

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

Injury No.: 05-098741

Employee: Mitchell Miller
Employer: Missouri Highway and Transportation Commission
Insurer: Self-Insured
Date of Accident: Alleged September 29, 2005
Place and County of Accident: Alleged Route N, Pike 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 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 22, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Ronald F. Harris, issued August 22, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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.

Introduction

Employee testified that as he walked briskly to move employer's truck to the next necessary location on the job site, he felt a popping sensation in his knee accompanied by immediate pain and stiffness. Dr. Haupt testified that employee's activity of walking briskly was the prevailing factor in causing employee's knee condition (including a suspected torn meniscus) and current need for treatment. The administrative law judge denied compensation.

Issues for Determination

The issue for determination as framed by the administrative law judge is "[w]hether Employee sustained a compensable injury by way of an accident arising out of and in the course of his employment on September 29, 2005." Of course, this issue is really many issues.

- Was employee the victim of an accident?
- Did the accident result in a personal injury?
- Did the accident result in a disability?
- Did the injury arise out of employment?
 - Was the accident the prevailing factor in causing the injury?
 - Did the injury 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?
- Was employee in the course of his employment when he suffered the injury?
- If the answers to the preceding questions are in the affirmative, do any provisions of Chapter 287 remove the claim from the realm of compensability?
 - Was the accident the prevailing factor in causing both the injury and the disability?
 - Did the injury result either directly or indirectly from an idiopathic cause?

Administrative Law Judge Award

Because the claimed injury occurred on September 29, 2005, the 2005 amendments to the Workers' Compensation Law (Law) apply.

The administrative law judge denied compensation for this claim on indistinct grounds. At some points, he seems to be addressing matters historically considered when determining whether an employee suffered an "accident." At other times, he discusses matters historically related to the "arising out of" determination.

The administrative law judge describes his analysis of the compensability of the claim.

Rather than focusing solely on the activity itself, one must carefully and thoughtfully examine the facts of each individual case in the context of how that activity interacts with the employment. Since prior case law has been abrogated, a logical common sense approach would be to examine if the incident or activity occurred while the individual was engaged in performing the necessary and required duties of the job in furtherance of the employer's business. While the employee certainly would have to get to his truck, whether

by walking or some other means, before being able to move the truck, under the facts of this case the activity of “walking” appears to be “incidental” to the employment.

Award p. 8.

The administrative law judge’s analysis is not derived from the statutory language he is bound to strictly apply. Rather, he based his ultimate conclusion on a word not defined by the Law – “incidental.”

“Incidental”, means “subordinate, nonessential or attendant in position or significance.” It has alternately been defined to mean “[s]ubordinate to something of greater importance; having a minor role.” To the extent the administrative law judge holds that injuries sustained by employees while engaged in necessary work activities are not compensable simply because other work activities are more important to the work by comparison, I vehemently disagree. This result is not mandated or even suggested by the plain language of the Law.

Effect of §287.020.10 RSMo.

The meaning of §287.020.10 RSMo has been the subject of much debate. That subsection 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.

In the majority of decisions applying the Law, as amended in 2005, the administrative law judge has offered a theory on the legislature’s intention in enacting the subsection. In the instant case, the administrative law judge theorized as follows:

During the 2005 legislative session, the legislature expressed its displeasure with what it perceived to be the expansion of the Act to such an extent that the focus on determining whether a case was compensable seemed to be whether the act was “incidental” to the employment, a doctrine that some refer to as “positional risk”, rather than whether the employee was actually engaged in performing the duties of employment.

...

By abrogating *Bennett*, *Kasl*, and *Drewes*, the legislature indicated in order for a case to be compensable under the Act it would require something more than simply being at the work place at the time of the incident.

Award p. 7.

The legislature did not state that it was abrogating the holdings in *Bennett*, *Kasl*, and *Drewes* for any specific purpose, such as to reject the positional risk doctrine. I will assume that the legislature was capable of saying the doctrine was rejected if that was the legislature’s intent.

Each of the named abrogated cases addressed more than one legal issue. The legislature did not identify any particular holding or doctrine it intended to reject *Bennett*, *Kasl*, and *Drewes*. Many practitioners and administrative law judges attempting to discern the meaning of the abrogation of *Bennett*, *Kasl*, and *Drewes*, including the administrative law judge and employer’s counsel in the instant case, seemingly have concluded that the abrogation was designed to specifically reinstate the unusual occurrence (slip, trip or abnormal strain) requirement for accidents which was disapproved by the Supreme Court in *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 781 (Mo. 1983). This conclusion is flawed.

First, it is illogical to conclude that the legislature specifically named *Bennett*, *Kasl*, and *Drewes*, to eliminate

a holding from *Wolfgeher*. It simply would have named *Wolfgeher*. Second, the legislature eliminated all cases interpreting “accident.” Among the abrogated cases is the line of cases establishing the unusual occurrence requirement in the first place, culminating in *State ex rel. Hussmann-Ligonier Co. v. Hughes*, 153 S.W.2d 40 (Mo. 1941). There is no more reason to assume the legislature intended to reinstate the pre-*Wolfgeher* requirement of an unusual occurrence to prove accident than there is to assume the legislature intended to reinstate the pre-*Hussman* position that no unusual occurrence is required to prove accident. We simply do not know what the legislature intended by specifically naming *Bennett*, *Kasl*, and *Drewes* and the administrative law judge erred when he concluded he knows.

In reality, the specific abrogation of *Bennett*, *Kasl*, and *Drewes* is much ado about nothing. Each of the phrases mentioned in §287.020.10 was significantly changed by the 2005 amendments to the Law. The legislature’s act of amending the definitions automatically rendered the old definitions inapplicable prospectively. Even in the absence of abrogation, the abrogated cases interpreting the old definitions would be of little value in applying the new definitions.

Legislative Elimination of the Employment Nexus

For example, the holdings in the *Bennett*, *Kasl*, and *Drewes* would be of no use in deciding the instant case because in each of the cases, the court had to determine whether claimant’s employment was a substantial factor in causing the injury. For reasons unknown, the legislature changed the threshold causation inquiry 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”).

The legislature did not stop there. The legislature stripped the Law of many other provisions demanding proof of a causal nexus between the employment and the injury. Section 287.020 RSMo (2000) 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.

It is little wonder that commissioners, administrative law judges, and practitioners alike are struggling to make sense of the Law. Before the changes to the Law, the meaning of the phrase “arising out of employment” was intuitive. We became conditioned to denying compensation for accidental injuries absent a showing that the employment somehow caused the injury.

Under this curious new Law, so long as a worker was injured in the course of employment, we need only find that the accident caused the injury to award compensation. The primary work connection that must be shown is that which appears in the definition of “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.” Section 287.020.2 RSMo. (Emphasis mine).

Compensability

Section 287.120.1 RSMo provides the basic right to compensation:

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.

“Accident” and “injury” are defined in §287.020 RSMo. The definition of each was modified by the 2005 changes to the Law.

Accident

See the statutory definition, *supra*. On September 29, 2005, while walking briskly to retrieve employer's truck, employee placed his foot on the surface of the ground, felt a pop on the inside back of his knee, and felt immediate pain.

Unexpected traumatic event

"Unexpected" means, "not expected: unlooked-for, unforeseen, surprising." The testimony of employee establishes that the sudden popping in employee's knee was unexpected. Even employer passionately argues that no evidence supports a finding that the condition of the pavement was uneven or hazardous such that employee should have foreseen a knee injury.

In its most prevalent usage, the phrase "traumatic event" is a psychiatric term of art referring to a psychological or emotional stressor giving rise to a mental disorder. See *Braswell v. Mo. State Highway Patrol*, 249 S.W.3d 293 (Mo.App. 2008), wherein this Commission used the phrase in just the manner I have described. See also American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* 463 (4th ed. 2000). If the legislature intended to use the words as a term of art, the Law covers very little indeed. I will look to the meanings of the words individually as set out in the dictionary to discern the legislature's meaning.

"Traumatic" means, "of, relating to, or resulting from trauma." "Trauma" means, "an injury or wound to a living body caused by the application of external force or violence." "External" means, "arising or acting from outside : having an outside origin <~ external force>" "Force" means, "an agency or influence (as a push or pull) that if applied to a free body results chiefly in an acceleration of the body and sometimes in elastic deformation and other effects (as from overcoming cohesion or adhesion or sustaining weight)" "Violence" means, "exertion of any physical force so as to injure or abuse (as in warfare or in effecting an entrance into a house). *Synonyms* see force."

"Event" means, "a noteworthy occurrence or happening: something worthy of remark: an unusual or significant development."

Employee testified he was walking briskly and when he stepped on the surface of the ground his knee popped. Dr. Haupt noted that by history employee was walking briskly. Dr. Haupt testified that the mechanism of injury in the instant case was walking briskly. Dr. Haupt testified that weight bearing activities can cause a tear in the meniscus. The testimony of Dr. Haupt establishes that walking is not a normal mechanism to cause internal derangement of the knee. Certainly, then, employee's knee injury (likely a meniscus tear) while walking briskly was a noteworthy occurrence and an unusual development.

Based upon the foregoing evidence, employee's knee injury (likely a meniscus tear) was caused by the striking of his lower extremity on the ground which was external to his body. Applying the dictionary definitions to the plain language of the statute, the event during which employee's knee popped was an unexpected traumatic event.

Identifiable by time and place of occurrence

On September 29, 2005, at approximately 10:30 a.m., employee briskly stepped on the roadway at employer's job site between the work area and employer's truck.

Producing at the time objective symptoms of an injury

Employee felt a popping sensation in his knee and felt immediate pain.

Caused by a specific event during a single work shift

Employee testified that he had no problems with his knee prior to the September 29, 2005, event and his knee pain began during the popping event.

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

Injury

Section 287.020.3 provides:

(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...

Dr. Haupt was selected by employer to perform an independent medical examination. Dr. Haupt's deposition and report were accepted into evidence. Dr. Haupt testified that employee's activity of walking briskly was the only factor of which he was aware contributing to employee's knee injury, thus he concluded employee's activity of walking was the prevailing factor in causing employee's knee injury. Dr. Haupt stated his understanding of the meaning of "prevailing factor" as "[O]f all the other issues that are out there...it is the major cause of the process." This meaning is in line with a conservative reading of the statute. We are precluded from substituting our opinion on the question of medical causation of a suspected torn meniscus for the uncontradicted testimony of Dr. Haupt, the only qualified medical expert to offer an opinion in this matter. See *Wright v. Sports Associated*, 887 S.W.2d 596 (Mo. 1994).

Dr. Haupt's uncontradicted testimony establishes the first prong (subparagraph (a)) of the 'arising out of and in the course of employment test'. I next address subparagraph (b) of the test.

Under subparagraph (b), 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." The administrative law judge misreads subparagraph (b). The administrative law judge concludes that "[t]here is nothing in the evidence that would lead to a conclusion this activity of walking would expose the employee to any greater risk than walking outside of the employment." (Emphasis mine).

First, the statute contains no requirement that employee's work exposure to the hazard or risk giving rise to the injury is greater than employee's non-work exposure to the same risk and the administrative law judge errs in imposing such a requirement. Second, the statute requires a comparison of employee's work exposure to the normal nonemployment exposure of workers in general. Employee's work exposure is not to be compared solely to employee's normal nonemployment exposure to the hazard.

For a proper analysis, 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."
- "Risk" means, "someone or something that creates or suggests a hazard or adverse change: a dangerous element or factor."

- “Equally” means, “to an equal degree.”
- “Exposed” means, “so situated as to invite or make likely an attack, injury, or other adverse development.”

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

- Hazards or risks related to employment with an equal degree of exposure
- Hazards or risks related to employment with an unequal degree of exposure
- Hazards or risks unrelated to employment with an equal degree of exposure
- 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.’

Employer asserts that “no unique condition of the claimant’s employment caused or contributed to the claimant’s injury. The claimant did not slip, trip or fall. The asphalt he walked on at the time of the incident was flat. There was no evidence of a foreign object or hole or any other cause for the injury.” In essence, employer is arguing that the evidence does not permit us to identify *any* thing or condition that operated against employee’s safety or any dangerous element or factor. In other words, employer is arguing that the evidence does not establish any hazard or risk giving rise to the injury. This argument is of no assistance to employer, because in cases where *no* hazard or risk gives rise to the injury, subsection (b) will always be met.

According to Dr. Haupt, any weight bearing activity on the lower extremity can cause a tear in the meniscus or other internal derangement of the knee. In this case, it is the weight bearing activity of walking briskly that makes employee more likely to suffer the peril of a knee injury. The activity of walking briskly is the hazard to which employee was exposed. Employee’s brisk walking was related to his employment. Contrary to the suggestion of the administrative law judge, it matters not that employer did not specifically instruct employee to walk to the truck or instruct employee to walk briskly. Employee’s choice of walking briskly to accomplish the task of retrieving the truck was reasonable and employer did not prohibit walking for that purpose.

Employee proved that his injury came from a hazard or risk related to employment – walking briskly to move the truck to the necessary location. 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.

Employee’s injury is not denied compensation under §287.030.3(3)

Employer argues that employee cannot recover because employee sustained an idiopathic injury that is denied compensation under §287.030.3(3) RSMo. Employer argues that employee could not relate the injury to any cause and that employee’s walking bore no causal connection to his injury. Dr. Haupt’s uncontradicted testimony clearly establishes that walking briskly was the only factor shown by the evidence to have caused employee’s knee injury. The incident was an unexpected, traumatic event involving force external to employee’s body. Employer’s argument has no merit.

Conclusion

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 diagnosis and treatment of his knee injury and other temporary benefits. I would issue a temporary award of same.

John J. Hickey, Member

AWARD

Employee: Mitchell Miller

Injury No. 05-098741

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

Dependents: N/A

Employer: Missouri Highway and Transportation Commission

Additional Party: N/A

Insurer: Self-Insured

Hearing Date: June 26, 2007

Checked by: RFH/tmh

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 September 29, 2005.
5. State location where accident occurred or occupational disease was contracted: Route N, Pike 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? Self-Insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Walking to truck and felt a pop in his knee.

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 knee.

- Nature and extent of any permanent disability: N/A.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? None.

17. Value necessary medical aid not furnished by employer/insurer?

18. Employee's average weekly wages: \$690.46.

19. Weekly compensation rate: \$460.31/\$365.08.

- Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mitchell Miller

Injury No: 05-098741

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Missouri Highway and Transportation Commission

Additional Party: N/A

Insurer: Self-Insured

Checked by: RFH/tmh

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge for a hardship hearing on June 26, 2007. The Division had jurisdiction to hear this case pursuant to §287.110 R.S.Mo. Attorney Joseph Brannon represented Mitchell Miller (“Employee”). Attorney Robert Bidstrup represented Missouri Highway and Transportation Commission (“Employer”). The Employer is self-insured for purposes of workers’ compensation. Both parties submitted post hearing memoranda.

STIPULATIONS

1. The Employee and the Employer were operating under the provisions of the Workers’ Compensation Law on or about September 29, 2005;
2. The Employer’s liability was self-insured;
3. The Employer had notice of the alleged accident and a claim for compensation was timely filed;
4. The Employee’s average weekly wage was \$690.46;
5. The rate of compensation for temporary total disability was \$460.31 and \$365.08 for permanent partial disability; and
6. The Employer has paid no TTD or medical benefits to date.

DISPUTED ISSUES

The parties requested the Division to determine:

1. Whether Employee sustained a compensable injury by way of an accident arising out of and in the course of his employment on September 29, 2005.
2. In the event Employee is deemed to have sustained a compensable injury is he entitled to additional care and treatment and if appropriate, TTD.

The following exhibits were admitted into evidence without objection.

EXHIBITS OF EMPLOYEE

Exhibit A: Deposition of Dr. Herbert Haupt
Exhibit B: Dr. Haupt’s Curriculum Vitae
Exhibit C: Dr. Haupt’s IME report

EXHIBITS OF EMPLOYER

Exhibit 1: Missouri Highway and Transportation Commission report of injury
Exhibit 2: Deposition of Mitchell Miller

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

FINDINGS OF FACT

Employee testified that at the time of the alleged accident he had worked for the employer for nearly 20 years, beginning as a part-time employee in 1988, becoming a full-time employee in 1999, and since 2003 had held the title of Assistant Maintenance Supervisor. His job entailed paperwork, lining out crews in the morning, and then working with the crew, usually acting as the crew chief.

On September 29, 2005, the employee and his crew were repairing, patching a section of Route N in Pike County. Employee was driving a truck hauling "hot mix", an asphalt amalgam made up of an oil-based rock aggregate. The "hot mix" was prepared and heated to a temperature of between 225 degrees and 275 degrees at a plant in Troy, Missouri, and then transported over the course of the day by multiple trucks, one of which the employee drove, to the jobsite.

Upon arriving at the jobsite, employee parked his truck inside the "work zone," approximately 200 feet from where the crew was performing the repair work, and joined them. At some point, he was informed that the crew was getting low on the "hot mix," so he began walking back to his truck in order to drive it over to the machine that lays the hot mix on the road. At various times, employee described his walking speed as: A "brisk walk", "fairly fast paced" (Employer/Insurer's Exhibit 2, p. 16); a "trot" (Employer/Insurer's Exhibit 2, p.17); and "three or four times" his regular or normal walking pace (Employer/Insurer's Exhibit 2, p. 18). Employee testified that if his normal walking pace would be a one on a scale of one to ten, then his walking pace at the time of the alleged injury would have been a four. (Employer/Insurer's Exhibit 2, p. 19). In explaining why he was walking briskly, he admitted no one had told him he needed to hurry or that there was any danger in the mixture cooling to the extent that it would set and become unusable. (Employer/Insurer's Exhibit 2, pgs. 23, 32).

About three-quarters of the way to his truck, he felt a pop behind his right knee. (Employer/Insurer's Exhibit 2, pgs. 14-15, 17). Employee stated that he had no idea what caused the problem. (Employer/Insurer's Exhibit 2, p. 16). He testified no specific event happened (Employer/Insurer's Exhibit 2, p. 16); he did not slip or trip or stumble over anything (Employer/Insurer's Exhibit 2, p. 20). Employee testified he was not aware of anything about the surface of the road that would have caused a problem; he didn't step in a hole; there was nothing different about that particular step compared to all the others. To the best of his recollection, there was nothing on the soles of his shoes that would have caused a problem (Employer/Insurer's Exhibit 2, p. 57).

Employee reported the injury to the employer and approximately a week later was informed that the employer was denying his case. Employee then sought treatment on his own. On October 3, 2005, an MRI was performed and suggested a tear of the inferior aspect of the meniscus. Surgery was performed with the surgeon noting the medial meniscus was intact and showed no signs of a tear. The surgeon did find an impingement of the medial shelf plica, which he excised.

Following a period of improvement, the soreness recurred and became more prominent. On October 30, 2006, employee was sent by the employer/insurer to Dr. Herbert Haupt for an independent medical examination. X-rays taken at that time revealed no acute pathology and well maintained joint spaces. Although the diagnostic testing did not support such a conclusion, Dr. Haupt suspected the employee had a small under the surface meniscal tear, that the surgeon did not find during the operation, and recommended another MRI or arthroscopic surgery in order to discover the source of the continued complaints.

Dr. Haupt admitted that a brisk walk is not a normal mechanism of injury for a meniscal tear (Employee's Exhibit A, p. 15) and explained that activities such as kneeling, stooping, bending, or twisting were more likely to cause a meniscal tear. He also acknowledged the tear he suspected to be present could be degenerative and occurred over time or could have been torn at a different time and was simply asymptomatic until the event at work. Dr. Haupt concluded that absent any information to the contrary, the work event of September 29, 2005, was the prevailing factor in the development of the symptomatic plica (Employee's Exhibit A, p.10).

Employer/Insurer on cross-examination, grilled Dr. Haupt about his understanding of the definition of the term "prevailing factor". Dr. Haupt commented that "it's not a term I frankly would ever want to use and I don't like using it" (Employee's Exhibit A, p. 29). The doctor explained that from a physician's perspective, he was more comfortable

with the prior “a substantial factor” standard in determining the main cause for an injury pattern. He went on to note that under the new law, a physician is asked to apply a term called “prevailing factor,” not just for the cause of the injury, but also the disability associated with the injury and that “makes no sense to me medically” (Employee’s Exhibit A, pgs. 30-31). The doctor went on to say that physicians are uncomfortable trying to understand the new language in the statute and from his point of view, the statute “is not well written” (Employee’s Exhibit A, p. 31).

Dr. Haupt conceded assuming all other factors were equal, walking at home and walking at work carried the same risk (Employee’s Exhibit A, pgs. 50, 53).

Employee testified that he has always enjoyed getting out and walking around, that walking is a part of his lifestyle (Employer/Insurer Exhibit 2, p. 55). In 2004 and 2005, employee took regular walks, sometimes alone and sometimes with his teenage daughter, walking a half-mile to a mile a couple of times a week. He would generally walk around his neighborhood, walking on pavement similar to the surface he was on when he felt his knee pop at work and his walking pace would vary from a brisk walk at a “four” pace, the same as when he felt the knee pop, to sometimes “ambling” and sometimes walking “pretty fast” (Employer/Insurer’s Exhibit 2, pgs 51-55).

Employee testified that he has had two prior surgeries to his other knee and a back surgery but denied any prior injury to his right knee.

Employer/Insurer went to great lengths, to no avail, to attempt to discredit both the employee and the employer/insurer’s own doctor. To the contrary, both the employee and Dr. Haupt attempted to the best of their ability to respond to the questions posed to them in a straight forward and honest manner. I find both of them to be very credible witnesses. While I certainly am not disregarding Dr. Haupt’s opinions, and commend him for his honesty, the threshold question that must be addressed is one of a purely legal nature.

RULINGS OF LAW

Did Employee sustain a compensable injury by way of an accident arising out of and in the course of his employment on September 29, 2005?

A number of changes were enacted to the Workers’ Compensation Act (the “Act”) effective August 28, 2005. The definition of “accident” was one such change.

As of August 28, 2005, Section 287.020.2 defines accident as “...an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of 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.”

Section 287.020.3(1) (all statutory references are as of 2005) defines injury as “...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.”

Subsection 2 of 287.020.3 provides further guidance by stating that “An injury shall be deemed to arise out of and in the course of the employment only if:

- it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- 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.”

During the 2005 legislative session, the legislature expressed its displeasure with what it perceived to be the expansion of the Act to such an extent that the focus on determining whether a case was compensable seemed to be whether the act was “incidental” to the employment, a doctrine that some refer to as “positional risk”, rather than whether the employee was actually engaged in performing the duties of employment.

Section 287.020.10 clearly states that displeasure as follows:

“In applying the provisions of the 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.”

In *Kasl* the Court found that the conditions of Ms. Kasl’s work which included waiting for time to dispense medication, caused her foot to fall asleep thus causing the accident when she attempted to walk. In *Drewes* the Court held that the claimant, who fell while carrying lunch through a break room, had a compensable injury because she would not have been equally exposed outside of her employment to the risk of falling during her lunch break. The *Bennett* Court held that an injury caused or aggravated by walking could be considered arising out of employment because walking was incidental to her duties.

By abrogating *Bennett*, *Kasl* and *Drewes* the legislature indicated in order for a case to be compensable under the Act it would require something more than simply being at the work place at the time of the incident. That is consistent with the concept that workers’ compensation was not designed to “operate as accident insurance with blanket coverage as to any and all accidental injuries wherever and whenever received by an employee...” *Leslie v. School Services and Leasing, Inc.*, 947 S.W.2d 97 (Mo. App. 1997) quoting *McQuerrey v. Smith St. John Mfg. Co.*, 216 S.W.2d 534, 537 (Mo. App. 1948).

While walking is certainly an activity in which we all engage in our normal non-employment life, it is important to note that the statutes do not provide a list of activities that are **automatically** prohibited from compensability. Indeed, since so many of the physical activities associated with our employment are also associated with our normal non-employment lives; such as bending, lifting, carrying, pulling, pushing, turning, twisting, packing, climbing, etc., a very extensive list of automatically prohibited activities would essentially render the Act meaningless.

Rather than focusing solely on the activity itself, one must carefully and thoughtfully examine the facts of each individual case in the context of how that activity interacts with the employment. Since prior case law has been abrogated, a logical common sense approach would be to examine if the incident or activity occurred while the individual was engaged in performing the necessary and required duties of the job in furtherance of the employer’s business. While the employee certainly would have to get to his truck, whether by walking or some other means, before being able to move the truck, under the facts of this case the activity of “walking” appears to be “incidental” to the employment.

In the instant case, the evidence shows the employee was walking at a “brisk” pace to his truck, although no one had instructed him to “hurry”. Employee admitted that he likes to walk outside of work, does so on a regular basis, and often at a “brisk” pace, even on a similar surface as the asphalt road. By his own admission, employee did not slip, trip, or stumble; he did not step in a hole; he was not aware of anything on the soles of his shoes that would have caused a problem; was not aware of anything about the surface of the road that would have caused a problem; there was nothing different about the step immediately preceding the pop in his knee compared to all the other steps he had taken; no specific event happened, indeed the employee had no idea what caused the problem. There is nothing in the evidence that would lead to a conclusion this activity of walking would expose the employee to any greater risk than walking outside of the employment. The evidence does not reveal a cause or explanation for the knee to pop.

Regardless of whether one agrees or disagrees with the 2005 legislative changes to the Act, it seems quite clear this incident is an example of what the legislature specifically intended to exclude from compensability under the Act.

Applying strict construction of the statutes as required by Section 287.800, I conclude the employee has not suffered a compensable injury by way of an accident arising out of and in the course of employment. Employee requested a temporary award, but since I am finding this case is not compensable I am entering a final award. All other issues are rendered moot.

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CONCLUSION

Employee has failed to meet his burden of proving that he suffered a compensable injury as the result of a work related accident arising out of and in the course of his employment. Therefore, Employee's claim is denied.

Date: _____

Made by: _____

RONALD F. HARRIS
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation