

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

Injury No.: 07-132005

Employee: Melinda Penachio, Deceased
Dependents: Paul Penachio, widower; Kaylie Penachio and Stephanie Penachio, dependent daughters
Employer: Capital Region Medical Center
Insurer: Self-Insured c/o Thomas McGee Management Services
Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund (Dismissed)

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 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.

Employee filed a Motion to Consider Reply Brief as Additional Evidence and Argument. Employee's Reply Brief consists primarily of a recitation of testimony contained in depositions already in the record. The deposition testimony is not additional evidence. In reaching our decision, we considered the arguments appearing in employee's Reply Brief.

Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge. The January 3, 2011, award and decision of Administrative Law Judge Vicky Ruth is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 11th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Melinda Penachio (deceased)

Injury No. 07-132005

Dependents: Paul Penachio (surviving spouse),
Kaylie Penachio (child),
Stephanie Penachio (child)

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

Employer: Capital Region Medical Center

Additional Party: Second Injury Fund (dismissed at hearing)¹

Insurer: Self-Insured,
c/o Thomas McGee Management Services

Hearing Date: September 30, 2010

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: December 20, 2007.
5. State location where accident occurred or occupational disease was contracted: Miller County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee died in a car accident.
12. Did accident or occupational disease cause death? Yes. Date of death? December 20, 2007.
13. Part(s) of body injured by accident or occupational disease: Body as a whole.
14. Nature and extent of any permanent disability: Death.
15. Compensation paid to-date for temporary disability: N/A.

¹ Claimant dismissed the Second Injury Fund just prior to starting the hearing.

16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: \$742.72.
20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: None.
22. Second Injury Fund liability: N/A.
23. Future medical awarded: N/A.

Employee: Melinda Penachio (deceased)

Injury No. 07-132005

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Melinda Penachio (deceased)

Injury No: 07-132005

Dependents: Paul Penachio (surviving spouse),
Kaylie Penachio (child),
Stephanie Penachio (child)

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

Employer: Capital Region Medical Center

Additional Party: Second Injury Fund (dismissed)

Insurer: Self-insured,
c/o Thomas McGee Management Services

On September 30, 2010, Paul Penachio (the widower) and Capital Region Medical Center/Thomas McGee Management Services appeared for a final award hearing in Jefferson City, Missouri. Ms. Penachio (deceased) and Mr. Penachio were represented by attorney Thomas E. Loraine. Capital Region Medical Center and Thomas McGee Management Services were represented by attorney Jared P. Vessell. Although the Second Injury Fund, represented by attorney David Zugelter, appeared for the hearing, claimant dismissed the Fund prior to the commencement of the hearing.

Mr. Penachio testified in person at the trial and by deposition. Dr. Bill Sweezer, Ms. Helen Marie Evans, Ms. Tonya Carlton Sandifer, Mr. Robert Mazur, Officer Scott White, and Ms. Mary Dobbins testified by deposition. The parties filed briefs or proposed awards on or about October 18, 2010.

STIPULATIONS

The parties stipulated to the following:

1. On or about December 20, 2007, Melinda Penachio was involved in a motor vehicle accident and sustained injuries to her body as a whole. The accident resulted in her death.
2. Melinda Penachio was an employee of Capital Region Medical Center.
3. On or about December 20, 2007, Capital Region Medical Center (the employer) was an employer operating subject to the Missouri Workers' Compensation law.
4. The employer's liability for workers' compensation was self-insured and Thomas McGee Management Services was the third-party administrator.
5. Notice is not an issue.
6. Claimant filed a Claim for Compensation within the time prescribed by law.
7. The Missouri Division of Workers' Compensation has jurisdiction and venue in Miller County is proper.
8. The agreed-upon rate of compensation is \$742.72/week.

ISSUES

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

1. Accident arising out of and in the course of employment.
2. Injury.
3. Medical causation.
4. Attorney fees and costs on behalf of the employer/insurer.

EXHIBITS²

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Birth certificate.
Exhibit B	Marriage license.
Exhibit C	Certificate of Marriage.
Exhibit D	2007 W-2 Earnings Summary.
Exhibit E	Certificate of Live Birth (10-04-91).
Exhibit F	Certificate of Live Birth (4-15-93).
Exhibit G	Certificate of Death.
Exhibit H	Photographs.
Exhibit I	Records from St. Louis University.
Exhibit J	Report from the Highway Patrol.
Exhibit K	Deposition of Ms. Mary Dobbins.
Exhibit L	Page from Patient Care Policy Manual (JJ-LD-18.1).
Exhibit M	Pages from Patient Care Policy Manual (JJ-LD-10.6).

On behalf of the employer/insurer, the following exhibits³ were admitted in to the record:

Exhibit 2:	Atwill and Montgomery bills.
Exhibit 3:	Additional billing information.

The following exhibits were admitted as joint exhibits on behalf of the claimant and the employer/insurer:

Exhibit A-1:	Deposition of Ms. Helen Marie Evans.
Exhibit B-2:	Deposition of Patrolman Scott White.
Exhibit C-3	Deposition of Ms. Tanya Carlton Sandifer.
Exhibit D-4	Deposition of Dr. Bill Sweezer.
Exhibit E-5	Deposition of Mr. Robert A. Mazur.

² All depositions were received subject to the objections contained therein.

³ Proposed Exhibit 1 was withdrawn and not admitted into the record.

Exhibit F-6 Deposition of Mr. Paul Penachio.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Melinda Penachio was born on July 30, 1962. Her maiden name was Melinda J. Burn. She married Paul Penachio on September 11, 1987, and remained married to him at the time of her death. During the periods relevant to this award, Ms. Penachio and Mr. Penachio lived in Eldon, Missouri.
2. Melinda Penachio and Paul Penachio had two children. The oldest child, Kaylie Penachio, was born on October 4, 1991; she lives in St. Louis, where she is attending college. The younger child, Stephanie Penachio, was born on April 15, 1993; she lives at the family home and plans to go to college in about a year.
3. On December 20, 2007, Ms. Penachio was employed by Capital Region Medical Center (the hospital). Mr. Penachio, her husband, described her position as a Surgical Technician.⁴ Ms. Penachio was on the open heart team at the hospital.
4. On the afternoon of December 20, 2007, Ms. Penachio was involved in a one-car motor vehicle accident while driving home from work. Ms. Penachio lived approximately one-half hour from her employer's location (the hospital). The accident occurred in Miller County, Missouri. Ms. Penachio died at the scene of that accident.
5. Mr. Penachio testified that his wife died from blunt trauma after being ejected from her car, and that she was not wearing her seatbelt. Mr. Penachio stated that the site of the accident was on his wife's direct route home from work, and was about 4 to 5 miles before the turnoff to their home. He also indicated that weather-wise, the day of the accident was a nice day and there was no snow or rain.⁵
6. Mr. Penachio testified that his wife's normal work shift was from around 6:45 a.m. to 3:15 p.m., Monday through Friday.
7. Ms. Penachio was frequently "on-call" and sometimes during her "on-call" periods she would actually be called back to work.

⁴ Exh. F-6, p. 11.

⁵ Exh. F-6, pp. 22-23.

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8. Mr. Penachio testified that on the day prior to his wife's accident, December 19, 2007, she had worked a normal work shift of about 6:00 a.m. to 3:00 p.m. Mr. Penachio stated that after his wife's shift ended on December 19, she was on "on-call" status. At the trial, he testified that she was called back to the hospital around 10:30 p.m. and left the house at 11:15 p.m. In his deposition, he indicated that she was called back to work between 10:15 and 10:30 p.m.
9. At the trial, Mr. Penachio testified that the last thing his wife said to him before returning to work on December 19th was that she was very tired and did not want to go back to the hospital. In his deposition testimony, however, Mr. Penachio stated that his wife had not complained of being tired on the night of December 19, when he last saw her.⁶
10. Mr. Penachio testified that in the six months prior to his wife's fatal car accident, she was called back three or four times per week while on "on-call" status.⁷ His testimony is inconsistent with the documentary evidence regarding Ms. Penachio's work hours, which will be discussed later.

Helen Marie Evans

11. Helen Marie Evans testified via deposition on April 2, 2010. She was the head nurse in the early morning of December 20, 2007, when Ms. Penachio was called back to work.⁸ Ms. Evans stated that she herself was called into work about 1:30 a.m. to 2:00 a.m. that morning, and that Ms. Penachio was called in after her.⁹ She testified that Ms. Penachio was in fit condition and performed well.¹⁰
12. Ms. Evans testified that the surgery for which they were called in concluded at 10:36 a.m. on December 20, 2007.¹¹ Ms. Evans indicated that Ms. Penachio was the "number four person" on the heart team that morning, and the usually the number four person on the heart team was the first person to go home.¹² In addition, Ms. Evans remembered that she told Ms. Penachio that she could go home when the cross clamp came off, which was at 7:05 a.m.; Ms. Penachio, however, indicated that she did not want to go home as she wanted to stay for the luncheon that was being provided by the Anesthesia Section.¹³
13. Ms. Evans is responsible for creating the on-call calendar, and she usually sets it up so that all nurses have an equal amount of on-call time. Some nurses, however, request more on-call time because of the opportunity to make more money. Ms. Evans testified

⁶ Exh. F-6, p. 40.

⁷ Exh. F-6, pp. 24-26.

⁸ Exh. A-1, p. 23.

⁹ Exh. A-1, pp. 19-20.

¹⁰ Exh. A-1, p. 20.

¹¹ Exh. A-1, p. 26.

¹² Exh. A-1, p. 31.

¹³ Exh. A-1, p. 32.

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that Ms. Penachio often requested more on-call time, especially with it being close to Christmas.¹⁴

Tonya Carlton Sandifer

14. Tonya Carlton Sandifer also testified by deposition on April 2, 2010. She is the Vice President of Patient Care at Capital Region Medical Center.¹⁵ She indicated that employees will not be asked to report to work two or more times in a 24-hour period unless they are on an on-call rotation or unless they voluntarily agree to work the extra shifts.¹⁶

15. Under the employer's policy, Ms. Penachio was paid for certain on-call periods. Attached to Ms. Sandifer's deposition is the On-Call and Call-Back Pay Policy.¹⁷ Ms. Penachio fell under the "Level 1" category of employee; as such, she was compensated for 2 hours of regular pay for on-call shifts that were from 13 hours to 16 hours of on-call time per day.

Scott White

16. Missouri State Highway Patrolman Scott White testified by deposition on April 2, 2010. The Missouri Uniform Accident Report was attached to the deposition as Exhibit 1. Officer White testified that the approximate time of the accident was 12:40 p.m. on December 20, 2007. He was first contacted about the accident at 12:48 p.m., and he arrived at the scene at approximately 1:19 p.m.¹⁸ He testified that Ms. Penachio had not been wearing a seatbelt and she was ejected from the vehicle.¹⁹ He indicated that it was his guess that the cause of the accident was either inattentiveness or falling asleep, although he acknowledged that this was speculation.²⁰

17. Officer White also testified that the roadway conditions that day were wet, and that it was cloudy.²¹

Robert Mazur

18. Robert Mazur testified by deposition on February 3, 2010. Mr. Mazur is responsible for the personnel and human resource activities at Capital Region Medical Center.²² In his deposition, he referred to a timecard report, which was attached as deposition exhibit 3. Mr. Mazur testified that the timecard report reflects the hours that the employee worked

¹⁴ Exh. A-1, p. 34.

¹⁵ Exh. C-3, p. 4.

¹⁶ Exh. C-3, p. 29.

¹⁷ Exh. C-3, deposition Exh. 1.

¹⁸ Exh. B-2, pp. 7-8.

¹⁹ Exh. B-2, p. 12.

²⁰ Exh. B-2, p. 31.

²¹ Exh. B-2, p. 31.

²² Exh. E-5, p. 5.

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during the days between December 9, 2007 and December 24, 2007.²³ He indicated that the hospital has an electronic time and attendance system. Employees are required to clock in and out on that system, and the timecard report reflects the particular hours in which the employee was clocked in. The report also indicates the pay for that time period and notes things like whether the employee was on call or any hours in which the employee was clocked in as on-call.²⁴

19. A copy of the on-call schedule for the employees that worked on the open heart team for the month of December 2007 was attached to the deposition as deposition exhibit 4. Mr. Mazur stated that Ms. Penachio was part of the open heart team.²⁵
20. The attachment indicates that on December 9, 2007, Ms. Penachio was not scheduled for a regular work shift.
21. While referring to the timecard report, Mr. Mazur indicated that on December 10, 2007, Ms. Penachio worked 8.5 hours.
22. On December 11, she worked 8.25 hours.
23. On December 12, Ms. Penachio worked 8.0 hours.
24. She also worked 8.0 hours on December 13, 2007.
25. On December 14, 2007, Ms. Penachio worked 7.25 hours, plus an extra 0.25 hours that was classified as overtime because she went over 40 hours for that week.²⁶
26. She was then off work on December 15 and 16.
27. On December 17, she was clocked in from 6:47 a.m. to 3:05 p.m. and worked a total of 7.75 hours.
28. On December 18, she was clocked in from 6:36 a.m. to 3:02 p.m., for a total of 8 hours.²⁷
29. On December 19, Ms. Penachio arrived for her regular work shift at 6:41 a.m. and departed at 3:04 p.m., for a total of 7.75 hours. She was then on on-call status until she clocked back in at 2:38 a.m. on the morning of December 20, 2007, when she was called back to work.²⁸ Mr. Mazur testified that Ms. Penachio's regular work shift would have begun at 6:30 a.m. that morning, so she was required to clock out of her on-call status at 6:30 a.m. She then clocked back in at 6:32 a.m. as working her regular shift. She continued to work until 12:15 p.m., when she clocked out, taking 5.75 hours of vacation

²³ Exh. E-5, pp. 6 and 8.

²⁴ Exh. E-5, p. 10.

²⁵ Exh. E-5, pp. 21-22.

²⁶ Exh. E-5, p. 58.

²⁷ Exh. E-5, p. 45.

²⁸ Exh. E-5, pp. 31, 32-33.

pay to cover the remainder of her normal shift, which was scheduled to end at 3:00 p.m. that afternoon.²⁹ Mr. Mazur testified that on December 20, 2007, claimant actually worked for approximately nine hours.³⁰

30. The on-call schedule, Exh. E-5, deposition exhibit 4, shows that Ms. Penachio was listed to be on-call for the following 16 days in December: 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 19, and 20.
31. The document also shows that for the period of December 9 through 24, 2007, Ms. Penachio was called back to work from an "on-call" status for only 3.75 hours.³¹
32. Mr. Mazur noted that on December 19, 2007, Ms. Penachio was on "on-call" status for 16 hours, starting when she left work at 3:00 p.m.³² Mr. Mazur noted that on-call status means that the employee gets paid for "simply being home and being available to come back it. And it does appear [sic] from this time record that she did get 16 hours of on call that evening...."³³ The 16-hour period ran from 3:00 p.m., December 19, 2007, until 7:00 a.m., December 20, 2007.³⁴ Ms. Penachio was called in around 2:30 a.m. on December 20, 2007, during that on-call period.³⁵
33. Mr. Mazur noted that employees in an on-call status must remain within a one-hour commute of the hospital during that on-call period. Employees may sleep during that period of time and they do not have to remain at home.³⁶ However, an employee must not be "impaired."³⁷
34. On December 19, 2007, Ms. Penachio worked 7.75 regular hours. She was also on "on call" status for 16 hours. (Although, as noted above, the 16-hour "on call" status actually began on December 19 and ended on December 20th.) It was Mr. Mazur's understanding that Ms. Penachio would have been paid 2 hours of her regular hourly wage for those 16 hours of on-call status.³⁸
35. The pay records or timecard records show that on December 20, 2007, Ms. Penachio was paid for 14.75 hours; however, 5.75 of those hours were for vacation hours that she did not actually work.³⁹ Mr. Mazur testified that the records show that Ms. Penachio actually worked 9 hours on December 20, 2007.⁴⁰

²⁹ Exh. E-5, p. 31.

³⁰ Exh. E-5, p. 43.

³¹ Exh. E-5, p. 28, and depo exh. 3, p. 4.

³² Exh. E-5, p. 32.

³³ Exh. E-5, p. 32.

³⁴ Exh. E-5, pp. 32-33.

³⁵ Exh. E-5, p. 33.

³⁶ Exh. E-5, p. 34.

³⁷ Exh. E-5, pp. 34-35.

³⁸ Exh. E-5, pp. 38-39.

³⁹ Exh. E-5, p. 42.

⁴⁰ Exh. E-5, p. 43.

Dr. Bill Sweezer

36. Dr. Bill Sweezer was the operating surgeon when Ms. Penachio was called back to the hospital on the morning of December 20, 2007.⁴¹ Dr. Sweezer stated that he had seen the patient earlier that day and there were no signs that the patient needed surgery; however, at about 1:45 a.m. on the morning of December 20, 2007, the patient's condition changed.⁴² He stated that he and the cardiologist on duty made the decision on December 20th, sometime after 1:45 a.m., that the patient needed immediate surgery.⁴³ He testified that the heart team, on which Ms. Penachio worked, would have been notified sometime after the patient's condition changed.⁴⁴

Miscellaneous

37. I find that at the time of the motor vehicle accident, Ms. Penachio was on vacation-leave status; that is, she was being paid though her vacation time since she chose not to finish working her regularly scheduled shift. She was also on "on-call" status.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

The accident in this case occurred on December 20, 2007. Thus, the 2005 amendments to the Missouri Workers' Compensation law apply. Section 287.800.1, RSMo, provides that the Workers' Compensation law is now to be strictly construed and the administrative law judge is to weigh the evidence impartially, without giving the benefit of a doubt to any party when weighing evidence and resolving factual conflicts.⁴⁵ Strict construction means that a "statute can be given no broader application than is warranted by its plain and unambiguous terms."⁴⁶ The operation of the statute must be confined to "matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter."⁴⁷

In the case of *Allcorn v. TAP Enterprises, Inc.*, the court was presented with the issue of interpreting the notice requirement of the Workers' Compensation Law.⁴⁸ There, the court found that the Commission had not strictly construed the statute, Section 287.420, and had erroneously attributed a meaning that was not in accordance with a strict reading of the statute. The court noted that the mandated strict construction prohibits courts from "enlarging or extending the law" beyond what is explicitly declared within the statute.⁴⁹

⁴¹ Exh. D-4, p. 8.

⁴² Exh. D-4, pp. 21-22.

⁴³ Exh. D-4, p. 24.

⁴⁴ Exh. D-4, pp. 21, 23.

⁴⁵ *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010) .

⁴⁶ *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo.App. 2009).

⁴⁷ *Allcorn v. Tap Enters, Inc.*, 277 S.W.3d 823, 828 (Mo.App. 2009).

⁴⁸ 277 S.W.3d 823 (Mo.App. S.D. 2009).

⁴⁹ *Alcorn* at 828.

To begin, it is helpful to summarize the timeline of Ms. Penachio's work schedule for the two weeks prior to the date of the motor vehicle accident.

- 12/09/07 (Sun.) On-call status for 24 hours with no call-back.
- 12/10/07 (Mon.) Worked 8.5 hours; on-call for 16 hours with no call-back.
- 12/11/07 (Tues.) Worked 8.25 hours; on-call for 16 hours with no call-back.
- 12/12/07 (Wed.) Worked 8.0 hours; on-call for 16 hours with no call back.
- 12/13/07 (Thurs.) Worked 8.0 hours; on-call for 16 hours with no call back.
- 12/14/07 (Fri.) Worked 7.25 hours plus .25 hours overtime. (Not on-call.)
- 12/15/07 (Sat.) Did not work; not on-call.
- 12/16/07 (Sun.) Did not work; not on-call.
- 12/17/07 (Mon.) Worked 7.75 hours; on-call for 16 hours with no call back.
- 12/18/10 (Tues.) Worked 8.0 hours; on-call for 16 hours with no call back.
- 12/19/10 (Wed.) Worked 7.75 hours; on-call for 16 hours with no call back.
- 12/20/07 (Thurs.) Worked 5.25 hours; took 5.75 hours of vacation time; worked 3.75 hours of a call-back shift.

From December 8 through December 15, claimant worked 40 hours of regularly scheduled shift work and was on-call for 88 hours with no call backs. That is, during her 88 hours of on-call time she was *not* called back into work even once.

For the week of the car accident, December 16 through December 20, Ms. Penachio worked 28.75 regular hours, 0.25 hours of overtime, took 5.75 hours of vacation time, was on-call for 48 hours, and was called back for 3.75 hours of her on-call periods.

Thus, for the two weeks before the car accident, Ms. Penachio worked 68.75 hours of regular time, was on-call for 136 hours, took 5.75 hours of vacation time, and was called back for 3.75 hours. To reiterate, in the two week period before the accident, Ms. Penachio was called back to work only one time, for 3.75 hours, and she worked only 0.25 hours of overtime.

The following is a more detailed timeline of the two particular days in question, December 19 and 20, 2007.

December 19

6:41 a.m. – 3:04 p.m. Ms. Penachio worked normal shift – 7.75 hours.
 3:05 p.m. Ms. Penachio was on call for the next 16 hours.

December 20

1:30 – 2:00 a.m. Nurse Evans testified that the heart team was called in.
 Approximately 1:45 a.m. Dr. Sweezer testified that he and the cardiologist made the decision to operate.
 2:38 a.m. Ms. Penachio clocks in for work.

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6:30 a.m.	She clocks out of the “call back” status.
6:32 a.m.	Ms. Penachio clocks in for her regular shift.
7:05 a.m.	Nurse Evans told Ms. Penachio she could leave.
10:36 a.m.	Surgery ended.
12:15 p.m.	Claimant clocks out of her regular shift (and takes 5.75 hours of vacation time).
Approximately 12:40 p.m.	Ms. Penachio was involved in a motor vehicle accident.

Mr. Penachio testified at the trial that his wife was called in to work between 10:30 p.m. and 11:00 p.m. on December 19; in his deposition, however, he testified that she was called back to work between 10:15 and 10:30 p.m. on December 19. The more credible evidence demonstrates that Ms. Penachio was not called back to work until later, between 1:30 and 2:00 a.m. on December 20, 2007. The evidence is clear that Ms. Penachio actually clocked into work at 2:38 a.m. on December 20th.

Although Mr. Penachio testified that during the six months before the accident, his wife was called into work during her “on call” shifts three or four times per week, the credible evidence demonstrates that she was called back much less frequently. For the two weeks before the accident, Ms. Penachio was called back only one time, for 3.75 hours. In addition, there was no credible evidence that Ms. Penachio was ever called back with the frequency that Mr. Penachio claimed.

Mr. Penachio also contradicts himself with regard to what, if anything, his wife said to him after she was called back to work on December 19 or 20, 2007. In his deposition, Mr. Penachio was asked if his wife had complained about being tired when she was called back, and he answered “no.” At the trial, Mr. Penachio testified that after his wife was called back to work, she said she was really tired and did not want to go; he testified that this was the last thing she said to him.

Issues 1, 2, and 3: Accident arising and of and in the course of employment, injury, and medical causation.

Under Missouri Workers’ Compensation law, the claimant bears the burden of proving all essential elements of his or her workers’ compensation claim.⁵⁰ Proof is made only by competent and substantial evidence, and may not rest on speculation.⁵¹ The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony even absent contradictory evidence.⁵²

⁵⁰ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002). See also *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271 (Mo.App. 1996).

⁵¹ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

⁵² *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 198, 199 (Mo. App. E.D. 1990).

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The claimant must establish a causal connection between the accident and the injury.⁵³ “Arising out of employment” means that a causal connection exists between the employee’s duties and the injury for purposes of workers’ compensation.⁵⁴ An injury is compensable only if it is clearly work related, and an injury is clearly work related only if work was a substantial factor in the cause of the injury and the resulting medical condition. However, an injury is not compensable if work was merely a triggering or precipitating factor.⁵⁵

Pursuant to Section 287.020.2, RSMo, “accident” is defined 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. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3 defines “injury” as an injury that 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 the 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.

Section 287.020.5, RSMo., states as follows:

Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee’s home to the employer’s principal place of business or from the employer’s principal place of business to the employee’s home are not compensable. The extension of premises doctrine is abrogated 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.

However, it has been suggested that Ms. Penachio was under undue stress while she was employed at Capital Region Medical Center, and that this caused her to be involved in the fatal motor vehicle accident on December 20, 2007. Prior to the 2005 statutory changes, there was an exception to the general concept that going to and coming from work cases were not compensable. One such case was *Snowbarger v. Tri-County Electric Coop.*⁵⁶ The issue in that case was whether a motor vehicle accident involving the claimant arose out of and in the course of the claimant’s employment. In *Snowbarger*, the claimant worked many hours during an emergency ice storm. From Saturday, November 30, to Thursday, December 5, he worked 86 out of 100.5 hours. The claimant was also cutting up trees with chainsaws, digging holes by hand, and resetting poles in winter weather conditions. On the date of the accident, he went off duty at 1:00 a.m. On the way home, he fell asleep and collided with another vehicle. He died from the accident. The Missouri Labor and Industrial Relations Commission found that the case was

⁵³ *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 198 (Mo. App. E.D. 1990).

⁵⁴ *Cruzan v. City of Paris*, 922, S.W.2d 473 (Mo. App. E.D. 1996), overruled on other grounds by *Hampton*.

⁵⁵ Section 287.020.2, RSMo. 2000.

⁵⁶ 793 S.W.2d 348 (Mo. banc 1990).

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compensable and that the accident arose out of and in the course of employment. The reasoning was that the accident was due to the long hours that claimant worked in extreme weather immediately before the accident. The Commission stated that “Snowbarger was subjected to a “special hazard” in driving home from work at 1:30 a.m. after working exhaustingly long hours at the bidding of his employer.” The Supreme Court also found that the claimant’s accident fell within an exception to Section 287.020.5, and pointed out that claimant had worked 86 of the 100.5 hours preceding the fatal accident.

The present case is easily distinguished from *Snowbarger*. In *Snowbarger*, the claimant worked 86 out of the preceding 100.5 hours before the accident performing heavy manual labor in extremely cold weather. Ms. Penachio, however, worked only 32.50 hours during the approximately 108.66 hours prior to the accident (December 16 through 12:40 p.m. on December 20). Thus, she worked 29.9% of the 108.66 hours preceding the accident, compared to Mr. Snowbarger, who worked 85.6% of the 100.5 hours prior to his accident – in extreme cold, no less.

I find that Ms. Penachio did not work exhaustingly long hours prior to the accident. I find that a special situation or condition did not exist, and that there was not a peculiar or abnormal exposure to a peril whose risk was incident or inseparable from her employment. I find that the “Special Hazard” exception to the general rule (that accidents going to or returning from the place of work are not compensable) does not apply to this case. I find that on December 20, 2007, Ms. Penachio did *not* sustain an accident that arose out of and in the course of her employment.

The claimant’s claim against the employer is denied. Given the denial of the claim on the issue of accident, the remaining issues are moot (except attorney’s fees and costs) and will not be ruled upon.

Issue 4: Attorneys’ Fees and Costs

The employer/insurer requests that an award of attorney’s fees and costs be assessed against the employer/insurer.

Section 287.560, RSMo., addresses attorney’s fees and costs, as follows (in relevant part):

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers’ compensation; provided, however, that if the division or commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

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In *Landman v. Ice Cream Specialties, Inc.*, the Missouri Supreme Court established that the “whole cost” referred to in the statute included attorney’s fees.⁵⁷ The statute, however, should only be invoked where the issue is clear and the behavior is egregious.

Upon review, I find that the facts of this case do not rise to the level where the claimant should be ordered to pay attorney’s fees and costs; thus, attorney’s fees and costs will not be awarded.

Any pending objections not expressly ruled on in this award are overruled.

Date: _____

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

⁵⁷ 107 S.W.3d 240 (Mo. banc 2003).