insurer? None.
17. Value of necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$349.83.
19. Weekly compensation rate: \$233.23.
20. Method wages computation: By agreement of the parties.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A.

TOTAL: NONE.

23. Future requirements awarded: None.

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

Employee: Randy K. Johnson

Injury No. 06-078999

Dependents: N/A

Employer: Town & Country Supermarkets, Inc.

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

Additional Party: N/A

Insurer: Zenith Insurance Company

Hearing Date: January 4, 2007

Checked by: VRM/meb

### **INTRODUCTION**

Claimant Randy K. Johnson requested a hardship hearing after Town & County Supermarkets, Inc., and its insurer Zenith Insurance Company [hereafter Employer] denied all liability for the injury to Claimant's foot that occurred on July 29, 2006. The parties appeared for a hearing before the undersigned Administrative Law Judge on January 4, 2007, in Rolla, Missouri. Linda Powers represented Claimant. James B. Kennedy appeared on behalf of Employer. The initial issues for determination are whether Claimant sustained an accident within the meaning of the Workers' Compensation Law, whether the accident resulted in an injury that arose out of and in the course of employment, and whether the injury is medically and causally related to Claimant's work. Should these issues be ruled in Claimant's favor, Claimant requests past and future medical aid and past and future Temporary Total Disability. Claimant also challenges as unconstitutional the 2005 amendments to the Missouri Workers' Compensation Law contained in Senate Bill 1. Claimant argues that the amendments violate the Due Process guarantees of the Missouri and United States Constitutions. He also contends that the amendments are invalid under the Supremacy Clause of the United States Constitution insofar as they conflict with the American with Disabilities Act, 42 U.S.C. § 12132.

### **EXHIBITS**

Exhibit A Deposition of Robert Pearson, D.P.M.

Exhibit B Letter of Zenith Insurance Company Dated August 8, 2006

### **WITNESSES**

Claimant Randy K. Johnson

### **FINDINGS OF FACT**

The facts generally are not in dispute. Claimant Randy K. Johnson is a 26-year-old man with two years of college education. He is a healthy-looking individual, who stands six-feet tall and weighs around 300 pounds. He earned \$8.50 per hour as the frozen foods manager for Town & County Supermarkets, and had worked for that company more than five years at the time of his injury on July 29, 2006.

On that date, which was a Saturday, Claimant was working in a cooler near aisles 11 and 12 when he was called by

store management to assist in retrieving shopping carts from the Rolla Towers. The Rolla Towers is a retirement community near the grocery store. Elderly customers were known to take their purchases home in the shopping carts and leave the carts at the Rolla Towers. Claimant walked from aisle 11 to aisle 2 and then towards the front of the store. Claimant walked at a rapid pace knowing that other employees were waiting for him. Claimant had walked this aisle many times before at a rapid pace. As Claimant walked up aisle 2, he said he “stepped wrong,” he rolled his ankle, he heard two “pops” in his foot, and felt immediate pain. Claimant then limped to the front of the store. Claimant waited at the front of the store while other employees retrieved the shopping carts.

Claimant did not see anything unusual on the floor. The floor is tile, not unlike the floor in a typical grocery store. There were no witnesses to the injury.

When the stockers returned from retrieving grocery carts, one of the employees rolled Claimant to the back room by means of a wheelchair. Claimant spoke with Jan Dooley, Employer’s safety coordinator. She completed an accident report. The assistant store manager then directed Claimant to rest his foot with ice and, if he needed medical attention, to call the store first. One of stockers then drove Claimant home.

Claimant was next scheduled to work on a Tuesday. On Monday he called Store Manager, Glenn Sapaugh, who advised Claimant to go to the Bond Clinic rather than the emergency room as it would be cheaper. The following day Claimant saw Dr. Brown who ordered x-rays, which revealed a fracture of the fifth metatarsal. Claimant’s foot was bruised, swollen, and painful. Dr. Brown referred Claimant to a podiatrist – Dr. Robert Pearson, and provided Claimant with a “boot.”

