

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 10-019309

Employee: Jason Pope
Employer: Gateway to the West Harley Davidson
Insurer: Missouri Automobile Dealers WC Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated August 4, 2011.

Preliminaries

On March 17, 2010, employee injured his right ankle in a work fall. The ALJ denied employee's claim for benefits because she found that the injury did not arise out of his employment.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Based upon the opinions of Dr. Berkin, employee's testimony, and the record as a whole, we find that as a result of the work injury, employee sustained 30% permanent partial disability of his right ankle.

Discussion

It is important to note that employee is alleging that his accidental injury occurred on March 17, 2010. Therefore, this case falls under the purview of the 2005 amendments to Missouri Workers' Compensation Law.

Section 287.120 RSMo "requires employers to furnish compensation according to the provisions of the Worker's Compensation Law for personal injuries of employees caused by accidents arising out of and in the course of the employee's employment." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Section 287.020.3 RSMo provides, as follows:

(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:

¹ Statutory references are to the Revised Statutes of Missouri 2009 unless otherwise indicated.

Employee: Jason Pope

- 2 -

(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.”

The primary issue in this case lies in whether the injury satisfies § 287.020.3(2) (b). The application of § 287.020.3(2) (b) RSMo involves a two-step analysis. *Pile v. Lake Reg'l Health Systems*, 321 S.W.3d 463, 467 (Mo. App. 2010).

The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

Id.

The ALJ found that the hazard or risk of injury (descending stairs while carrying a helmet and wearing work boots) was unrelated to employee's employment. The ALJ reasoned that employee's normal job duties did not include climbing an excessive number of stairs or moving motorcycles to the showrooms. Further, the ALJ reasoned that employee was not even involved in a work activity when he fell because he had finished moving the motorcycles, and planned to clock out if his supervisor had no additional work for him to do. We disagree with the ALJ's conclusions.

It is irrelevant that employee did not move the motorcycles to the upper showroom on a daily basis. The facts are undisputed that on March 17, 2010, employee moved the motorcycles to the upper showroom in compliance with a work directive given to him by his supervisor. It is further undisputed that he was required to wear a helmet whenever he moved the motorcycles. Lastly, it is undisputed that when employee fell he was on his way to the service department to ask his supervisor if there were any other duties he needed to complete before clocking out.

First, moving the motorcycles to the upper showroom was clearly integral to the performance of employee's job. He was engaged in that activity solely because his supervisor directed him to complete that task. As part of his employment, employee was required to comply with his supervisor's directives. On March 17, 2010, these directives included moving motorcycles to the upper showroom. Second, the ALJ's conclusion that descending the stairs was not part of the work activity of moving the motorcycles is illogical. In order to report back to his supervisor and see if there were any more tasks he needed to complete that day, he had to descend those stairs. It was integral to employee's job as a technician to make sure there were no other tasks that his supervisor needed him to complete before he clocked out. There are numerous activities that employee's engage in throughout a workday that may not be listed in their job description, but that does not necessarily mean that they are not integral to the performance of their job.

We find that the competent and substantial evidence shows that the risk to which employee was exposed, negotiating stairs while in the process of performing work activities, while wearing work boots and carrying necessary tools of his trade (helmet), created a clear connection or nexus

Employee: Jason Pope

between the hazard or risk of injury and the injury itself. Consequently, there is no need to consider whether employee is equally exposed to the hazard or risk in normal non-employment life.

Award

We reverse the ALJ's award and find that employee's injury arose out of and in the course of his employment.

In accordance with the parties' stipulations and the findings herein, employee is entitled to, and employer is ordered to pay: 1) past medical expenses of \$20,910.82; 2) 9 1/7 weeks of temporary total disability benefits from March 18, 2010 to May 21, 2010, or \$2,438.13;² 3) hardware removal from the ankle at the 155 week level; and 4) 30% permanent partial disability benefits rated at the right ankle, or \$12,400.16.³

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

The award and decision of Administrative Law Judge Suzette Carlisle, issued August 4, 2011, is attached and incorporated to the extent it is not inconsistent with this final award.

