

Dependents: N/A Before the
Division of Workers'
Employer: Dierbergs **Compensation**
Department of Labor and Industrial
Additional Party: N/A Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured
Hearing Date: June 7, 2004 Checked by: KOB:tr

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: March 5, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 driving from home to work when she was involved in a rear end collision.
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Piera King Injury No.: 02-146941

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$215.66
19. Weekly compensation rate: \$187.68 / \$143.77
19. Method wages computation: Statutory calculation

COMPENSATION PAYABLE

21. Amount of compensation payable: \$0
22. Second Injury Fund liability: No

TOTAL: \$0

23. Future requirements awarded: None.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Piera King	Injury No.: 02-146941
Dependents:	N/A	Before the
Employer:	Dierbergs	Division of Workers'
Additional Party:	N/A	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: KOB:tr

PRELIMINARIES

The matter of Piera "Patty" King ("Claimant") proceeded to hearing on June 7, 2004 to determine whether Claimant's motor vehicle accident arose out of and in the course of her employment with Dierbergs ("Employer"). Attorney Robert Merlin represented Claimant. Attorney Karen Mulroy represented Employer, which is self-insured. The Second Injury Fund was not a party to the claim.

The parties agreed that on March 5, 2002, Claimant was in a motor vehicle accident while on her way to a training session at Employer's corporate headquarters in Chesterfield, Missouri. Coverage of the Act, employment, venue, notice, and timeliness of the claim were not at issue. Employer paid no benefits.

The issues to be determined are:

1. Did Claimant's motor vehicle accident arise out of and in the course of her employment;
2. What is Claimant's appropriate rate of compensation;
3. Is Employer liable for past medical benefits and, if so, in what amount;
4. Is Claimant entitled to temporary total disability benefits from March 6 through March 24, 2002;
5. What is the nature and extent of Claimant's permanent partial disability; and
6. Is Employer liable for attorney's fees pursuant to §287.560?

The parties also agreed that there was a third party settlement associated with Claimant's March 5, 2002 motor vehicle accident. The total amount of the settlement was \$10,000.00, from which attorney's fees of \$3,333.33 and expenses of \$293.12 was deducted.

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SUMMARY OF THE EVIDENCE

Claimant lives in Shrewsbury, and since 1997, has worked at the Mackenzie Point Dierbergs store as a part-time cashier. She did not work as a cashier anywhere else. She earned \$9.60 per hour and worked a varying schedule of 20 hours per week^[1]. As a cashier, Claimant scans merchandise, bags groceries, and often engages in heavy lifting.

As part of her job as a cashier, Employer required Claimant to attend occasional training meetings at the corporate headquarters in Chesterfield. Training, as Claimant testified, was "part of her job as a cashier." She went to headquarters "a handful of times" over the years to learn about new technology and attend training meetings. She learned of the meetings when her schedule was posted, and received her regular hourly pay for attending the meetings. The meetings were considered mandatory. Claimant did not receive mileage reimbursement for her travel time to work, or to corporate headquarters.

On March 5, 2002, Claimant was scheduled to attend a 7:00 p.m. meeting at the corporate headquarters in Chesterfield to learn a new system. Claimant did not work at her regular store that day, so she left from home to begin her travel to Chesterfield. Claimant's regular route called for her to leave from her home and travel to Shrewsbury, which became Laclede Station, and ultimately became Hanley Road. On this occasion, Claimant stopped at her store on Watson to pick up Kim, a co-worker who worked a shift at the store and was scheduled to attend the same meeting. Picking up Kim did not cause her to deviate from the route she would have taken.

At the intersection of Hanley and Dale, Claimant stopped at the red light and engaged in a conversation with Kim waiting for the light to change. Suddenly, a car that failed to stop struck her vehicle, throwing her into the front of the car, knocking off her glasses, and causing her knee to hit the dashboard. Then, Claimant was thrown backwards in a whipping motion and struck her head on the headrest. The vehicle was rendered undriveable and ultimately totaled.

Initially, Claimant refused hospital treatment at the scene, thinking she could take care of it herself. A co-worker named Jason responded to Kim's call for assistance and took Claimant home. Once at home, Claimant realized she needed medical treatment, so her husband called a cab and she went to St. Mary's Hospital, where she had tests and was diagnosed with neck and back strains. The bill from St. Mary's was approximately \$500.00.

Three days later, Claimant went to see Dr. Droege, a chiropractor, because her pain was getting unbearable. The conservative treatment that Dr. Droege provided her neck, shoulder and back "worked wonders". Claimant underwent eight weeks of treatment through May of 2002, and then returned to work in her regular capacity. Dr. Droege told her to return if needed, and to do home exercises. Claimant had no new injuries and continued to work, but did return to Dr. Droege in the fall of that year for more treatment, which helped. The bill from Dr. Droege totaled approximately \$4,000.00.

Currently, Claimant's neck, back and shoulders still hurt, especially after standing on her feet for a full eight-hour shift. She has given up her former hobby of bowling, and has limited her gardening to minutes at a time. It is difficult for her to do her job sometimes, and she tries to avoid any lifting by asking for help with heavy items.

Carol Schone has been the training manager at Dierbergs' corporate office in Chesterfield for nine years. She is in charge of developing and scheduling all training needs of the corporation. Ms. Schone confirmed that mileage to and from home is not paid to associates when they are attending training sessions. Training time is paid at the hourly rate based on attendance established by a sign in sheet. The corporate offices contain support facilities for the Dierbergs grocery stores, and the only reason for a checker to be at headquarters is to attend training.

FINDINGS OF FACT AND RULINGS OF LAW

Claimant seeks benefits for an accident that occurred soon after she left home to attend a special training session at the corporate headquarters. A claimant must demonstrate that her injury was caused by an accident "arising out of" and "in the course of her employment" in order to receive workers' compensation benefits. §287.120.1, RSMo 2000. In determining whether an injury arises out of and in the course of employment, the particular facts and circumstances of each case are considered. *Wamhoff v. Wagner Elec. Corp.*, 354 Mo. 711, 190 S.W.2d 915, 917 (1945).

In general, "an employee does not suffer injury arising out of and in the course of employment if the employee is injured while going or journeying to or returning from the place of employment." *McClain v. Welsh Co.*, 748 S.W.2d 720, 724 (Mo.App. E.D. 1988). Going to or returning from employment is one of those essential conditions of employment that every worker must present oneself to perform duties at the assigned location for which he was hired and depart therefrom when the work day is ended. *Id.* Going to or returning from employment is a personal act, akin to dressing, grooming and presenting oneself for work. *Person v. Scullin Steel Company*, 523 S.W.2d 801, 806 (Mo.App. 1975); *Kunce v. Junge Baking Company*, 432 S.W.2d 603, 606 (Mo.App. 1968); *Downs v. Durbin Corporation*, 416 S.W.2d 243, 246 (Mo.App. 1967); *Garbo v. P.M. Bruner Granitoid Co.*, 249 S.W.2d 477, 479 (Mo.App. 1952); *Koder v. Tough*, 247 S.W.2d 876 (Mo.App. 1952); *Cox v. Copeland Bros. Const.*

Co., 589 S.W.2d 55, 57 (Mo.App.1979); *Garrett, supra*, 600 S.W.2d at 519; *Baldrige v. Inter-River Drainage District of Missouri*, 645 S.W.2d 139 (Mo.App.1982); 82 Am.Jur.2d, *Workmen's Compensation*, § 255 at 43 (1976); *annot.*, 50 A.L.R.2d 366 (1956). In other words, a trip to or from one's place of work is merely an inevitable circumstance with which every employee is confronted and which ordinarily bears no immediate relation to the actual services to be performed. *McClain at 725*. The employer usually controls neither the place of residence chosen by the employee nor his mode of transport and the employer therefore plays no part in the relative extent of the risk incurred by the employee in traveling to and from work. *Garrett at 519*.

However, there are multiple exceptions to this general rule. The "special task" exception holds that the general coming/going rule is not applicable where the employee during that period performs a special task, service or errand in connection with his employment. *Daniels v. Krey Packing Company*, 346 S.W.2d 78, 83-84 (Mo. 1961). See also, *Cowick v. Gibbs Beauty Supplies*, 430 S.W.2d 626 (Mo.App. 1968). The "mutual benefit" doctrine states "an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee, is compensable when some advantage to the employer results from the employee's conduct." *Brenneisen v. Leach's Standard Service Station*, 806 S.W.2d 443, 448 (Mo.App. E.D.1991). The "dual purpose" doctrine holds: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. *Cox v. Copeland Bros. Const. Co.*, 589 S.W.2d 55, 57 (Mo.App. W.D.1979). Further exceptions include: (1) the "conveyance exception" where the employer furnishes the employee with a vehicle or the employee uses his own vehicle and the employer pays expenses on it when used for business purposes. *Sanderson v. Producers Commission Ass'n*, 360 Mo. 571, 229 S.W.2d 563 (1950); (2) the "special task" exception whereby the employee performs a special task, service or errand in connection with his employment. *Delozier v. Munlake Const Co.*, 657 S.W.2d 53 (Mo.App. S.D.1983); *Daniels v. Krey Packing Company*, 346 S.W.2d 78, 83-84 (Mo. 1961); 1 A. Larson's *Workmen's Compensation Law*, § 16.10; (3) the exception which authorizes compensation where the duties of the employee entail travel away from the employer's business to obtain parts or supplies for employer. *Baldrige at 140*; *Miller v. Sleight & Hellmuth Ink Co.*, 436 S.W.2d 625, 628 (Mo. 1969); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952-53 (1940); 1 A. Larson, *supra*, § 25.00 (1979).

As with all "arising out of and in the course of employment" cases, the unique facts of this case control the outcome. An important step in cases of employment-related injuries is to scrutinize the factual setting to determine whether there is a direct and positive causal connection between the employment and the injury. *Hilton v. Pizza Hut*, 892 S.W.2d 625, 634 (Mo.App. W.D.1994)(overruled on other grounds) citing *Snowbarger v. Tri-County Elec. Coop.*, 793 S.W.2d 348, 349-50 (Mo. 1990) and cases cited therein.

I find the following facts, which determine the outcome of this case: Claimant's job as a cashier at the McKenzie Point store required her to occasionally attend training sessions at Employer's corporate headquarters in Chesterfield. At the March 5, 2002 training session, Claimant was to learn a new system, which was essential to her job. Claimant received her assignment to attend the training session as she received all her job assignments, with the posting of her weekly schedule. Each week, Claimant's schedule varied. Claimant was not paid for her mileage or travel time, but only received her regular pay for the time she spent at the meeting. When Claimant's vehicle was struck from behind at the intersection of Hanley and Dale, she was on her way from home to the assigned work location for the day – the Chesterfield headquarters. She did not receive any pay until she signed in at the training session, where she would have been paid for the time spent in the training session only. Employer did not pay her for mileage or direct her method or means of transportation.

Based on these findings of fact, the record as a whole, and the applicable Missouri Law outlined above, I find that Claimant's automobile accident did not arise out of and in the course of her employment. The facts establish that her case falls within the general rule – that an employee does not suffer injury arising out of and in the course of employment if the employee is injured while going or journeying to or returning from the place of employment – and not within any of the varied exceptions to the rule. Claimant was on her way from her home to the assigned location for the day. While Chesterfield was not her usual location, it was a remote location where she was occasionally expected to appear to gain essential job skills. Had she reported as scheduled, it would have been the first time she presented herself for work – unlike Kim, who was essentially working a "spilt-shift" and had already worked at the McKenzie Point location before she left there to travel to Chesterfield.

I find that the "mutual benefit" doctrine does not apply under these circumstances. It is an essential condition of employment for an employee to present herself at the appointed time and place to start her shift, a personal act akin to dressing and grooming. The benefit to employer for an act so essential in each employment relationship cannot trigger the exception without destroying the rule. Furthermore, the fact that Claimant voluntarily shared her ride to work with a co-worker does not generate a benefit to Employer beyond assisting the co-worker to present herself at work. Employer did not control or influence the driving arrangement. Simply, the act of driving to work, or freely driving a co-worker to work,

does not confer a benefit to employer to activate the “mutual benefit” exception.

Apart from the mutual benefit doctrine, the recognized exception that most closely matches the instant facts is the "journey" exception, which authorizes compensation when an injury suffered by the employee occurs while the employee is traveling for the employer. The journey exception generally applies where the employer, because of the distance to the job site or for the convenience of the employer, furnishes the employee's transportation, compensates him for the use of his vehicle, or pays him for travel time. *Reneau v. Bales Electric Company*, 303 S.W.2d 75 (Mo.1957)(Employer provided travel expenses); *Griffin v. Doss*, 411 S.W.2d 649 (Mo.App.1967)(ride to job was a “fringe benefit”); *Ellis v. Western Elec. Co.*, 664 S.W.2d 639 (Mo.App. S.D. 1984)(Employee received a per diem). *But see, Garrett v. Industrial Commission*, 600 S.W.2d 516, 519 (Mo.App.1980)(Purpose of traveling employee’s late night drive unexplained); *Garbo v. P.M. Bruner Granitoid Co.*, 249 S.W.2d 477, 479-480 (Mo.App.1952)(Where employer paid for one round trip from home to remote job cite and living expenses during the week, employee injured on mid-week trip home was not entitled to compensation). The key in to applying the “journey” exception is that the employer provides some sort of compensation for the journey from home to the work cite.

No Missouri case appears to have substantially similar facts. A review of *Larson’s Workers’ Compensation Law* revealed two cases from other jurisdictions with similar fact patterns. In *Davis v. Workmen’s Comp. App. Bd*, 41 Pa. Commw. 262, 398 A.2d 1105 (1979), the employee was a pharmacist who normally worked at the drug store closest to his home, but knew he would occasionally be assigned to stores further away. He had worked away from his “home store” only five times in the previous eighteen months. He worked one day at a more remote store, and was returning home when he had a fatal accident. Larson’s indicated: “Benefits were denied, as the claimant failed to bring the case within any of the exceptions to the “going and coming” rule.” In *Flanders v. Hoy*, 326 A.2d 493 (Pa. Super. 1974), Flanders and Hoy were injured while driving to a seminar required by their employer, located a substantial distance from their workplace. In finding the matter subject to workers’ compensation law, the court applied the special errand rule because: 1) the distance to the seminar was almost 50 times longer than the regular commute; 2) the driver was paid mileage; and 3) both employees were paid the hourly wage during the trip. Unlike *Flanders*, Claimant received no compensation for her journey, which makes her case more like *Davis*.

The “coming and going” rule is well established in Missouri, and the exceptions, while numerous, are well defined. The particular facts of this case do not fall within any exception, leaving the general rule to apply to Claimant’s detriment.

CONCLUSION

I find that Claimant was injured on her way from home to work, and that her journey did not fall within any of the exceptions to the rule that traveling to and from work does not arise out of and in the course of employment. Her injury did not arise out of and in the course of her employment. All other issues are moot. Claimant is not entitled to workers’ compensation benefits.

Date: _____ Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation

[1] Claimant testified she earned \$9.60 per hour, but she has no reason to dispute Employer's Exhibit 2, which includes a one-time referral or hiring bonus. Applying the statutory calculation and excluding the bonus, the data in Exhibit 2 reveals an average weekly wage of \$215.66.

[2] Claimant conceded in her post-trial brief that the mutual benefit doctrine did not apply.