On August 4, 2006, Claimant gave a recorded statement to Brenda McLaughlin, a claims manager for Zenith Insurance Company. Four days later, Zenith sent Claimant a letter denying his claim because employment was not the prevailing factor in causing the injury (Claimant’s Ex. B).

Dr. Pearson saw Claimant on August 1, 15, and 29, 2006, and on October 6, 2006. In his deposition on December 21, 2006, Dr. Pearson confirmed that Claimant suffered a fracture of the base of the fifth metatarsal in the right foot and that he had recommended surgery to reduce the fracture. Due to the span of time without surgery, however, Claimant’s foot has healed with a mal-union. Claimant did not have surgery because he has no health insurance.

Dr. Pearson testified that Claimant suffered a twisting injury of the foot where the front part of the foot gets fixed against the ground. Dr. Pearson said Claimant’s weight did not cause the fracture and no degenerative condition or disease caused or contributed to it. Dr. Pearson understood that Claimant was just walking as he normally would be walking down the aisle when claimant took a misstep. In other words, Claimant placed his foot on the surface of the ground in an incorrect anatomical position. Dr. Pearson agreed that we do not know why Claimant misstepped. Dr. Pearson was quite clear that such incident and resulting injury can happen at any place or at any time, including the doctor’s parking lot or the Claimant’s kitchen. He was aware of other persons who had sustained this type of injury without having stepped on a defect in the surface on which they were walking (Claimant’s Ex. A, p. 21-24).

## CONCLUSIONS OF LAW

### Constitutional Challenges Denied

While I am mindful that constitutional challenges must be raised at the earliest opportunity or they are waived, *Land Clearance for Redevelopment Authority v. Kansas University Endowment Ass'n*, 805 S.W.2d 173, 176 (Mo. banc 1991), an Administrative Law Judge has no authority to determine the constitutionality of a Missouri statute. Moreover, the Honorable Byron Kinder, considering the same grounds raised by Claimant, recently ruled in a separate declaratory judgment action that the 2005 version of the Missouri Workers' Compensation Law is constitutional. *Missouri Alliance For Retired Americans v. Department of Labor and Industrial Relations*, 05AC-CC01114 (Cr. Ct. Cole Co. 11/30/06). Absent other precedent, I will follow this most recent judicial decision.

### Claimant's Injury Is Not Idiopathic - § 287.020.3(3)

Employer contends Claimant's injury is idiopathic and barred by § 287.020.3(3), RSMo Cum. Supp. 2005. I conclude that it is not idiopathic.

An idiopathic injury has been defined as one which has no known cause as well as a physical defect or disease that is innate or peculiar to an employee. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo. banc 1993). Dr. Pearson unequivocally stated that the injury was caused by the twisting of the foot – an inversion injury. Thus, the cause of the injury is known. Dr. Pearson further testified that no disease process caused or contributed to the injury, nor was Claimant's weight a factor in the injury. Thus, no physical defect or disease innate or peculiar to Claimant caused or contributed to the injury.

### Injury Does Not Arise Out of and In the Course of Employment - § 287.020.3(2)(b)

Section 287.020.3(2)(b), RSMo Cum. Supp. 2005, provides that an injury shall be deemed to arise out of and in the course of employment "only if:"

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.

There was no unique condition of Claimant's employment that caused or contributed to Claimant's injury. Claimant did not slip, trip, or fall. There was no showing that the surface in aisle 2 was in disrepair, was rough, slippery, or that any foreign object was present on the floor. Claimant merely walked up the aisle, misstepped, and broke his foot. Dr. Pearson made clear that the accident could have occurred anywhere at anytime. Thus § 287.020.3(2)(b), precludes the award of compensation in this case.

Claimant argues, however, that 1) he was walking in a hurried manner to comply with his supervisor's request and 2) in any event, walking was an integral part of his job. Claimant suggests that the General Assembly could not possibly have intended to exclude all injuries that were sustained by walking, lifting, twisting, bending, stooping, or "perhaps even climbing a ladder" merely because such injuries could have been sustained outside of employment (Claimant's br. 14).

First, the fact that Claimant was walking in a hurried manner is irrelevant. Dr. Pearson did not hinge his

opinion on whether Claimant was walking quickly or slowly.

Second, irrespective of how this statute might be applied to other facts, in *this* case, Claimant was injured walking on a level floor in a grocery store with no evidence of any kind of defect. The General Assembly could not have been more explicit that this type of case is not compensable when it enacted § 287.020.10, RSMo Cum.

Supp. 2005:

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 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.

This case is substantially similar to *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo. App. W.D. 2002).

Bennett was a nurse aide who heard a “pop” in her knee while she was walking to make a patient’s bed and while traversing the stairs at work. She subsequently required a knee replacement. The Labor and Industrial Relations Commission denied compensation, ruling that walking and climbing stairs were normal activities of daily life to which the claimant was equally exposed outside of her employment. The appellate court reversed, noting (just as Claimant does in the instant case) that Bennett’s act of walking or traversing stairs were an integral part of Bennett’s job activities and incidental to her employment. Given the General Assembly’s explicit rejection of the *Bennett* decision, Claimant’s argument is not persuasive.

Also instructive is the dissenting opinion in *Drewes v. TWA*, 984 S.W.2d 512 (Mo. banc 1999). There, while Drewes was walking with her lunch in a break room, she fell and injured her ankle. A majority of the Missouri Supreme Court held the injury was compensable, but Judge Covington dissented noting:

Even assuming, arguendo, that the break room was part of the TWA premises, thus arguably related to Drewes’ employment, there is no evidence that her fall was caused by any characteristic or condition of the break room. Drewes inexplicably fell. She was no more likely to fall in the break room during her lunch break than in her “normal nonemployment life.” Section 287.020.3(2). Because Drewes’ injury resulted from “a hazard or risk unrelated to the employment,” it cannot be deemed to have arisen “out of and in the course of employment.” The injury, therefore, is not compensable under Missouri’s workers’ compensation law.

984 S.W.2d at 516 (Covington, J. dissenting). Similarly, in the instant case, Claimant was no more likely to break his foot at work than at home.

### **Strict Construction of Statutes Required**

Section 287.800 RSMo Cum Supp. 2005, requires that the provisions of the Workers’ Compensation Law be construed strictly. Giving a strict construction to § 287.020.3(2)(b), RSMo Cum. Supp. 2005, and § 287.020.10, RSMo Cum Supp. 2005, Claimant’s injury is not compensable.

### **Work Was Merely A Triggering or Precipitating Factor**

Finally, “An injury is not compensable because work was a triggering or precipitating factor.” §287.020.2, RSMo

Cum Supp. 2005. The 2005 amendment to this statute removed the word “merely.” Based on all the evidence, I conclude that work was a triggering or precipitating factor; nothing more. For that reason also, compensation is denied.

Date: March 7, 2007

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Patricia “Pat” Secrest  
Patricia “Pat” Secrest  
*Director*  
*Division of Workers' Compensation*

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[1] SB1 & SB130, Truly Agreed and Finally Passed

[2] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1041 (3d ed. 1971).

[3] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2432 (3d ed. 1971).

[4] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 767 (3d ed. 1971).

[5] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 802 (3d ed. 1971).

[6] Comparison of employee's work-related exposure to a hazard or risk against the exposure to the same hazard or risk of workers in general in their nonemployment life.

[7] “Deem” means, “to consider, think, or judge.” BLACK'S LAW DICTIONARY 446 (8<sup>th</sup> ed. 2004).

[8] Insurer's August 8, 2006, letter to employee stated insurer's basis for rejecting employee's claim: “It seems that work is not the prevailing factor in regards to your injury.” Claimant's Exhibit B.