Given at Jefferson City, State of Missouri, this 2nd day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

CONCURRING OPINION FILED
James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

² 9 1/7 weeks x \$266.67 TTD rate

³ 46.5 weeks x \$266.67 PPD rate

Employee: Jason Pope

CONCURRING OPINION

I write separately to disclose the fact that I did not participate in the December 14, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

James Avery, Member

AWARD

Employee:	Jason Pope	Injury No.:	10-019309
Dependents:	N/A		Before the
Employer:	Gateway to the West Harley Davidson		Division of Workers'
Additional Party:	N/A		Compensation
Insurer:	Missouri Automobile Dealers WC Fund		Department of Labor and Industrial
Hearing Date:	May 12, 2011		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	SC

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? Yes
4. Date of accident or onset of occupational disease: March 17, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:
Claimant fell down the stairs and fractured his right ankle.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right ankle
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$0

Employee: Jason Pope

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$400.00
- 19. Weekly compensation rate: \$266.67/\$266.67
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: None

23. Future requirements awarded: N/A

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jason Pope	Injury No.: 10-019300
Dependents:	N/A	Before the
Employer:	Gateway to the West Harley David	Division of Workers'
Additional Party:	N/A	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Missouri Automobile Dealers WC Fund	Checked by: SC

STATEMENT OF THE CASE

A hearing was held at the Missouri Division of Workers' Compensation (DWC), St. Louis office at the request of Jason Pope (Claimant), on May 12, 2011, pursuant to Section 287.450 RSMo (2005).¹ Claimant seeks a Permanent Partial Disability (PPD) award against Gateway to the West Harley Davidson (Employer) and the Missouri Automobile Dealers Workers' Compensation Fund (Insurer), c/o MADA Services Corporation. Venue is proper and jurisdiction lies with the DWC. Attorney Thomas Burke represented Claimant. Attorney Susan Kelly represented the Employer and Insurer. The Second Injury Fund is not a party to the case.

The record closed after presentation of the evidence. Parties were asked to submit Memorandums of Law by June 2, 2011.

STIPULATIONS

The parties stipulated that on or about March 17, 2010:

1. The Claimant was employed by the Employer;²
2. Claimant sustained an accident in St. Louis County, Missouri;
3. The Employer and Claimant operated under the provisions of the Missouri Workers' Compensation Law;
4. Employer's liability was fully insured by Insurer;
5. Employer had notice of the injury;
6. A Claim for Compensation was timely filed;
7. Claimant's average weekly wage was \$400.00, resulting in a rate of compensation of \$266.67 for temporary total disability (TTD) and PPD;

¹ All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

² Any references in this award to the Employer also include the Insurer.

8. The Employer paid no medical or TTD benefits;

The parties entered into the following conditional stipulations:

9. If the Employer is found to be liable for compensation, the Employer shall be liable for TTD benefits for 9 1/7 weeks from March 18, 2010 to May 21, 2010;
10. If the Employer is found to be liable for compensation, Employer is also liable for hardware removal from the ankle at the 155 week level;
11. The medical expenses in evidence are reasonable and necessary. If Employer is found liable for compensation, Employer agrees to pay the medical bills which total \$20,910.82.

ISSUES

The parties identified the following issues for disposition:

1. Did Claimant's accident arise out of and in the course of his employment?
2. If so, what is the nature and extent of the Employer's liability, for PPD, if any?

EXHIBITS

Claimant's Exhibits A through N and Employer's Exhibits 1 through 7 were offered and admitted into evidence without objection.

SUMMARY OF THE DECISION

Based on the entire record, Claimant's testimony, demeanor, expert medical opinion and records, and the applicable law in the State of Missouri, I find Claimant did not meet his burden to show his injury arose out of and in the course of his employment.

FINDINGS OF FACT

All evidence was reviewed, but only evidence discussed below is considered to establish the facts based upon competent and substantial evidence contained in the record.

1. Claimant is a 36 years old high school graduate. In 2009, he completed the Suzuki and BMW Tier One programs at the Mechanics Institute in Phoenix Arizona.
2. Employer hired Claimant as an entry level technician, and he worked from March 10, 2010, to July 16, 2010. He inspected trade-in motorcycles, washed motorcycles being serviced, performed test rides to identify and correct problems, and changed oil and tires. On three occasions during Claimant's first week of employment, he moved motorcycles from the sales lot to two show rooms. However, the sales staff was responsible for moving the motorcycles.

3. On March 17, 2010, Claimant arrived at work around 9:00 a.m. About 6:30 p.m., Claimant's supervisor asked him to pull motorcycles into the lower and upper showrooms from the parking lot. Claimant wore a helmet and riding boots, which he supplied, when parked about five motorcycles. State law required that Claimant wear a helmet when he rode a motorcycle.
4. After Claimant parked the last motorcycle in the upper showroom, he proceeded down five stairs to the service department, to find out if his supervisor needed anything else before he clocked out.
5. While descending the stairs, Claimant lost his footing, fell on the stairs, and fractured his right ankle. He does not know if he slipped or tripped, and he does not know how the fall occurred. When Claimant fell he was carrying his helmet and he wore a work shirt, jeans, and his riding boots. He has not worn the boots since the injury.
6. Claimant purchased the boots in 2008 and he wore them when he rode his personal motorcycle during the day, when he walked in and out of buildings, climbed stairs, and purchased gas. The boots rose to the calf, laced up, and were well worn by the time the Employer hired him in 2010. The boots protect Claimant from exhaust fumes, and provide support. They are heavier than a regular shoe.
7. Claimant owned the helmet before Employer hired him, and he wore it, along with the boots, during personal motorcycle rides, including an over the road trip that covered up to 3,000 miles over a two week period.
8. Claimant's boots, helmet, and clothing did not cause or contribute to his fall, and there was no substance on the floor.
9. The **Melville Ambulance Service** provided emergency services and took Claimant to **St. Anthony's Medical Center**. X-rays revealed a fracture dislocation of the tibiolar joint. **Mahesh Bagwe, M.D.**, set the ankle and performed an open reduction, internal fixation with a plate and screws. The leg was casted six to eight weeks. Later, Claimant wore a walking boot, used a walker, crutches, and a cane.
10. Claimant returned to work on light duty wearing a boot in late May 2010. The injury did not affect his ability to perform his job. Claimant worked for a month before he was terminated.
11. Dr. Bagwe prescribed physical therapy and released Claimant in October 2010. Dr. Bagwe concluded the hardware may be removed in the future if it becomes painful or Claimant becomes more active.
12. Claimant's ankle has improved but he continues to have pain and swelling with standing and walking for four hours, and pain after two hours on uneven surfaces. The pain increases to 5 out of 10 and goes into the foot. To relieve pain, he takes Ibuprofen several

times a week. To relieve swelling he elevates the foot and applies ice several times a month. The ankle seems stable, but he does not trust it. He compensates by shifting his weight to his non-dominant left leg. Claimant has decreased range of motion, the ankle pops with movement, and Claimant has not run since the accident.

13. Claimant is currently a student at Vaterott trade school and he is unemployed.

Expert Medical Opinion

14. **Gary J. Schmidt, M.D.**, provided an Independent Medical Examination at Employer's request. Dr. Schmidt diagnosed mild pain post open reduction and internal fixation of the ankle fracture. X-rays revealed a fractured screw and loosening around both screws.
15. Dr. Schmidt opined the fall was the prevailing factor that caused the fracture, dislocation, and symptoms.
16. Dr. Schmidt opined Claimant had achieved maximum medical improvement, returned him to work full duty, and rated 10% PPD of the ankle.
17. Dr. Schmidt opined the hardware may need to be removed in the future.
18. **Shawn L. Berkin, D.O.**, examined Claimant on January 4, 2011, took a history and wrote a report. Dr. Berkin concluded the March 17, 2008 fall down the stairs was the prevailing factor that caused Claimant's right ankle fracture and dislocation.
19. Dr. Berkin rated 35% PPD of the right ankle, and recommended anti-inflammatory medication for pain, home exercise, and recommended Claimant avoid standing and walking for long periods, and to use caution on ladders and stairs, and when working above ground level and on uneven surfaces, and take frequent breaks to avoid further injury.

RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not meet his burden of proof to show the injury arose out of and in the course of his employment.

Claimant asserts the injury arose out of and in the course of his employment, because of his increased risk of exposure to injury when he walked down the stairs in his boots and carried his helmet, as required by state law and his Employer. Employer contends that walking down the stairs was not related to Claimant's work activities, and there is no explanation for the fall because he "just fell."

Section 287.020.3 (2) RSMo provides that an injury shall be deemed 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...

An employee has the burden to prove by a preponderance of credible evidence all material elements of the claim. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968).

I find the fall was the prevailing factor that caused the right ankle fracture. The parties stipulated that Claimant sustained an accident on March 17, 2008, and Drs. Schmidt and Berkin opined that Claimant's fall was the prevailing factor that caused the fracture.

The dispute involves whether the injury "arose out of" employment," which refers to whether the cause or origin of the injury was related to a work activity under Section 287.020.3(2) (b). I find it did not. Application of this subsection involves a two step process:

1. The first step is to determine whether the hazard or risk is related or unrelated to employment as decided in *Pile v. Lake Regional Health System*, 321 S.W.3d 463 (Mo.App. 2010). Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment and there is a clear nexus between the work and the injury, and the inquiry stops here. *Id.*
2. If the hazard or risk is unrelated to the employment, it is necessary to determine whether the [employee] is equally exposed to this hazard or risk in normal, non-employment life

1. The hazard or risk of walking down stairs was not related to employment

In *Pile*, the Court held that the Commission's inquiry should have ended when it decided that medical evidence showed the employee developed calcified bone from excessive walking at work, and the bone shattered when she twisted her ankle as she turned the corner to go into the medicine room.

Unlike *Pile*, this record contains no medical evidence that the fracture was caused by an underlying medical condition created by Claimant's work activities. Claimant had only worked a week when he was injured, and the record contains no evidence that he climbed an excessive number of stairs during that time. Also, Claimant was hired as a technician, to inspect and repair motorcycles, and change tires and oil in the service department, which he did. Claimant was not responsible for the movement motorcycles, and he did not assist the sales staff more than three times before the accident. Moreover, Claimant was not involved in a work activity when he fell because he had finished moving the motorcycles, and planned to clock out if his supervisor had no additional work for him to do.

The holding in *Bivins v. St. John's Regional Health Center*, 272 S.W.3d 446, 450 (Mo.App. 2008) is instructive. In *Bivins*, the employee walked down the hall at work and fell before she clocked in. Contradictory evidence was introduced about how the accident occurred, whether Claimant's foot stuck to the floor or she just fell. The Court held that the 2005 statutory changes require an employee to satisfy the concept of causation, i.e., establishing some rational connection between work and the injury sustained. Based on credibility, the Court decided the employee's fall could not be explained, i.e., she "just fell," or she "simply or merely fell," therefore she failed to prove that the injury arose out of employment.

Also persuasive is *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671(Mo 2009), where the Court held:

"[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 Mr. Miller fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment."

In this case, Claimant testified he did not know why he fell; he "just lost his footing." Like *Miller*, Claimant was unaware of any substance on the steps, or any dangerous or unsafe condition of the steps, and his boots, helmet, and clothing did not cause or contribute to his fall. Nothing about work caused the injury. Claimant, like *Miller*, was in the course of his employment when the injury occurred, but there is no evidence of a distinctive condition of his employment that caused or contributed to his injury.

In this case, Claimant "just lost his footing and fell." I find no connection between the risk or hazard of injury (descending stairs carrying a helmet and wearing boots), the fractured ankle, and Claimant's employment, based upon credible testimony by Drs. Schmidt, Berkin, and Claimant.

Having found the risk of descending stairs is unrelated to Claimant's employment, it is necessary to discuss whether Claimant was equally exposed to the hazard or risk of descending stairs while wearing his helmet and boots in normal, non-employment life.

2. Claimant was equally exposed to the hazard or risk of injury in normal nonemployment life

The evidence in *Pile* revealed the employee was on her feet eighty percent of the time during a 12 hour shift, three to four times a week. In contrast, she was on her feet fifty percent of the time outside of work. The Court found the Commission erred in finding Claimant was equally exposed to the risk of injury from walking outside of work. The Court reasoned that Claimant had a risk of developing tendonitis from excessive walking. Therefore, the more she was on her feet, the more likely injury would occur. Furthermore, to deny recovery unless an

employee can only show risk of exposure by employment would eviscerate almost any claim for workers' compensation. The case was remanded for proceedings consistent with the opinion.

Applying the quantitative analysis in *Pile* to the facts in this case requires a different result. Claimant wore his boots more in non-employment life than he did in employment life. I find credible Claimant's testimony that he bought the boots in 2008, and they were well worn before he started work in March 2010.

Claimant routinely wore the boots and helmet when he rode his motorcycle. Prior to Claimant's employment in 2008, he rode for two-weeks, and covered up to 3,000 miles while wearing the same helmet and boots that he later wore when he worked for Employer. Outside of work, Claimant wore the boots all day on numerous occasions when he walked into and out of buildings, climbed stairs, and purchased gasoline. In contrast, Claimant wore the boots and helmet for one week at work. The record contains no evidence that Claimant descended the stairs at work while holding the helmet and wearing the boots more than three times.

The Court observed the boots had only a left shoelace and both boots appeared scuffed, and worn, and emanated a strong odor ten weeks after the hearing. The helmet was not in evidence.

Based upon credible testimony by Drs. Berkin, Schmidt and Claimant, and the applicable law in the State of Missouri, I find Claimant's exposure to the risk of an ankle fracture while going down stairs at work wearing his boots and carrying his helmet was less than his risk of exposure to injury while descending steps with those items outside of work. I find Claimant was equally exposed to the hazard or risk in normal, nonemployment life.

I find the injury arose in the course of Claimant's employment, but did not arise out of his employment." Having found the injury did not arise out of Claimant's employment, issues related to permanency are moot.

CONCLUSION

The claim is denied. Claimant sustained an injury that arose during the course of his employment it did not arise out of his employment.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation