

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

Injury No.: 08-096157

Employee: Sead Muminovic, deceased

Claimant: Suada Muminovic, widow

Employer: St. John's Mercy Medical Center

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

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

The parties dispute whether employee's injuries arose out of and in the course of his employment. We defer to the administrative law judge's credibility determinations and her weighing of the conflicting evidence, and agree with her ultimate determination that employee's injuries cannot be deemed to arise out of and in the course of employment for purposes of § 287.020.3(2) RSMo as that provision was interpreted by the court in *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012). The administrative law judge also provided a thorough and well-researched discussion regarding the extension of premises doctrine. While we largely agree with her analysis, we do wish to make the following observations.

First, we note that the administrative law judge cited *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602 (Mo. App. 2005) for the proposition that "[i]n 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." *Award*, page 6. Because the legislature in 2005 abrogated all case law construing the meaning of the terms "arising out of" and "in the course of the employment," see § 287.020.10 RSMo, we cannot endorse the existence of any general rule, derived from *Custer* or any other case construing the pre-2005 meaning of those phrases, regarding injuries sustained by employees who are travelling to or from work.<sup>1</sup>

---

<sup>1</sup> The legislature's deletion, in 2005, of previous language in § 287.020.5 RSMo declaring the Missouri Workers' Compensation Law did not cover workers "except while engaged in or about the premises where their duties are being performed," suggests a legislative intention to remove from our analysis *any* general or per se rule regarding the premises or location where an employee's injury is sustained.

Employee: Sead Muminovic, deceased

- 2 -

Second, we note that the administrative law judge cited *Hager v. Syberg's Westport*, 304 S.W.3d 771 (Mo. App. 2010) for the proposition that after the 2005 amendments to the Missouri Workers' Compensation Law, the extension of premises doctrine is no longer "viable." *Award*, page 7. But the *Hager* court did not so hold. Instead, the court acknowledged the continued viability of at least some aspect of the doctrine, when it considered whether the employer controlled the premises where the employee fell. *Id.* at 776-777. For this reason, we must disclaim the administrative law judge's comments regarding the *Hager* decision and its effect on the continued viability of the extension of premises doctrine.<sup>2</sup>

We acknowledge that in the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012), the Supreme Court stated, as follows:

[An employee's] injury is compensable in workers' compensation only if it arose out of and in the course of her employment pursuant to section 287.020.3(2). The express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether Johme's injury shall be deemed to have arisen out of and in the course of her employment. See sec. 287.020.10 (expressly noting the legislature's intent to abrogate prior case law definitions applicable to workers' compensation, including case law interpretations for the definitions of "arising out of" and "in the course of the employment"). And the legislature has left no doubt that the provisions of section 287.020.3(2) are to be construed strictly. See sec. 287.800 ("courts shall construe the provisions of [chapter 287] strictly").

*Id.* at 509-10.

It can and has been argued that through the above language the Supreme Court ruled that the provisions of § 287.020.3(2) now constitute the statutory definition describing what injuries arise out of and in the course of employment. But we do not read the *Johme* decision so narrowly. Importantly, the legislature stated in § 287.020.3(2) that "[a]n injury shall be deemed to arise out of and in the course of the employment only if" it meets the named requirements, suggesting that a satisfaction of the unequal exposure test as described in *Johme* is *necessary* to an award of compensation, but may not be *sufficient* where there are further questions as to whether an employee's injuries arose out of and in the course of the employment.<sup>3</sup>

<sup>2</sup> Of course, the *Hager* court did not ultimately apply the extension of premises doctrine, so it is unclear what (if any) element of compensability the doctrine may have supplied in that case.

<sup>3</sup> The legislature did not offer, with the 2005 amendments, any other test or any further guidance in interpreting the meaning of the phrase "arising out of and in the course of the employment." This, combined with the legislature's sweeping abrogation of case law interpreting the phrase, suggests a legislative recognition of the wisdom inherent in the judicial admonition: "every case involving this phrase [arising out of and in the course of the employment] should be decided upon its own particular facts and circumstances and not by reference to some formula." *Finley v. St. Louis Smelting & Refining Co.*, 361 Mo. 142, 144 (Mo. 1950).

Employee: Sead Muminovic, deceased

- 3 -

In our view, the *Johme* decision's silence regarding the extension of premises doctrine is in no way instructive because application of said doctrine wasn't necessary to an analysis or resolution of that case. We believe an extension of premises doctrine remains applicable in cases such as this, wherein the employee is injured while travelling to or from work on premises owned or controlled by the employer, because § 287.020.5 specifically so states. We are left, then, to define and to apply an extension of premises doctrine pursuant to the strict construction mandate of § 287.800 and despite the legislative abrogation of the entire body of case law wherein said doctrine was exclusively developed and described. Although all prior cases which have defined and applied the extension of premises doctrine are no longer controlling, in the absence of any statutory definition, we deem it necessary (and therefore appropriate) to refer to such cases for guidance in an attempt to define and apply the doctrine in a manner that does not conflict with other strictly-construed provisions of Chapter 287.

Employee correctly cites certain pre-2005 cases quoting or paraphrasing a 1928 decision by the United States Supreme Court which suggested that the extension of premises doctrine provided both the "arising out of" and "in the course of" requirements to an award of benefits under § 287.120.1 RSMo:

If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of employment as much as though it had happened while the employee was engaged in his work at the place of its performance.

*Roberts v. Parker-Banks Chevrolet*, 58 S.W.3d 66, 70 (Mo. App. 2001), quoting *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 158 (1928).

Such broad language must, however, be considered in the context of the factual scenarios the extended premises doctrine was developed to address: employees who are injured while going to or coming from work rather than engaged in a particular work duty. Seen in this light, we believe the extension of premises doctrine permits employees to demonstrate that they were "in the course of" their employment when injured. See, e.g., *Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. 2000), stating the doctrine as follows: "[i]f an employee is injured on extended premises while coming to or from work, the injury is in the course of employment as if it had happened while the employee was engaged in his work at the place of its performance" (emphasis added). See also *Hunt v. Allis-Chalmers Mfg. Co.*, 445 S.W.2d 400, 408 (Mo. App. 1969)(suggesting that the extension of premises doctrine supplies the "in the course of" element, but that additional considerations are necessary to resolve whether an injury "arises out of" the employment).

We have previously considered these issues in our decision in the case of *David Viley v. Scholastic, Inc., and Treasurer of Missouri as Custodian of Second Injury Fund*, Injury No. 10-050708 (LIRC, April 16, 2014). In that case, we held that the extension of premises doctrine was applicable to demonstrate that an employee's injuries, occurring on a parking

Employee: Sead Muminovic, deceased

- 4 -

lot controlled by the employer, were sustained *in the course of* employment. Here, we likewise believe that the extension of premises doctrine satisfies employee's burden to prove that his injuries were sustained "in the course of" employment, because employee suffered his injuries on employer's premises while leaving work. See *Wells*, supra. A broader definition of the extension of premises doctrine appears to us to be incompatible with the clear language of § 287.020.3(2)(b) and inconsistent with the Supreme Court's directive in *Johme*.

As noted above, employee has failed to satisfy the unequal exposure test under § 287.020.3(2)(b) as defined in the *Johme* case. Accordingly, even though we believe that employee's injuries were sustained in the course of his employment, we find they did not arise out of his employment. For this reason, we affirm the award of the administrative law judge denying benefits.

**Conclusion**

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

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued November 7, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22<sup>nd</sup> day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

John J. Larsen, Jr., Chairman

---

James G. Avery, Jr., Member

---

Curtis E. Chick, Jr., Member

Attest:

---

Secretary

## AWARD

Employee:	Sead Muminovic (Deceased)	Injury No.: 08-096157
Dependents:	Suada Muminovic	Before the
Employer:	St. John's Mercy Medical Center	<b>Division of Workers' Compensation</b>
Additional Party	Second Injury Fund	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self	Jefferson City, Missouri
Hearing Date:	August 21, 2013	Checked by: KOB dwj

### 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: May 21, 2008
5. State location where accident occurred or occupational disease was contracted: Saint 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 was involved in a motor vehicle accident
12. Did accident or occupational disease cause death? No
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: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$10,393.00 (through group insurance)

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$358.80
- 19. Weekly compensation rate: \$239.20/\$239.20
- 20. Method wages computation: By Agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: \$0.00

23. Future requirements awarded: None

Said payments to begin immediately 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Frank J. Niesen, Jr.

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Sead Muminovic (Deceased)	Injury No.: 08-096157
Dependents:	Suada Muminovic	Before the <b>Division of Workers' Compensation</b>
Employer:	St. John's Mercy Medical Center	Department of Labor and Industrial Relations
Additional Party	Second Injury Fund	Of Missouri
Insurer:	Self	Jefferson City, Missouri
Hearing Date:	August 21, 2013	Checked by: KOB dwj

### PRELIMINARIES

The matter of Sead Muminovic ("Claimant") and his widow, Suada Muminovic ("Dependent") proceeded to hearing on August 21, 2013. Attorney Frank J. Niesen, Jr. represented Dependent. Attorney Dennis Lassa represented St. John's Mercy Medical Center ("Employer"). Assistant Attorney General Maria Dougherty represented the Second Injury Fund.

The parties stipulated that on May 21, 2008, Claimant Sead Muminovic sustained injuries in an automobile accident in St. Louis County on property owned and controlled by Employer. The parties also stipulated to employment, venue, notice and timeliness of the claim. The average weekly wage was \$358.80, and the rate of compensation for temporary total disability ("TTD"), permanent total disability ("PTD") and permanent partial disability ("PPD") is \$239.20. Employer denied the claim, and paid no TTD. However, Employer paid \$10,393.00 through its group insurance, and the parties stipulated that amount should be credited to Employer as medical paid under workers' compensation should this claim be found compensable. Mr. Muminovic died on April 22, 2013 for reasons unrelated to the alleged work accident, and Dependent is seeking to recover workers' compensation benefits due to her husband as well as herself under *Schoemehl v. State of Missouri*, 217 S.W.3d 900 (Mo. banc 2007).

The issues to be determined are: 1) Did Claimant sustain an accident and injury arising out of and in the course of his employment; 2) Is Employer liable for past medical expenses in the stipulated amount of \$3,105.91; 3) Should Employer have paid TTD to Claimant from May 22, 2008 to April 17, 2009; 4) What is the nature and extent of Claimant's disability; 5) What is the liability of the Second Injury Fund; and 6) Is Dependent entitled to payment of benefits under *Schoemehl*?

### FINDINGS OF FACT

Claimant<sup>1</sup> was born on October 30, 1946 in Bosnia. He and his wife, Dependent Suada Muminovic, were married for 42 years, lived together, and had two adult, independent children. In Bosnia, Claimant attended 12 years of schooling, including vocational machinists training, and worked 24 years as a supervisor in a tool manufacturing shop. He did not take part in the war, but was behind the lines and was separated from his family for two years, which was

---

<sup>1</sup> Claimant's May 27, 2011 deposition testimony was submitted.

psychologically difficult. Claimant lived in Germany from 1995 to 1997. In 1997, Claimant and his family immigrated to St. Louis, and he became a United States citizen in 2007, although he did not speak English fluently.

Upon arriving in St. Louis, Claimant was hired to work full time at Stout Marketing, where he packaged advertising materials. At the end of 2007, Claimant lost his job with Stout due to the economic downturn, and he experienced some depression for which his doctor prescribed Zoloft. For a few months, he worked as a custodian through an agency. On May 12, 2008, Employer hired Claimant to work the second shift, from 3 p.m. 11:30 p.m., cleaning offices, disposing of garbage, mopping and performing other housecleaning tasks.

On May 21, 2008, Claimant finished his shift at 11:30 p.m., clocked out, and walked to the staff parking lot. The sky was clear and the roads were dry. He entered his car, a Chevy Lumina, started the engine, exited the parking garage, stopped at the stop sign, and turned onto the driveway. The Conway parking garage was to his immediate right. Claimant had his headlights on. As he drove towards a mild curve in the road, Claimant's car continued straight, left the road, jumped the curb, struck a tree, hit a fence, flew over a retaining wall and landed in a grassy ditch about 20 yards from the road. There is no evidence Claimant attempted to brake. There were streetlights illuminating the drive, although the point where Claimant left the road was midway between the two closest lights.

At his May 27, 2011 deposition, when asked how the accident happened, Claimant replied via translator at page 15, lines 15-20:

I just don't know. I can't remember anything. I know that I was driving, and behind me was driving another person, another person from work, from my work, and I don't know how it happened....I don't remember anything.

Claimant's attorney exercised the right to read the deposition, and corrections by Claimant were certified on July 8, 2011, redacting the above testimony, and replacing it as follows:

Due to poor lighting and my unfamiliarity with the area, I went off the roadway. It curves there. I was a relatively new employee. I remember going down the hill. I remember the impact. Beyond that, I don't remember much.

The reason for the change was, "There was some mistranslation. Plus, this more accurately explains it." Both answers are part of the record.<sup>2</sup>

Irma Simonovich was a witness to Claimant's accident. Her testimony at hearing was persuasive and credible. She is a Bosnian-born nurse's aide who worked for Employer since 2008. Although Ms. Simonovich did not know Claimant prior to May 21, 2008, she saw him on the way to garage, and noted his coworkers were teasing him because he was very tired. Ms. Simonovich was driving behind Claimant as they left the garage. Because of construction at the

---

<sup>2</sup> Missouri Supreme Court Rule 57.03(f) provides in relevant part: "Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them; provided, however, that the answers or responses as originally given, together with the changes made and reasons given therefor, shall be considered as a part of the deposition."

Ronald McDonald House, her usual route of egress was blocked. She noted his head and shoulders were swaying side-to-side and front-to-back. She and Claimant were driving under 25 miles per hour. As he approached the curve in the roadway, Claimant did not turn or brake, but just drove over the curb and down the embankment. No other cars were approaching, passing or in any other way involved in the accident.<sup>3</sup> She drove a few yards past the point Claimant left the road, then, upon realizing what happened, Ms. Simonovich stopped her car and ran to render aid to Claimant. She called Claimant's wife, spoke to the first responders, and helped translate in the Emergency room until Claimant's wife arrived.

Officer Knobbe is the police officer who investigated the accident. He has years of experience and training in investigating accidents and coming to conclusions regarding the causes of accidents. His testimony established the proper foundation for the admission<sup>4</sup> of the police report (Exhibit 5) pursuant to the business records exception to the hearsay rule. See *State v. Henderson*, 920 S.W.2d 588 (Mo.App.E.D. 1996). Officer Knobbe established the area of the accident was illuminated by streetlights, had no skid marks, and showed no evidence of the car having been cut off. He testified Claimant had no idea what happened. He concluded the probable cause of the accident was driver inattention. I find Officer Knobbe's conclusion persuasive.

Claimant received emergency treatment at St. Johns and was admitted as an inpatient for several days. The records indicate he sustained a loss of consciousness for unknown duration, and "was amnesic for the impact." The post-trauma amnesia extended several minutes (he recalled the dust settling from the airbag) and there was virtually no retrograde amnesia. He was diagnosed with a right wrist scaphoid fracture that received nonoperative treatment, vertebral compression fractures at L2 and L1 that required bracing and kyphoplasty, closed head trauma, and traumatic headaches due to concussion. For nearly one year following the accident, Claimant received treatment in the form of physical therapy, bracing, cementing of the compression fractures of the spine, EMG of the wrist and injections.

Claimant's wife testified that after the accident, her husband was not the same person. Claimant did not sleep, was nervous and withdrawn, and needed more help to do basic tasks. Although he had taken Zoloft before the accident to help him deal with the loss of his job at Stout Marketing, Claimant needed it on a regular basis after the accident. The accident had a negative psychological impact on Claimant.

Claimant never returned to work in any capacity. Various experts opined he had permanent disability on account of the accident as follows: Dr. Volarich assigned 40% PPD of the right wrist, 45% PPD of the low back, 5% PPD BAW due to the concussion, and based upon those injuries, felt Claimant was permanently and totally disabled; Dr. Randolph assigned 8% PPD BAW for the compression fracture and 3% PPD of the right wrist; Dr. Stillings believed the accident of May 21, 2008 aggravated his pre-existing post-traumatic stress and personality

---

<sup>3</sup> One of three other witnesses to the accident, Keith Cutright, suggested in his deposition that a "phantom" car cut Claimant off, causing his accident. Mr. Cutright's co-workers, Carnell Dailey and Wade Williams, testified that no other car was involved, and that Claimant's car just went off the road. I find their testimony more credible and consistent with the evidence. There was no "phantom" vehicle that "cut-off" Claimant.

<sup>4</sup> Although I find the police report admissible, there is sufficient credible evidence absent the report to establish no "phantom" vehicle existed or was involved in causing Claimant's accident.

disorders and assigned a 2% psychiatric PPD of the body as a whole; and Vincent Stock, a psychologist, provided a rating of 30% PPD to a reasonable degree of psychological certainty. Vocational experts Stock and Dolan agreed Claimant was unable to compete in the open labor market, although they disagreed as to which combination of factors caused his total disability. On April 22, 2013, Claimant died as the result of a pulmonary embolism, which was not related to the accident in any way.

### **ADDITIONAL FINDINGS OF FACT AND RUINGS OF LAW**

In order to be compensable, Claimant's injury must be one that arouse out of and in the course of employment. RSMo §287.020.3.1 (2005). An injury shall be deemed to arise out of and in the course of the employment only if...it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. RSMo §287.030.3.2 (2005). 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. *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 610-11 (Mo. Ct. App. 2005)(citations omitted). This is true because in most circumstances, 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. *Id.*

Prior to 2005, Missouri courts recognized the "extended premises doctrine" as an exception to the general rule that "accidents occurring on the trip to or from work are not deemed to arise out of and in the course of employment." *Hager v. Syberg's Westport*, 304 S.W.3d 771, 775 (Mo. Ct. App. 2010) citing *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 535 (Mo. banc 1996). That doctrine held that when an employee suffers an accident while leaving work, still on the employer's premises, those injuries received are considered incidental to employment and are compensable. *Zahn v. Associated Dry Goods Corp.*, 655 S.W.2d 769, 772 (Mo. Ct. App. 1983) citing *Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 606 (Mo.App.1968); *Lawson v. Village of Hazelwood*, 356 S.W.2d 539, 542 (Mo.App.1962)(emphasis added). The extended premises doctrine developed in Missouri during a time when the statute was interpreted liberally in favor of employees. Furthermore, as recently as 1980, the Missouri Workers' Compensation Act expressly restricted the right of recovery to situations where workers were "engaged in or about the premises where their duties are being performed, or where their services require their presence as a part of such service." §287.020.5 RSMo Supp 1980<sup>5</sup>; *Pulliam v. McDonnell Douglas Corp.*, 558 S.W.2d 693, 698 (Mo. Ct. App. 1977) citing RSMo §287.020(6)(1969). The extended premises doctrine continued even after the statutory language no longer linked compensability to duties performed in or about specific premises.

In 2005, the legislature made significant changes to the workers' compensation system. *Missouri Alliance for Retired Americans v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 674 (Mo. 2009). In 2005, the legislature narrowed the definitions of "injury," "accident," and

---

<sup>5</sup> Section 287.020.5 RSMo Supp 1980 provided:

Without otherwise affecting either the meaning or interpretation of the abridged clause, "personal injuries arising out of and in the course of such employment," it is hereby declared not to cover workers except while engaged in or about the **premises** where their duties are being performed, or where their services require their presence as part of such service (emphasis added).

“an injury arising out of and in the course of.” *Stricker v. Children's Mercy Hosp.*, 304 S.W.3d 189, 192 (Mo.App. W.D. 2009) citing *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 672-73 (Mo. banc 2009). The legislature also changed the interpretation from a liberal statutory construction of Workers' Compensation Law to a strict construction of those statutes. See, *id.* at 673. Under strict construction, we give the statute its plain meaning and refrain from enlarging the law beyond that meaning. *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo.App. S.D.2009). Consequently, the cases interpreting those terms and applying a liberal construction of those statutes were abrogated. See § 287.020.10 (rejecting and abrogating case interpretations of those definitions, specifically *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App. W.D.2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999); *Drewes v. TWA*, 984 S.W.2d 512 (Mo. banc 1999), and their progeny). In addition to those broad changes, the Legislature specifically abrogated the extended premises doctrine “to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.” §287.020.5; *Hager v. Syberg's Westport*, 304 S.W.3d 771, 775 (Mo. Ct. App. 2010)

Dependent has argued that the extended premises doctrine is still viable and results in a compensable accident because the legislature only abrogated the doctrine to the extent it applies to property not owned or controlled by Employer. The claimant in *Hager v. Syberg's Westport*, 304 S.W.3d 771, 775- 76 (Mo. Ct. App. 2010)(citations omitted) raised the same argument, and the court soundly rejected it, holding:

Claimant states in his brief that “The Missouri Legislature likely intended to negate the holdings of [*Wells v. Brown*], ... [*Cox*], ... and [*Roberts*] ... that pertain to liability for injuries on property not owned or controlled by the employer.” Claimant erroneously attempts to either limit or disregard the Legislature's express intent “to reject and abrogate earlier case law interpretations on the meaning of or definition of ... ‘arising out of, and ‘in the course of the employment.’ ” Section 287.020.10. As discussed above, the abrogation of case law by Section 287.020.10 “is not limited to simply those cases named therein but any case interpreting a number of key terms.” Moreover, Section 287.020.10 does not limit its rejection or abrogation of earlier cases to holdings “that pertain to liability for injuries on property not owned or controlled by the employer” as Claimant alleges. Rather, Section 287.020.10 explicitly rejects and abrogates earlier case law interpretations of “arising out of” and “in the course of employment” and does not limit the scope of its rejection or abrogation.... Claimant's attempt to distinguish the facts of his case from *Wells*, *Cox*, and *Roberts* fails because Section 287.020.10 abrogates and rejects their entire analysis of “arising out of” and “in the course of employment” and Claimant may not therefore rely upon portions of *Wells*, *Cox*, and *Roberts* which would otherwise be beneficial to his appeal.

Thus, it is the statutory language, not the abrogated case law, which controls. Pursuant to Section 287.020.3(2), an injury shall to arise out of and in the course of 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.

Here there is no doubt the car accident is the prevailing factor in causing the injuries for which workers' compensation benefits are sought. The outcome of this case thus depends upon the correct application of § 287.020.3(2)(b).

A recent line of cases addresses the requirements of § 287.020.3(2)(b). In *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671 (Mo. Banc 2009), the claimant, who was repairing a section of road, was walking briskly toward a truck containing repair materials when he felt a pop in his knee. *Id.* Miller admitted that his work did not require him to walk briskly, he normally walks briskly at home, and he did nothing out of the ordinary when walking at work that day. *Id.* Additionally, nothing about the road surface, his work clothes, or the job caused him to slip, and he did not fall from the pop in his knee. *Id.* The Missouri Supreme Court determined that the injury, while it occurred in the course of employment, did not arise out of employment. *Id.* at 673.

An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. The injury here did not occur because [the employee] fell due to some condition of his employment.... He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so.

*Id.* at 674. Because there was no causal connection between the injury and the work activity other than the fact that it occurred at work, Miller's injury was not compensable under workers' compensation.

The Supreme Court relied on *Miller* when it next addressed the causal connection requirements in *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. banc 2012). Johme, a billing clerk, was making coffee at work when she turned, twisted her ankle and fell off her thick-soled heeled shoes. The *Johme* Court explained that “*Miller*'s focus was not on what the employee was doing when he popped his knee...but rather focused on whether the risk source of his injury—walking—was a risk to which he was exposed equally in his normal nonemployment life.” *Id.* at 511 (internal quotation omitted). The court looked at whether the risk source of Johme's injury—turning and twisting her ankle and falling off her shoe—had a causal connection to her work activity other than the fact that it occurred in the office kitchen while she was making coffee. *Id.* at 511. Under *Miller* and § 287.020.3(2)(b), “the assessment of Johme's case necessitated consideration of whether her risk of injury from turning, twisting her ankle, and falling off her shoe was a risk to which she would have been equally exposed in her normal, non-employment life.” *Id.* Because Johme failed to show that the injury was caused by a risk related to her employment as opposed to a risk to which she was equally exposed in her normal, non-employment life, the injury was not compensable under workers' compensation. *Id.* at 512.

In *Pope v. Gateway to West Harley Davidson*, 404 S.W.3d 315, 320, (Mo.App. E.D., 2012), Pope was descending the stairs on his employer's premises, carrying his helmet and wearing work boots, when he lost his footing and fell, breaking his ankle. The *Pope* court held:

Under the guidance of *Miller* and *Johme*, Pope's injury is compensable only if his injury had a causal connection to his work activity other than the fact that it occurred at work. More simply stated, we consider whether Pope was injured *because* he was at work as opposed to becoming injured merely *while* he was at work. This analysis requires us to consider whether the risk source of Pope's injury—here, walking down steps while wearing work boots and carrying a work-required helmet—is a risk to which Pope is equally exposed in his non-employment life. If Pope is equally exposed to this risk outside of his employment, then the injury does not arise out of the employment, and is not compensable under Missouri's workers compensation laws. *Johme*, 366 S.W.3d at 509–10; *Miller*, 287 S.W.3d at 673; *Pope* at 5.

Despite the fact Pope was on the employer's premises, the court required and found facts to reasonably support a finding that Pope's injury was causally connected to his work activity, i.e., a risk related to his employment as opposed to a risk to which he was equally exposed in his normal, non-employment life.

Dependent has failed to present sufficient credible evidence to establish Claimant's injury was causally connected to his work activity. Claimant was clocked out and driving home in his personal vehicle over a roadway that was owned by Employer but open to the public when the car left the roadway and crashed. I find the reason for the accident was Claimant's inattentiveness, whether from distractions within the car or tiredness. Claimant could not offer any explanation as to why his car left the road. Irma Sinanovic credibly described a tired man whose head was swaying back and forth immediately prior to the accident. Officer Knobbe conducted an investigation and concluded the reason for the accident was driver inattention. I find inattentiveness behind the wheel is a risk source to which every driver is exposed in normal, non-employment life, and Claimant presented no credible evidence to establish his exposure to inattentive driving was greater related to employment.

Dependent's attempts to establish the requisite causal connection between Claimant's accident and work are not supported by the facts found. First, Dependent proposed that Claimant wrecked the car because he was a new employee unfamiliar with a poorly lit road. The only evidence supporting this theory is Claimant's corrected deposition testimony, which is quoted above. The deposition correction sheet eliminated Claimant's testimony that he had no recollection of or reason for the accident, and blamed poor lighting/unfamiliar with the area for the accident.

The corrected deposition testimony exceeds the scope of the rule permitting correction. The right to correct a deposition "should not be considered to be an invitation to rewrite depositions on afterthoughts" or permit "a lawyer's statement of fact and argument for the view most favorable to the case." *Loveland v. Rowland*, 361 S.W.2d 685, 688 (Mo.1962). The right of correction is intended to afford an opportunity to correct errors of the reporter in transcribing and to permit a witness, who decides he gave a wrong answer, to have it corrected. *Id.* If an answer is changed, the adequacy of the reasons stated and the determination of the truth of

conflicting statements will be for the trier of the facts. *Id.* I do not find the “corrected” testimony credible. Claimant’s original testimony was consistent with all the other evidence such as the medical records establishing impact and post-trauma amnesia, Officer Knobbe’s testimony Claimant had no idea what happened and that the area was illuminated, and the lack of skid marks. The “corrected” testimony puts forth an entirely different answer that exceeds any possible correction of a translation error, is inconsistent with the credible evidence, and mirrors the attorney’s legal argument, all of which make the new testimony implausible and unpersuasive.

The suggestion that a phantom vehicle forced Claimant off the road is similarly implausible and unpersuasive. Claimant had amnesia surrounding the accident and offered no testimony regarding a phantom vehicle. Irma Simonovich, Carnell Dailey and Wade Williams all established there were no other vehicles involved. There were no physical findings such as skid marks or other evidence of evasive maneuvers. The investigating officer concluded the accident was a single vehicle event due to inattentiveness. Keith Cutright’s testimony given four years after the accident in which he suggests for the first time that a mystery vehicle forced Claimant off the road is completely inconsistent with all the credible evidence and is not persuasive. The issue of whether a phantom vehicle would establish a compensable claim is moot since no phantom vehicle existed.

Claimant did not face a hazard or risk related to his employment when he drove off the road and down an embankment on May 21, 2008. Having determined Claimant did not sustain an accidental injury arising out of and in the course of his employment, I further find that the remaining issues are moot.

### **CONCLUSION**

Sead Muminovic was in a car accident that did not arise out of and in the course of his employment. His injuries are not compensable, and his widow is not entitled to recover workers’ compensation benefits on his or her own behalf. The claim against the Second Injury Fund is denied as well.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

KARLA OGRODNIK BORESI  
*Administrative Law Judge*  
*Division of Workers' Compensation*