

TEMPORARY AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 04-024253

Employee: Timothy Miles
Employer: Lear Corporation
Insurer: Zurich North America Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: February 19, 2004
Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, heard oral argument and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 16, 2007, with this supplemental opinion. The award and decision of Administrative Law Judge Grant C. Gorman, issued January 16, 2007, is attached and incorporated by this reference.

We offer this supplemental opinion to explain in some detail our agreement with the conclusions of the administrative law judge.

The facts of the case, as accurately recounted by the administrative law judge in his award, are not disputed by the parties, and will not be repeated unless necessary. The issues for determination are as follows: whether or not employee sustained an injury due to an accident arising out of and in the course of his employment; and, if so, whether or not employee's participation in a voluntary recreational activity was the proximate cause of the injury, resulting in a forfeiture of benefits or compensation.

Section 287.120.1 RSMo 2000 and § 287.120.7 RSMo 2000, are the two controlling statutes concerning the issues to be determined.

As of the date of the accident, February 19, 2004, § 287.120.1 RSMo, stated, in pertinent part as follows:

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

Section 287.120.7 RSMo, as of the date of the accident, February 19, 2004, provided as follows:

Where the employee's participation in a voluntary recreational activity or program is the proximate cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:

- (a) The employee was directly ordered by the employer to participate in such recreational

activity or program;

(b) The employee was paid wages or travel expenses while participating in such recreational activity or program; or

(c) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition.

Section 287.120.1 RSMo, in general, requires an employer to furnish an employee compensation for injury due to an accident arising out of and in the course of the employee's employment. However, § 287.120.7 RSMo, states that benefits or compensation otherwise payable (emphasis added) shall be forfeited where the employee's participation in a recreational activity is the proximate cause of the injury. But, the forfeiture of benefits or compensation shall not apply when: (a) the employee was directly ordered by the employer to participate in such recreational activities; (b) the employee was paid wages or travel expenses while participating in such recreational activities; or (c) the injury from such recreational activity occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity and of the unsafe condition of the premises and failed to either curtail the recreational activity or cure the unsafe condition.

Construing these two statutory sections together, and emphasizing the language contained in § 287.120.7 RSMo, of "otherwise payable", the Commission is of the opinion that these type cases require a two step approach: (1) prior to applying the forfeiture provision of § 287.120.7 RSMo, the Commission must initially determine there was an injury due to an accident arising out of and in the course of employment, i.e., "benefits or compensation otherwise payable under this chapter"; and (2) subsequent to a determination that the employee sustained an injury due to an accident arising out of and in the course of his employment, the Commission reviews the forfeiture provisions contained in § 287.120.7 RSMo, as well as the statutory exceptions contained in the same provision.

A summary of the pertinent facts are as follows: as of the date of the accident, February 19, 2004, employee was a member of UAW Local 282, and a collective bargaining agreement was in effect between employer and UAW Local 282; the collective bargaining agreement provided that all employees were to receive two fifteen minute breaks each work shift, which are paid breaks; employer provided a break area outside the production facility and employees were free to use it; in this break area was located a basketball goal which employees were free to use; employees frequently played basketball on this court during paid breaks; supervisors would also participate in the basketball games; employees were prohibited from leaving the plant during the 15 minute paid breaks; employees were required to remain on the premises during the paid 15 minute breaks in order to get the production line restarted in a timely manner; employer did not direct employees on their individual breaks; employees were free to use their time as they so desired; employee was injured while playing basketball during his first 15 minute paid break on February 19, 2004.

Based on the facts presented, and relying on the case of *Seiber v. Moog Automotive, Inc.*, 773 S.W.2d 161 (Mo. App. 1989), the Commission finds the employee sustained an injury due to an accident arising out of and in the course of his employment. The injury occurred on the employer's premises; the injury occurred during a compensated 15 minute break pursuant to a collective bargaining agreement; employee was required to remain on the premises during the 15 minute compensated break; the playing of basketball during the 15 minute compensated breaks occurred regularly with the knowledge and approval of the employer; and due to the employer's acquiescence, the playing of basketball had become a regular incident to the employee's employment. As stated by the appellate court in *Seiber, supra*,

an injury sustained by an employee during a lunch hour recreational activity on the employer's premises is compensable where the employer has acquiesced to the activity to the extent that the activity has become a regular incident of employment. . . . Although the activity was unsupervised, it occurred regularly with the knowledge and approval of employer. The employer acquiesced, therefore playing basketball became a regular incident to employee's employment.

Accordingly, finding that the injury was due to an accident arising out of and in the course of employment, i.e., benefits or compensation are otherwise payable under this chapter, the Commission now must determine whether

or not § 287.120.7 RSMo, necessitates a forfeiture of benefits or compensation.

The Commission finds the proximate cause of the injury was due to employee's participation in a voluntary recreational activity. There is no evidence contra to this finding nor does employer make any such assertion.

Section 287.120.7 RSMo, requires benefits or compensation to be forfeited where the employee's participation in a voluntary recreational activity is the proximate cause of the injury, unless one of three exceptions exists: (a) the employee was directly ordered by the employer to participate in such recreational activity or program; (b) the employee was paid wages or travel expenses while participating in such recreational activity or program; or (c) the injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity and of the unsafe condition of the premises and failed to either curtail the recreational activity or cure the unsafe condition.

There was no evidence to support a conclusion that the exceptions provided in § 287.120.7(a) RSMo or § 287.120.7(c) RSMo were proven.

Section 287.120.7(b) RSMo, provides: "the forfeiture of benefits or compensation shall not apply when: (b) the employee was paid wages or travel expenses while participating in such recreational activity or program;"

In the instant case, the employee was paid wages while participating in the recreational activity at the time he was injured. There is no evidence contra.

Applying the plain meaning to this statutory language, the Commission must conclude that the forfeiture of benefits shall not apply.

Employer contends that the case of *Wilson v. Monsanto Co.*, 926 S.W.2d 48 (Mo. App. E.D. 1996) is dispositive and requires the Commission to reverse the award of the administrative law judge contending *Wilson, supra*, rejects the notion that an injury occurring during recreational activity is compensable simply because an employee was on a paid break while participating in a recreational activity.

However, the Commission is cognizant of the *Wilson* case, but does not agree with the interpretation contended by the employer.

The appellate court in the *Wilson* case, *supra*, stated as follows:

examining the pre—1990 case law, we find no case where an employee was compensated for an off-premises recreational injury simply because he was being paid when it occurred. Despite this, employee maintains employer is liable under § 287.120.7(b) because he was paid wages while engaging in a voluntary recreational activity.

The Commission does not interpret the holding in the *Wilson* case, *supra*, as contended by employer. The Commission is of the opinion that the appellate court simply found in the two-step analysis, that step one was not determined favorably for the injured employee. The appellate court found that the employee injured in the *Wilson* case, *supra*, did not sustain an injury due to an accident arising out of and in the course of his employment.

The appellate court found that the injuries sustained by the employee in the *Wilson* case, *supra*, did not arise out of and in the course of employment, since work did not create necessity of travel, employer neither required nor requested such activity, and employee was not on an errand for employer or serving any other purpose for employer when the injury occurred. Since the first step was decided unfavorably for the employee, the appellate court did not address the forfeiture provision of § 287.120.7 RSMo.

In summary, the Commission finds that the employee sustained an injury due to an accident arising out of and in the course of his employment; the employee's participation in a voluntary recreational activity was the proximate cause of the injury; but the forfeiture of benefits shall not apply since the employee was paid wages while participating in the recreational activity causing the injury.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 22nd day of June 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Timothy Miles

Injury No. 04-024253

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Lear Corporation

Additional Party: Second Injury Fund (Open)

Insurer: Zurich North America

Hearing Date: October 13, 2006

Checked by: GCG/bfb

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? Yes
3. Was there an accident or incident of occupational disease under the Law?
No
4. Date of accident or onset of occupational disease: February 19, 2004

5. State location where accident occurred or occupational disease contracted: St. Charles 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?
Yes
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 happened or occupational disease contracted:
Employee playing basketball on paid break
12. Did accident or occupational disease cause death? No Date of death?
N/A
13. Parts of body injured by accident or occupational disease: left lower extremity
14. Compensation paid to-date for temporary disability: Undetermined
15. Value necessary medical aid paid to date by employer/insurer? None
16. Value necessary medical aid not furnished by employer/insurer? Undetermined

Employee: Timothy Miles

Injury No. 04-024253

17. Employee's average weekly wages: Undetermined
18. Weekly compensation rate: Undetermined
19. Method wages computation: N/A

COMPENSATION PAYABLE

20. Amount of compensation payable: Undetermined

Unpaid medical expenses: Undetermined

Undetermined number of weeks of temporary total disability (or temporary partial disability)

TOTAL: N/A

This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Matthew J. Sauter.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy Miles

Injury No: 04-024253

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Lear Corporation

Additional Party Second Injury Fund (Open)

Insurer: Zurich North America

Checked by: GCG/bfb

INTRODUCTION

The above styled case was heard by the undersigned Administrative Law Judge on October 13, 2006 in the St. Charles office of the Missouri Division of Workers' Compensation. Claimant Timothy Miles (Claimant) appeared in person and was represented by Matthew J. Sauter. Employer Lear Corporation (Employer) and its Insurer Zurich North America were represented by Tim Tierney. The Second Injury Fund (SIF) was represented by Assistant Attorney General Barbara Toepke, who was not present by agreement of all parties to leave SIF liability open.

The parties made the following stipulations: Claimant was injured on February 19, 2004 on Employer's premises located in St. Charles County, Missouri; Claimant was an employee of Employer; venue is proper in St. Charles County, Missouri; Employer received proper notice of injury; the claim was timely filed; Employer has not paid any benefits to date.

The only issue for determination at hearing was whether the injury arose out of and in the course of employment, or in other words, if this was a compensable injury. The parties, through counsel, indicated that all other issues in dispute could be resolved if a determination of liability was made by the Administrative Law Judge.

SUMMARY OF THE EVIDENCE

Claimant testified in person at hearing. Claimant also called Lee Holmes as a witness at hearing. In addition to the testimony elicited at hearing, Claimant offered the following exhibits:

Exhibit A: Agreement between Lear Corporation and UAW Local 282.

Exhibit B: Photograph.

Exhibit C: Photograph.

Exhibit D: Photograph.

Exhibit E: Photograph.

Exhibit F: Deposition of Doug Dillon.

Exhibit G: Deposition of Willie Buchanan.

Exhibit H: Deposition of Juan Morales.

Exhibits A, F, G and H were received into evidence without objection. Exhibits B, C, D and E were received into evidence over Employer's objection. Said exhibits are pictures of the area of Employer's premise where the injury occurred. The objection posed was that it had not been disclosed who took the pictures, when the pictures were taken, and if the photographer had permission from Employer to take the pictures. Employer offered no legal authority to support its objection that a picture is not admissible under these circumstances if the proper foundational testimony that the pictures accurately represent the scene of the occurrence is elicited.

Doug Sherwin testified at hearing on behalf of Employer. In addition to the testimony elicited at hearing, Employer offered the following Exhibits:

Exhibit 1: Deposition of Chad Willis.

Exhibit 2: Deposition of Kenny Debold.

Certain Exhibits offered into evidence contained additional handwritten markings, underlining and/or highlighting on portions of the documents. Any extraneous markings on the exhibits were present when they were offered by the parties. Further, any such notes, markings and/or highlights were ignored by the undersigned ALJ in reaching any decisions made in this case. Additionally, Exhibit A had a page marked by a yellow post-it note when offered into evidence; the page marker was left in place by the undersigned ALJ.

FINDINGS OF FACT AND RULINGS OF LAW

The witnesses who testified at hearing were pleasant and credible. Only facts which are pertinent to the rulings made herein are discussed. The facts elicited through both live and deposition testimony which are relevant to the issue on which this case is decided are virtually undisputed. Claimant has been employed by Employer since February of 2000. On February 19, 2004 he was working in Employer's plant in Wentzville, Missouri. At that time, Claimant was working first shift, which was from approximately 6:30 am to 2:30 pm. Claimant is a union employee. Claimant's employment is subject to the provisions of the contract between the union and Employer. (Exhibit A). The provisions of the contract provide that employees, including Claimant are to receive two fifteen minute breaks each work shift, which are paid breaks. They also receive a thirty minute lunch break which is not paid.

There is a break area outside of the production facility. Employees are free to use this area during their breaks, both paid and unpaid. The area is paved, and in this area there was, on the date of Claimant's injury, a pole with a basketball hoop and net. There was also a free-throw line and a 3-point goal line painted on the pavement in yellow paint around the basketball goal.

None of the witnesses testified to having direct knowledge of who erected the basketball goal or painted the lines on the pavement, but it was believed to have been there when Lear acquired the facility from General Motors. There was also no direct testimony regarding the origin of the basketballs used to play on the court, however, Lee Holmes testified at hearing that the employees did not have to bring their own balls, but that they were provided by Employer. Chad Willis testified in his deposition that the hourly employees brought the basketballs and left them at the plant. None of the hourly employees testified to bringing basketballs. It is unclear from the testimony if the balls were left from the time General Motors operated the facility, if Lear had purchased them, or if they were brought by employees.

The uncontradicted testimony of several witnesses established that the union employees frequently played basketball on this court during their paid breaks. Sometimes supervisors would also play during the breaks. Claimant testified that he recalled seeing Chad Willis and Nelson Wright, both supervisors, playing basketball on the court. He identified two other supervisors he could only name by first name, Aaron and Adrian, that also played basketball during breaks. Chad Willis in fact testified in his deposition that he was a salaried supervisor, and that he did play basketball with the hourly employees on the court. (Ex .1, p.16).

Employees are prohibited from leaving the plant during their 15 minute paid breaks, but may leave the plant during the 30 minute lunch break if they "clock out." Employees are required to stay on the premises during the paid 15 minute break in order to get the production line started again in a timely manner at the conclusion of the break period. The facility produces seats for General Motors vehicles. On occasion, employees are asked to work through their breaks if it is deemed necessary to match the production at the General Motors production plant in Wentzville. Employees can decline to work through the break when requested by management. There are no repercussions for declining to work through the breaks. In general, Employer does not direct what employees do while on their breaks. They are free to read, sleep, eat, etc., but they could also play basketball on the court provided by Employer in the outside break area. Immediately after the injury to Claimant, the basketball goal was removed.

On February 19, 2004, Claimant was playing basketball during the first 15 minute paid break of the day. He was playing with several other employees who play quite often during the breaks. Claimant slipped and fell, and sustained the injuries which are the subject of this claim. The nature and extent of the injuries is undetermined at this time as no medical evidence was presented at this hearing, as that issue was left open for determination. Employer's witness Doug Sherwin, the plant manager, testified that he began working at the Lear facility in Wentzville in late November of 2003, and that due to winter weather conditions, this was the first time that he knew of that the basketball court had been used during his tenure as plant manager.

ANALYSIS

It must be determined then if Claimant's injury arose out of and in the course of employment. It is axiomatic that the employee bears the burden of proving all elements of his claim for compensation, including whether his injury arose out of and in the course of his employment. **Duncan v. Springfield R-12 School District**, 897 S.W.2d 108, 114 (Mo.App. 1995). The quantum of proof is reasonable probability. While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." **Sanderson v. Porta-Fab Corp.**, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing **Cook v. Sunnen Prods. Corp.**, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

Section 287.120.7 RSMo. addresses injuries sustained while engaging in voluntary recreational activities. Section 287 RSMo. underwent significant changes through legislative amendments which took effect August 28, 2005. Therefore, it must be determined which law applies to injuries sustained prior to August 28, 2005. Article I, §13 of the Missouri Constitution provides: That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be enacted.

There are two exceptions to the rule that a statute shall not be applied retrospectively. First, where the statute is only procedural and does not affect any substantive right of the parties and, second, where the legislature manifests a clear intent for retrospective application. **Gershman Investment Corp. v. Duckett Creek Sewer Dist.**, 851 S.W.2d 765 (Mo.App.1993). Section 287, as amended, does not contain a manifestation of legislative intent for retroactive application. Therefore, for any provision of §287 to apply retroactively, it must only be procedural in scope, as the retroactive application of statutory provisions which affects substantive rights violates the constitution. **Fletcher v. Second Injury Fund**, 922 S.W.2d 402, 406 (Mo.App.1996).

The distinction between substantive and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used to effect the suit. **Wilkes v. Missouri Highway and Transp. Com'n**, 762 S.W.2d 27, (Mo. banc 1988). Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty. **Brennecka v. Director of Revenue**, 855 S.W.2d 509, 511 (Mo.App.1993).

As §287.120.7 relates to the compensability of an injury, and is not limited to the machinery used to effect the suit itself, it is substantive law. Therefore, the controlling statutory authority for Claimant's injury is the statute as it existed on February 19, 2004. At the relevant time §287.120.7 stated:

7. Where the employee's participation in a voluntary recreational activity or program is the proximate cause of the injury, benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited regardless that employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. The forfeiture of benefits or compensation shall not apply when:
 - (a) The employee was directly ordered by the employer to participate in such recreational activity or program;
 - (b) The employee was paid wages or travel expenses while participating in such recreational

activity or program; or

(c) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises

and failed to either curtail the recreational activity or program or cure the unsafe condition. ^[1]

Section 287.120.7 generally denied compensation when participation in a voluntary recreational activity was the proximate cause of an injury. It did, however, create certain exceptions to the general rule. One such exception is if the employee is paid wages or travel expenses while participating in the recreational activity.

The exception contained in §287.120.7(b) applies to Claimant's injury. Playing basketball during the 15 minute breaks is a recreational activity. The testimony offered by both parties demonstrates that Claimant's participation was voluntary. Claimant was not directed to play basketball, nor was he even encouraged to do so. The evidence is also undisputed that Claimant was paid during the 15 minute break in which he was injured. Therefore, Claimant's injury occurred while he was participating in a voluntary recreational activity and was paid wages while so participating.

Employer, in its argument submitted to this court, offered a number of cases to support its position that the injury is not compensable. This authority was considered very carefully in making a determination in this case. The cases submitted, while somewhat similar in nature, are factually distinct from the instant case, and these distinctions are the basis for a dissimilar result.

In **Wilson v. Monsanto**, 926 S.W.2d 48 (Mo.App.E.D.1996), the employee had two 15 minute paid breaks and one 30 minute unpaid lunch break each day, just like Lear employees in the instant case. However, Mr. Wilson chose to combine the breaks into a one hour period which he used at lunch, and would ride his bike off the premises of Monsanto. Mr. Wilson was struck by a motor vehicle while cycling during his break. The instant case is factually distinguishable from **Wilson**. Monsanto did not provide the bicycle for use, Wilson was not required to remain on the premises, Wilson indeed left the premises, and it was a singular activity for Wilson, no other employees, not to mention members of management participated in the activity.

Further, in **Wilson**, the court relied on the decision in **Bell v. Arthur's Fashions**, 858 S.W.2d 760 (Mo.App.E.D.1993). Bell left the business during a 15 minute paid break to walk to a nearby store and buy a soda. Bell fell at the store and sustained injury. The court in **Wilson** found the fact situation in **Bell** to be analogous to **Wilson**, stating that Bell "while on a paid break, where she was unrestricted as to where she could go while on that break, was not performing special task or duty for her employer. Her presence was not required at the place where she fell and it was a place where the employer had no control over the premises." **Bell** at 764 as cited in **Wilson** at 49.

Again, the factual differences distinguish **Bell** from the instant case. In the instant case, Claimant was not able to leave the premises. He was participating in a recreational activity that was, even though not mandated or even encouraged, provided by Employer. He was not acting on his own, but participating with other employees and even management at times. He was in a place where Employer had control of the premises, which was evidenced by the fact that the basketball goal was removed immediately after Claimant's injury.

Additionally, **Jones v. TWA**, 70 S.W.2d 468 (Mo.App.W.D.2002) was offered. In **Jones**, the claimant was injured while walking to a walking path provided by the employer which was on its premises. However, Jones was on an unpaid break, which on its face precludes application of §287.120.7(b), and therefore it is not applicable.

Claimant was on a break, and he was being paid during that break as part of the contract negotiated by his union. While it is true that he was not being paid to play basketball, §287.120.7(b) does not require that an employee be paid specifically for that activity, it only requires that he be paid while participating in the recreational activity. The logical extension of the argument that Claimant's injuries are not compensable because he was not being paid to play basketball would render §287.120.7(b) meaningless. Every employer would maintain that employees are paid for their work, and any recreational activity offered by an employer is outside the scope of employment, and that specific activity is not the reason employee received wages while participating. Such a result would frustrate the legislative intent of §287.120.7(b).

CONCLUSION

Based on the competent and substantial evidence presented in this case, pursuant to §287.120.7(b), the injury sustained by Claimant on February 19, 2004 arose out of and in the course of employment and is a compensable injury. All other issues are left open for future determination. Although no benefits are awarded

herein, attorney Matthew J. Sauter is granted a lien in the amount of 25% of any amounts which may be recovered in the future as a result of this award as and for attorney fees.

Date: January 16, 2007

Made by: /s/ GRANT C. GORMAN
GRANT C. GORMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret
Director
Division of Workers' Compensation

[\[1\]](#) Claimant presented evidence to proceed under both paragraphs (b) and (c), as the case was ultimately decided under paragraph (b), no evidence or analysis relating to paragraph (c) is contained herein.