

**TEMPORARY OR PARTIAL AWARD**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 07-079319

Employee: Thomas M. Roemisch  
Employer: Greene County, Missouri  
Insurer: Missouri Association of Counties c/o Gallagher Bassett Services  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated September 23, 2010.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued September 23, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14<sup>th</sup> day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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**DISSENTING OPINION FILED**

Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

Employee: Thomas M. Roemisch

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be reversed and the respondent in this case should not be considered an employee under § 287.020.1 RSMo.

Under § 287.020.1 RSMo, an employee is "every person in the service of any employer, ... express or implied, oral or written, or under any appointment or election...." In no way can it be said that by abiding by the legal summons to appear for jury duty respondent became an employee.

The question of whether a potential juror is an employee of the county under Missouri Workers' Compensation Law has not been decided by Missouri Courts. However, several other jurisdictions have rejected the argument. In *Metropolitan Dade County v. Glassman*, 341 S.O.2d 995 (Fla. 1977), the claimant was not chosen for jury duty, but was ordered to return the following day. *Id.* at 996. Upon return, the claimant suffered a skull fracture after being knocked down by a crowd leaving an elevator. *Id.* In reversing the Florida Industrial Relations Commission's award of benefits to the claimant, the Supreme Court of Florida stated, "[c]ourts have no power to extend the provisions of the Workmen's Compensation Act to classes not clearly contemplated by it. There is no class of county employees that may be compared to a citizen called on to perform such a duty as is involved [here]." *Id.* The court then pointed out that this is the view in New Jersey, North Carolina, Michigan, New Mexico, Colorado, and Ohio.

In this case, the ALJ examined the definition of "employee" to determine whether or not respondent would qualify as an employee of Greene County on February 13, 2007, when he fell in the parking lot outside of the Greene County Courthouse prior to appearing/checking in for jury duty. Much focus was given to the phrase "in the service of" that is contained in the definition of employee. In interpreting said phrase, the ALJ pointed to the definition of "in the service of" contained in *Howard v. Winebrenner*, 499 S.W.2d 389 (Mo. 1973). In *Howard*, the Court defined "in the service of" as "the performance of labor for the benefit of another." *Id.* at 395. The ALJ pointed out that this interpretation appears to be consistent with the plain and ordinary meaning of the word and, thus, consistent with statutory construction. The ALJ found that jurors of Greene County assume a role that benefits and provides valuable labor for Greene County and, therefore, concluded that respondent was an employee of Greene County when the accident occurred. I disagree.

Respondent provided no labor for the benefit of Greene County. On February 13, 2007, respondent did not do anything other than have his jury duty postponed until July 30, 2007. Respondent did not appear in any designated area where jurors would collectively meet prior to going through the selection process, nor was respondent subject to voir dire in February 2007. For the foregoing reasons, it is illogical to conclude that he met the definition of "in the service of" as interpreted in *Howard*.

Employee: Thomas M. Roemisch

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The ALJ also concluded that a juror is “appointed” because they are selected from a pool of qualified voters, and summoned to appear and provide jury service for Greene County. In this case, respondent was not appointed, as contemplated by § 287.020.1 RSMo. His name was picked from a random list of qualified potential jurors. Even if he had been selected to serve jury duty, he still would not have been considered appointed because he would not have been designated to perform the duties of an office as the term “appointed” generally implies.

For the foregoing reasons, I disagree with the administrative law judge’s conclusion that respondent is an employee for purposes of § 287.020.1 RSMo. As such, I would reverse the temporary or partial award of the administrative law judge.

I respectfully dissent from the decision of the majority of the Commission.

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Alice A. Bartlett, Member

## TEMPORARY OR PARTIAL AWARD

Employee: Thomas M. Roemisch

Injury No. 07-079319

Dependents: N/A

Employer: Greene County, Missouri

Insurer: Missouri Association of Counties c/o Gallagher Bassett Services

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

Hearing Date: August 12, 2010

Checked by: LTW

### 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? This issue is deferred for further proceedings.
3. Was there an accident or incident of occupational disease under the Law? This issue is deferred for further proceedings.
4. Date of accident or onset of occupational disease: Alleged accident occurred on February 13, 2007
5. State location where accident occurred or occupational disease contracted: Alleged accident occurred in Greene 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? This issue is deferred for further proceedings.
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted: As a juror, summoned to appear for jury duty, Employee exited his vehicle and began walking toward the courthouse with his hands placed in the pockets of his jacket, which he kept in his pockets to keep warm. While walking to the courthouse and still in the parking lot owned or controlled by Employer, Employee slipped on ice in the parking lot and fell to the ground, falling directly on concrete and hitting his right elbow. The adjudication of whether these facts constitute a compensable accident under Section 287.020, RSMo is deferred.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: The slip and fall on ice caused Employee to sustain an injury to his right upper extremity. The adjudication of whether the slip and fall is a compensable injury under Section 287.020, RSMo is deferred.

14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? None
16. Value necessary medical aid not furnished by employer/insurer? This issue is deferred for further proceedings.
17. Employee's average weekly wages: This issue is deferred for further proceedings.
18. Weekly compensation rate: This issue is deferred for further proceedings.
19. Method wages computation: N/A

**COMPENSATION PAYABLE**

20. Amount of compensation payable: This issue is deferred for further proceedings.

TOTAL: N/A

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

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Thomas M. Roemisch

Injury No. 07-079319

Dependents: N/A

Employer: Greene County, Missouri

Insurer: Missouri Association of Counties c/o Gallagher Bassett Services

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

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 12, 2010. The parties were afforded an opportunity to submit briefs, resulting in the record being completed and submitted to the undersigned on or about August 24, 2010.

The employee, Thomas M. Roemisch, appeared personally and through his attorney, Ann R. Littell Mills, Esq. The alleged employer, Greene County, Missouri (a governmental entity), and its insurer, Missouri Association of Counties, appeared through their attorney, Jared P. Vessell, Esq. The Second Injury Fund did not appear at the proceeding by agreement of the parties, and in light of the employee seeking only a Temporary or Partial Award.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about February 13, 2007, Greene County, Missouri (a governmental entity) was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Association of Counties c/o Gallagher Bassett Services (TPA).
- (2) The alleged employment and accident occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (3) The alleged employee notified the alleged employer of his injury as required by Section, 287.420, RSMo.
- (4) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (5) Temporary disability benefits have not been provided to the claimant.
- (6) The employer and insurer have not provided medical treatment to the claimant.

The parties further stipulated that the sole issues to be resolved by this hearing include:

- (1) Whether the claimant Thomas Roemisch was an employee of Greene County, Missouri (a governmental entity) on or about February 13, 2007?
- (2) Whether the claimant sustained an accident on or about February 13, 2007; and, if so, whether the accident arose out of and in the course of employment?
- (3) Whether the alleged employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$49,256.38?
- (4) What is the applicable compensation rate?
- (5) Whether the claimant is entitled to temporary disability benefits? (The claimant seeks payment of temporary total disability compensation for the periods of February 13, 2007 to March 20, 2007, and September 12, 2007 to September 20, 2007?)

**EVIDENCE PRESENTED**

The parties jointly offered for admission into evidence the following joint exhibit:

Exhibit A-1 .....Deposition of Anthony Rodebusch

Joint Exhibit A-1 was received and admitted into evidence.

The claimant Thomas Roemisch testified at the hearing in support of his claim. Also, the claimant offered for admission the following exhibits:

Exhibit A.....(Not Offered for Admission)  
 Exhibit B..... Copies of Invoices (Medical Expenses)  
 Exhibit C.....Medical Records

Exhibits B and C were received and admitted into evidence.

The alleged employer and insurer did not present any witnesses at the hearing of this case, and did not offer any additional exhibits for admission into evidence at the hearing of this case.

The Second Injury Fund, having elected not to appear for the hearing, did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Second Injury Fund Letter Dated June 22, 2010
- Notice of Hearing
- Request for Hearing-Hardship
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

### **PRELIMINARY STATEMENT**

The parties present several issues for adjudication. The underlying and primary issue pertains to the presenting question – is a juror an employee of the county which summoned such person for jury duty (as the term “employee” is defined in Chapter 287, RSMo)? Surprisingly, this issue appears to be one of first impression in Missouri.

In addition, the employer and insurer challenge, among other things, the compensability of a slip and fall on ice. This denial is premised on the 2005 amendments to Chapter 287, RSMo, which redefined the meaning of accident.

### **DISCUSSION**

The employee, Thomas Roemisch, is 61 years of age, having been born on October 13, 1948. Mr. Roemisch resides in Springfield (Greene County), Missouri with his wife.

Mr. Roemisch’s employment history relates to working as a property and casualty insurance agent, and has been licensed as an insurance agent for 35 years. He presently works for his wife, who is an independent insurance agent and owns an insurance agency. In this business, Mr. Roemisch works in the office and performs various administrative duties. Notably, as an individual working for his wife, Mr. Roemisch does not earn an income. Rather, all monies earned while working for his wife are considered income for the business, which his wife receives.

#### **First Juror Summons & Service**

In January 2007 Mr. Roemisch received a summons, issued by the Greene County Circuit Court, to appear for jury duty at the Greene County Judicial Courts Building on February 13, 2007, at 9:00 a.m. This summons placed Mr. Roemisch in Group 001<sup>1</sup> and directed Mr. Roemisch to contact the Greene County Judicial Center by telephone after 5:00 p.m. on February

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<sup>1</sup> Anthony Rodebusch, who serves as Jury Supervisor for Greene County Circuit Court, indicates that a person who is assigned to Group No. 1 enjoys a “higher likelihood of actually needing to appear” and serve as a juror. Mr. Rodebusch begins with Group No. 1 and then works his way down the groups until he secures the amount of people he needs for service.

12, 2007, in order to determine whether he needed to appear for jury duty on February 13, 2007. The summons notes that upon making the telephone call, a recorded message will indicate whether the jury service had been cancelled for the day in question.

The back page of the summons provides instruction and information relative to service as a juror. The summons states,

Instructions

Please complete lower half (opposite side) of this form. Detach and mail in lower half only.

Parking

Free parking is available to jurors in the lot around the Courthouse and directly across the street.

Length of service

Your jury service is for one week or one trial. Occasionally, trials may last up to two weeks. Jurors typically complete their service in two or three days. Be prepared to spend most of the day at the Courthouse.

Available facilities

There are restaurants close by, or you may bring a lunch. Appropriate change is necessary for vending machines and telephones. Coffee is complimentary.

Juror Payment

Jurors will receive no payment for the first two days of service, but shall receive \$50.00 per day for the third day and each subsequent day thereafter, plus 7¢ per mile round trip from your residence to the Courthouse. A check will be mailed to you after service is complete. A CORRECT MAILING ADDRESS IS ESSENTIAL FOR PAYMENT.

Courthouse Security

All persons entering the Greene County Judicial Facility are required to pass through a security system. Knives, razors, hair spray, scissors, lighters, mace, handguns and any other items that may be considered a weapon are not allowed.

Penalties for failure to obey a juror summons (494.450, RSMo)

A person who is summoned for jury service and who willfully fails to appear is guilty of criminal contempt and upon conviction may be fined not more than \$500.00

You are required to serve if summoned

Missouri Law provides that your employer may not terminate your employment or discipline you because you perform jury service.

For more information

A juror handbook is available at your local library or the Greene County jury office. If you have any questions or if you need an accommodation for a disability, please call at least one week in advance of your report date. The office number is 868-4821.

According to Mr. Roemisch, he made the telephone call as directed by the summons, and received word that he would need to appear as ordered by the Circuit Court of Greene County. In light of this directive, on February 13, 2007, at approximately 8:45 a.m., Mr. Roemisch arrived for juror service and parked in the lot identified in the summons, which is directly across the courthouse. (The parties do not dispute that this parking lot is owned or controlled by Greene County. The parties, however, did not present any evidence or enter into a stipulation regarding ownership of the parking lot, although the Report of Injury filed by the employer indicates that the injury occurred on the employer's premises.)

#### Accident

The weather on February 13, 2007, was cold with a light mist of rain. According to Mr. Roemisch, he exited his vehicle and began walking toward the courthouse with his hands placed in the pockets of his jacket, which he kept in his pockets to keep warm. While walking to the courthouse and still in the parking lot, Mr. Roemisch slipped on ice in the parking lot and fell to the ground, falling directly on concrete and hitting his right elbow.

Upon falling to the ground, Mr. Roemisch experienced immediate pain and felt "stunned." He called out for help, but nobody was present. He then got back on his feet by himself and proceeded to the assigned location in the courthouse. Mr. Roemisch checked-in at a registration table. This registration table was being managed by a couple of ladies, who were responsible for registering the jurors. While at this table, and appearing injured, Mr. Roemisch was asked by the ladies if he was okay; Mr. Roemisch informed that ladies that he had fallen. The ladies placed Mr. Roemisch in a waiting room different from the other jurors.

While in the waiting room, word was given to Mr. Rodebusch (Jury Supervisor) that Mr. Roemisch had fallen on the parking lot and had suffered an injury. In light of this incident, Mr. Rodebusch postponed this jury service and scheduled Mr. Roemisch for another day. (The record indicates that Mr. Roemisch received a subsequent jury summons to appear for jury service on July 30, 2007.) Mr. Rodebusch then directed court security to inform Mr. Roemisch that his jury service would be postponed to another date and he was free to leave and get medical attention.

Subsequently, Mr. Roemisch telephoned his wife and informed her of this incident. Mr. Roemisch's wife then drove to the courthouse and transported Mr. Roemisch to a local hospital.

#### Medical Treatment

Mr. Roemisch presented to the emergency room of Cox Medical Center on February 13, 2007. The attending physician examined Mr. Roemisch and took a history of the "slip and fall" incident. Additionally, the attending physician ordered diagnostic studies. In light of his examination and evaluation the attending physician diagnosed Mr. Roemisch with a proximal humerus fracture of the right upper extremity. A referral was made to David B. Rogers, M.D., who is an orthopedic surgeon, and affiliated with Orthopaedic Specialists of Springfield.

On February 14, 2007, Dr. Rogers examined Mr. Roemisch and diagnosed him with a “3-part proximal humerus fracture with significant displacement of the greater tuberosity.” In addition, Dr. Rogers indicated that the injury appeared to include “some lateral rotation of the articular surface of the humerus.” In light of this diagnosis, and after discussion of treatment options for this condition with Mr. Roemisch, Dr. Rogers scheduled Mr. Roemisch for surgery in the nature of an open reduction and internal fixation.

On or about February 17, 2007, Mr. Roemisch was admitted to Cox Medical Center and underwent an open reduction and internal fixation of the right upper extremity, for treatment of the right proximal humerus fracture. Mr. Roemisch remained in the hospital for post-operative care and observation for evidence of infection. Dr. Rogers subsequently discharged Mr. Roemisch from the hospital on February 19, 2007. The discharge released Mr. Roemisch to home with instructions to follow-up with Dr. Rogers in 5 to 7 days, and to keep his right arm in a sling.

Dr. Rogers provided follow-up treatment, which included an initial follow-up visit on February 27, 2007. Notably, on February 27, 2007, Dr. Rogers continued to keep Mr. Roemisch off work and noted that Mr. Roemisch was continuing to take hydrocodone for pain. During the follow-up treatment Dr. Rogers ordered additional diagnostic studies.

On March 20, 2007, Dr. Rogers prescribed physical therapy for Mr. Roemisch. Additionally, on this date Dr. Rogers permitted Mr. Roemisch to resume day-to-day activities as tolerated. Dr. Rogers notes that he provided a March 23, 2007, return to work date for Mr. Roemisch. And Mr. Roemisch returned to work on that date. During the course of receiving follow-up treatment Mr. Roemisch experienced improvement but developed post-traumatic / post-surgical adhesions in the right shoulder, which resulted in Dr. Rogers scheduling a second surgery in order to treat this condition and to improve Mr. Roemisch’s mobility. Mr. Roemisch received physical therapy during the period March 23, 2007, through July 25, 2007, with Advantage Hand Therapy & Orthopedic Rehabilitation, LLC.

On September 12, 2007, Mr. Roemisch underwent a second surgery, which was in the nature of a manipulation under anesthesia and arthroscopic lysis of adhesions. Additionally, on this date, Dr. Rogers took Mr. Roemisch off work. This second surgery occurred without complication and Dr. Rogers provided follow-up care. According to Mr. Roemisch he remained off work for one week following the second surgery, and received a release to return to work on September 20, 2007. Dr. Rogers continued to provide follow-up treatment through October 2, 2007.

On May 4, 2009, Mr. Roemisch presented to Dr. Rogers for reevaluation of the right shoulder, noting that he continued to present with pain and limited motion. At the time of this examination, Dr. Rogers ordered additional diagnostic studies. In light of his examination and diagnostic studies, Dr. Rogers propounded the following comments:

**IMPRESSION:** Status post three part right proximal humerus fracture with open reduction and internal fixation. He has developed arthrofibrosis as a result of his injury and surgical treatment. He is developing early post-traumatic arthritic changes as a result of his injury.

PLAN: I do not think an MRI of his shoulder would be of any value. From his history and from his examination and from his x-rays, I have a very good idea of what his (sic) going on his shoulder. An MRI would be of no value in a shoulder such as this with such a large amount of hardware. There would be enough scatter of the signal that the MRI would be uninterpretable. I told him that at some point his pain worsens with time, that we could consider shoulder replacement surgery as a direct result of this injury. It may or may not improve his mobility. The primary goal would be relief of pain, should his pain worsen.

Also, at the time of this evaluation Dr. Rogers indicated that he would like to follow-up for further evaluation in six months.

Mr. Roemisch indicates that the medical expenses he incurred for treatment of his right shoulder were paid partially by and through his group health insurance policy and partially paid by and through him personally. Mr. Roemisch further notes that he continues to experience pain and soreness in his right shoulder, and he is unable to do things that he did before the injury.

#### Second Juror Summons & Service

In July 2007, and in light of the earlier postponement, Mr. Roemisch received the second summons, issued by the Greene County Circuit Court, to appear for jury duty. Mr. Roemisch indicates that he appeared for jury service as ordered, and he spent nearly a full day at the courthouse, but was not selected as a juror for the case.

Mr. Roemisch noted that he did not receive any compensation for his service, either in February or July of 2007. Also, Mr. Roemisch noted that relative to both service dates, he never received an employee handbook; he never entered into a written contract to serve as a juror; and he never received any instruction on how to decide a case.

### **FINDINGS AND CONCLUSIONS**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

#### **I. Employment**

The facts pertinent to this issue are not in dispute. Yet, to the extent there is a dispute, I find the following facts. In January 2007 Mr. Roemisch received a summons, issued by the Greene County Circuit Court, to appear for jury duty at the Greene County Judicial Courts Building on February 13, 2007, at 9:00 a.m. This summons placed Mr. Roemisch in Group 001; he enjoyed a "higher likelihood of actually needing to appear" and serve as a juror. And the summons directed Mr. Roemisch to contact the Greene County Judicial Center by telephone after

5:00 p.m. on February 12, 2007, in order to determine whether he needed to appear for jury duty on February 13, 2007.

Mr. Roemisch made the telephone call as directed by the summons, and received word that he would need to appear as ordered by the Circuit Court of Greene County. In light of this directive, on February 13, 2007, at approximately 8:45 a.m., Mr. Roemisch arrived for juror service and parked in the lot identified in the summons, which is directly across the courthouse and owned or controlled by Greene County. While in this parking lot and walking to the Courthouse, Mr. Roemisch suffered an accident.

The parties stipulate and acknowledge that Greene County (a governmental entity) is an employer operating under and subject to The Workers' Compensation Law (Chapter 287, RSMo.) The alleged employer, Greene County, however, disputes that the claimant, Thomas Roemisch, is an employee of Greene County.

### Whether Mr. Roemisch is an employee?

The issue presented in this case is in context of Mr. Roemisch being summoned for jury service by the Circuit Court of Greene County and then appearing for jury service in response to the summons. The question is thus presented, is a juror an employee of the county which summoned such person for jury duty (as the term "employee" is defined in Chapter 287, RSMo)? This issue appears to be one of first impression in Missouri.

The parties do not cite any Missouri cases, which address the question under consideration. The employer and insurer, however, cite two court decisions from other jurisdictions,<sup>2</sup> which have adjudicated this issue. Independent research by the undersigned fails to disclose any Missouri cases having adjudicated the issue. Further, independent research by the undersigned suggests that most states, like Missouri, have not adjudicated the issue.

The jurisdictions that have adjudicated this issue offer two competing views. The majority of jurisdictions do not consider a juror an employee of the county which summoned such person for jury duty. The majority view denies eligibility chiefly on the ground that employment is a voluntary and consensual relationship under a contract; and there is no contractual relationship existing between a juror and the governmental body the juror serves. Rather, juror service is a burden of citizenship imposed involuntarily by the governmental body. Stated differently, jurors are summoned to perform their duty as a citizen in the administration of justice, and have not voluntarily entered into a contract with the governmental body to perform services for the governmental body. See, *Jaskoviak v. Industrial Commission of Illinois*, 785 N.E.2d 1026, 337 Ill. App. 3d 269, 271 Ill. Dec. 832 (Ill. App., 2003); *Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977); *Metropolitan Dade County v. Glassman*, 341 So.2d 995 (Fla.1976); *Jeansonne v. Parish of East Baton Rouge*, 354 So.2d 619 (La.Ct.App.1977); *In re O'Malley's Case*, 361 Mass. 504, 281 N.E.2d 277 (1972); *Jochen v. County of Saginaw*, 363 Mich. 648, 110 N.W.2d 780 (1961); *Silagy v. State*, 105 N.J.Super. 507, 253 A.2d 478 (1969); *Seward v. County of Bernalillo*, 61 N.M. 52, 294 P.2d 625 (1966); *Hicks v.*

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<sup>2</sup> *Metropolitan Dade County v. Glassman*, 341 So.2d 995 (Fla.1976); *Silagy v. State*, 101 N.J.Super. 455, 244 A.2d 542 (1968).

*Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966) *Board of Comm'rs of Eagle County v. Evans*, 99 Colo. 83, 60 P.2d 225 (1936).

Notably, in applying the majority view, the Illinois court in *Jaskoviak* further considered whether a juror could be classified as an “employee” within the parameters of the term “appointment.” In addressing this question by defining “appointment”, the court in *Jaskoviak* applied similar contract principles, finding that “appointment also requires mutual assent.” (The Illinois workers’ compensation statute is similar, but notably different, insofar as the term “appointment” is not separated from the term “contract” and is situated in the statute as part of a single phrase, “appointment or contract for hire.”<sup>3</sup>)

A minority of jurisdictions consider a juror to be an employee of the governmental body the juror serves. This minority view recognizes that a juror is not an ordinary employee, and is not an “employee” under principle of contract. Rather, the juror is accepted as an employee by statutory definition, chiefly on two grounds. First, the juror is working in the service of the governmental body that summoned her or him for jury duty. Secondly, the juror is serving under an “appointment” to jury duty; the juror is being asked to discharge a trust, a debt of citizenship, as an appointed individual. See, *Holmgren v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 200 (N.D. 1990); *Bolin v. Kitsap County*, 785 P.2d 805, 114 Wn.2d 70 (Wash., 1990); *Yount v. Boundary County*, 796 P.2d 516, 118 Idaho 307 (Idaho 1990); *Industrial Comm'n v. Rogers*, 122 Ohio 134, 171 N.E. 35 (1930). The jurisdictions adhering to the minority view necessarily rely on their specific statutory provision, which defines the term “employee” in their state.

Although a majority of jurisdictions deny coverage, these cases are not controlling, and do not necessarily arise to the level of persuasive authority. Moreover, different states have different statutory provisions. Further, in the jurisdictions having adjudicated this issue, no state appears to have interpreted their state statute in context of a strict construction. The interpretation of Missouri’s applicable statute requires a strict construction.

In 2005, the legislature made several changes to The Workers' Compensation Law, which included changing the Court's interpretation from a liberal statutory construction to a strict statutory construction. *Stricker v. Children's Mercy Hosp.*, 304 S.W.3d 189, 192 (Mo. App. W.D. 2010) (citing *Miller v. Missouri Highway and Trans. Com'n*, 287 S.W.3d 671, 672-73 (Mo. banc 2009)). Strict construction requires the Court to "give the statute its plain meaning and refrain from enlarging the law beyond that meaning." *Pile v. Lake Regional Health System*, No. SD30153, slip op. at 5 (Mo. App. S.D. September 1, 2010) (citing *Stricker*, 304 S.W.3d at 192).

Section 287.020.1, RSMo, in pertinent part, states,

The word “employee” as used in this chapter shall be construed to mean *every person in the service of an employer, as defined in this chapter*, under any

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<sup>3</sup> The court in *Jaskoviak*, noted that the Illinois statute defined the term employee to include “Every person in the service of the State..., and all persons in the service of the ..., county... whether by election, under appointment or contract of hire, express or implied, oral or written.”

contract of hire, express or implied, oral or written, or *under any appointment* or election, including executive officers of corporations. [Emphasis added.]

A strict construction of this statute appears to incorporate three elements for determining whether an individual is an employee. First, the alleged employer must be an employer covered under the Act (as defined under Chapter 287). Secondly, the alleged employee (worker) must be in the service of the covered employer. Thirdly, the service must be under a contract of hire (express or implied, oral or written), or under any appointment or election. Notably, as written, the two phrases, “under a contract of hire” and “under any appointment or election” are expressed in the disjunctive and are not dependent on the other.

The Supreme Court of Missouri, in *Orphant v. St. Louis State Hospital, Division of Mental Diseases*, 441 S.W.2d 355 (Mo., 1969), acknowledged the disjunctive language in interpreting this statute, even without applying a strict construction. In addressing this issue, which involved an uncompensated situation, the Supreme Court stated,

Appellant's position is that the words, 'under any contract of hire', in Section 287.020, subd. 1, supra, imply that the person hired is to receive some compensation for his services, whereas claimant received no pay at all. We assume that this is true; however, the statutory definition goes on to include an alternative, namely, 'or under any appointment or election.' The use of the disjunctive 'or' means that if the service in question is under 'an appointment', it need not also be under a contract of hire.

*Id.* at 360.

This third element, therefore, necessitates two separate and distinct inquiries:

- Is the service in question under any contract of hire (express or implied, oral or written)?
- Or, alternatively, is the service in question under any appointment or election?

Further, because the statute must be strictly construed, the terms “contract for hire” and “appointment” must be given their plain meaning and the Court must refrain from enlarging the law beyond that meaning. *See Pile*, SD30153, slip op. at 5.

In the present case, Greene County acknowledges that it, as a governmental entity, is an employer covered under Chapter 287, RSMo. Greene County is a government entity and an employer covered under The Workers’ Compensation Law. Consideration of this first element need not be further addressed. Consideration of the two remaining elements necessitates a discussion of whether Mr. Roemisch, as a juror (or prospective juror), is in the service of Greene County under a “contract of hire”; or, alternatively, whether Mr. Roemisch, as a juror (or prospective juror), is in the service of Greene County under “any appointment or election”.

Whether Mr. Roemisch is in the service of Greene County under a contract of hire?

Mr. Roemisch is not in the service of Greene County “under a contract of hire”. “The basic elements of a contract are offer, acceptance and consideration.” *Tinucci v. R.V. Evans Co.*, 989 S.W.2d 181, 184 (Mo. App. E.D., 1998). See also, *American Nat. Ins. Co. v. Noble Communications Co., Inc.*, 936 S.W.2d 124, 131 (Mo. App. S.D., 1996), which discusses the essential elements of an enforceable contract.

As a juror (or prospective juror), Mr. Roemisch’s did not enter into a contract with Greene County to perform jury duty. From a pool of qualified citizens, Greene County selected Mr. Roemisch as a juror, and summoned him to appear and provide jury service. The summons is not an offer to provide jury service, but a lawful order commanding Mr. Roemisch to appear and provide jury service. And Mr. Roemisch’s acceptance of the summons and subsequent effort to provide jury service for Greene County is not a legal acceptance; it is compliance with a lawful order. The lack of an offer and an acceptance, even if consideration could be found, is insufficient to support the basic elements of a contract. Without an offer and an acceptance there can be no contract.

Whether Mr. Roemisch is in the service of Greene County under any appointment or election?

Mr. Roemisch was not elected to serve as a juror (or prospective juror); however, he was selected by Greene County from a pool of qualified voters, and he was summoned to appear and provide jury service for Greene County. These facts raise the possibility that Mr. Roemisch’s status as a juror (or prospective juror) constitutes being in the service of Greene County under an appointment. The adjudication of this issue requires consideration of the statutory terms “in the service of” and “any appointment”. As previously noted, these terms – “in the service of” and “acceptance” – must be given their “plain meaning”. And the Court must “refrain from enlarging the law beyond that meaning.” *Pile*, No. SD30153, slip op. at 5 (Mo. App. S.D. September 1, 2010) (citing *Stricker*, 304 S.W.3d at 192).

Merriam Webster’s Collegiate Dictionary 1070 (10d ed. 1993) offers several definitions for the word “service.” In context of labor, these definitions include:

1 a: the occupation or function of serving <in active ~> b: employment as a servant <entered his ~> 2 a: the work performed by one that serves <good ~> b: HELP, USE, BENEFIT <glad to be of ~> c: contribution to the welfare of others d: disposal for use <I’m entirely at your ~> ... 4: the act of serving: as a: a helpful act <did him a helpful ~> b: useful labor that does not produce a tangible commodity ... *Id.* at 1070.

In a case involving an interpretation of Section 287.020.1, RSMo, but in context of an ordinary employment relationship under contract, the Supreme Court of Missouri defined “in service of” to involve “the performance of labor for the benefit of another.” *Howard v. Winebrenner*, 499 S.W.2d 389, 395 (Mo. 1973). Although the *Howard* court did not apply a strict statutory construction, the definition given by this court appears to be consistent with the plain and ordinary meaning of the word, and thus consistent with a statutory construction. Notably, this definition does not require remuneration. And to add remuneration into the definition would have the effect of enlarging the law beyond the plain and ordinary meaning, which is prohibited by strict construction.

As a government entity responsible for the administration of justice, Greene County is required to undertake judicial proceedings, which include jury trials. Without jurors, Greene County would be unable to perform all of its constitutional and statutory duties. Thus, jurors of Greene County assume a role that benefits and provides valuable labor for Greene County. Although a juror's labor may require minimum physical labor, and may be limited in duration, it is nonetheless an essential and integral function of Greene County government.

Accordingly, in light of the foregoing, I find and conclude that any person occupying the position of juror for Greene County is in the service of Greene County. Thus, given the facts of this case, is Thomas Roemisch a juror of Greene County?

Although we do not appear to have in Missouri a statutory definition of the word "juror," the statutory language seems clear that those drawn and summoned are considered to be "jurors." Chapter 494, RSMo utilizes the words "prospective juror" and "juror" interchangeably in reference to a person who has been summoned to appear for jury duty. For example, Section 494.420, RSMo states,

1. Those persons constituting the qualified jury list, when summoned, shall be placed under the control and supervision of the sheriff or other person designated by the board of jury commissioners in a designated area to be provided in the courthouse.

Section 494.445, RSMo states,

1. Except as otherwise provided in subsection 2 and 3, no petit juror shall be required to attend court for prospective jury service more than twenty days in one-year period except as is necessary to complete service in a particular case.
2. Subsequent to January 1, 2005, in jurisdictions on the nonpartisan court plan, no petit juror shall be required to attend court for prospective jury service for more than 20 days pursuant to a jury summons unless selected to a panel of prospective jurors for jury service pursuant to subsection 2 of section 494.420, or selected to serve as a petit juror in one particular case.
3. In jurisdictions on the nonpartisan court plan, no petit juror shall be required to serve as a juror for more than in any one-year period except as is necessary to complete service in a particular case.

Section 494.460, RSMo states,

4. A court shall automatically postpone and rescheduled the service of a summoned juror of an employer with five or fewer employees, or their equivalent, if another employee of that employer has been previously summoned to appear during the same period.

Notably, Chapter 494, RSMo indicates that once a person is summoned to appear for jury duty, the person is subject to penalties of law, including being held in contempt and imposition of

a fine. The person need not actually serve as a juror in a case to be subject to these penalties. Further, Barron's Law Dictionary 262 (3d ed. 1991) defines a juror as a "person sworn as a member of a jury; a person selected for jury duty, but not yet chosen for a particular case." Similarly, Merriam Webster's Collegiate Dictionary 636 (10d ed. 1993) defines a juror as "a: a member of a jury b: a person summoned to serve on a jury."

Accordingly, while Mr. Roemisch had not become a member of a jury sworn to decide a particular case at the time of his accident, he was a prospective juror who had been summoned to serve on a jury. Further, at the time of the accident he was responding to the summons and had arrived on property owned or controlled by Greene County in furtherance of his duty as a juror. Upon being summoned as a juror, Mr. Roemisch became subject to the statutory mandates and obligations of a juror of Greene County.

Therefore, in light of the foregoing, I find and conclude that Mr. Roemisch occupied the position of "juror" at the time of his accident; he was in the service of Greene County.

The remaining question is whether this service was under "any appointment." Initially, in examining this statutory term it is noted that the phrase includes the use of "any." The inclusion of the word "any" suggest an inclusive and broad application of the word appointment.

Merriam Webster's Collegiate Dictionary 57 (10d ed. 1993) defines "appointment" to include:

1 a: an act of appointing: DESIGNATION ... 4: a nonelective office or position  
<holds an academic ~>

If this definition is accepted and applied to the instant case, Mr. Roemisch was in the service of Greene County, under an appointment. As previously noted in this Award, at the time of the accident Mr. Roemisch occupied the position of "juror," which he received by a formal selection process, according to law and by a person possessed with authority to make the selection.

Notably, the ability to render a jury verdict exists because the individual holds a special office or position, which cannot occur without the individual having been selected by the governmental body from a list of qualified candidates, and then summoned to appear. In the absence of being selected and summoned to appear by the governmental body, the individual possesses no such power or authority.

Anthony Rodebusch, who serves as Jury Supervisor for Greene County Circuit Court, selected Mr. Roemisch from a list of citizens qualified to serve as jurors in Greene County. He then assigned Mr. Roemisch to Group No. 1, and then caused a Jury Summons to be issued and served upon Mr. Roemisch, which required Mr. Roemisch to appear for jury duty and provide jury service on February 13, 2007. The selection of Mr. Roemisch and the subsequent issuance of the summons and service on Mr. Roemisch effected a legal change in Mr. Roemisch's status as a citizen of Greene County; Mr. Roemisch assumed the position of juror. These facts support a finding that Mr. Roemisch received an appointment or designation to a nonelective office or position.

Yet, it is further noted that the definition of “appointment” may require that the person not only be designated to serve the employer in a particular position; it may include the additional requirement that the position be a “position of trust.” In *Orphant v. St. Louis State Hospital*, Division of Mental Diseases, 441 S.W.2d 355, 360 (Mo. 1969), the Supreme Court of Missouri defined “appointment” to include the designation of a person occupying a position of trust. The *Orphant* decision was rendered in context of finding a volunteer dance therapist, who had been designated by the employer to perform volunteer services (without pay) for the employer, an employee in the service of an employer, under “appointment”. In setting forth a definition, and finding in favor of the claimant, the Court in *Orphant* stated,

Black’s Law Dictionary, 4<sup>th</sup> Edition, and also Bouvier’s Law Dictionary, 3<sup>rd</sup> Revision, define “appointment” as “the designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.” We have no hesitancy in ruling that as a volunteer dance therapist, claimant was occupying a position of trust at the St. Louis State Hospital and that she was designated as such by the person having authority to therefor, namely, the Supervisor of Volunteer Services for the hospital. The fact she received no pay for her work does not preclude her being a statutory employee.

*Id.* at 360.

The court in *Orphant* did not construe the statute in context of the present statutory mandate that the statute be given strict construction. However, considering the definition of appointment, as provided by Black’s Law Dictionary, 4<sup>th</sup> Edition, the inclusion “of trust” is not inconsistent with a definition made under a strict construction analysis. Accordingly, additional consideration is given to whether Mr. Roemisch, as a juror, occupied a position of trust.

In Missouri, a juror is discharged with the duty to adjudicate questions of fact and participate in the administration of justice with their verdict. In criminal cases, jurors decide innocence and guilt; the fate of individual lives is placed in the hands of jurors. Arguably, there can be no greater trust placed in someone’s hand than the trust given to jurors.

The facts of this case thus support a finding that Greene County selected Mr. Roemisch to serve in a position of trust for Greene County – the position of juror. This appointment falls within the definition of appointment under Section 287.020, RSMo; the appointment was to a position of trust, and the appointment was made by a person possessing such authority to make the appointment in behalf of Greene County.

Finally, it is noted that subsequent to the *Orphant* decision, and prior to the enactment of the 2005 amendments to Chapter 287, RSMo, which requires a strict statutory construction, the Supreme Court of Missouri in *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204 (Mo. 1981), rendered a decision that added an additional requirement to determining whether an uncompensated worker is an employee by appointment. In addition to requiring the individual to be in the service of the employer, “the employer must exercise control, or have the right of control, over the worker.” *Id.* at 206. In applying this analysis, the court determined that a volunteer performing labor in the construction of a building for a church was an employee; the

worker had been designated to perform work (service beneficial to the church) for the church by a person possessing authority to make the designation, and the church had the right of control.

The analysis in *Stegeman* appears to involve a more traditional employee-employer type analysis, which seeks to determine whether an individual is a servant working for an employer, and not an independent contractor. I am of uncertain whether the requirement of this second element is applicable to this case, considering the pronouncement by the Court in *Orphant* to interpret Section 287.020 in the disjunctive, and further considering the recent statutory mandate that the statute be strictly construed. Notwithstanding, to the extent “control” is an element in the analysis and the employer must exercise control, or have the right of control, over the worker; I find and conclude that Greene County enjoyed the right of control over Mr. Roemisch, in his capacity as a juror.

Notably, jurors are directed by Greene County as to when, where and how jury service is to be performed, including when jurors are permitted to take breaks and go home. Only in relation to a juror’s ultimate role in rendering a verdict – how a juror votes in a given case – does Greene County lack control over a juror.

To be sure, the adjudication of this issue is not taken lightly; Thomas Roemisch, as a juror, and Greene County, as the governmental entity summoning Mr. Roemisch to appear for jury service, enjoyed a relationship that is not readily or commonly viewed as an employee-employer relationship. Nor did Mr. Roemisch voluntarily enter into this relationship. However, constrained by rules of strict statutory construction, I am compelled to find Mr. Roemisch an employee under Section 287.020, RSMo. At the time of the accident, Mr. Roemisch had been properly appointed by Greene County to serve in the position of juror; he was in the service of Greene County, under an appointment.

## II.

### Accident / Arising Out of & In the Course of Employment

In January 2007 Mr. Roemisch received a summons, issued by the Greene County Circuit Court, to appear for jury duty at the Greene County Judicial Courts Building on February 13, 2007, at 9:00 a.m. In light of this directive, on February 13, 2007, at approximately 8:45 a.m., Mr. Roemisch arrived for juror service and parked in the lot identified in the summons, which is directly across the Courthouse.

In reference to the parking lot, the parties did not address specifically at trial the ownership of the parking lot. However, in the Report of Injury the employer indicates in the affirmative that the injury occurred on the employer’s premises. Further, in the pleadings and at trial, as well as the post-hearing briefs, the employer and insurer have not denied that Greene County enjoyed ownership or control of the parking lot.

The weather on February 13, 2007, was cold with a light mist of rain. Upon exiting his vehicle Mr. Roemisch began walking toward the courthouse with his hands placed in the pockets of his jacket, which he kept in his pockets to keep warm. While walking to the courthouse and still in the parking lot, Mr. Roemisch slipped on ice in the parking lot and fell to the ground, falling directly on concrete and hitting his right elbow.

The parties do not dispute that Mr. Roemisch sustained an injury to his right elbow when he slipped on ice and fell to the ground. Nor is it disputed that the slip and fall incident occurred on a parking lot owned or controlled by Greene County, and it occurred prior to Mr. Roemisch signing in at the registration desk and being sworn as a juror. The employer and insurer, however, dispute the compensability of this accident, contending that the accident did not arise out of and in the course of employment.

The adjudication of this issue requires consideration of Section 287.020, RSMo and the definitions of "accident" and "injury." Yet, as part of the 2005 amendments, the definitions of accident and injury were changed. The definitions are set forth in Sections 287.020.2 and 287.020.3, RSMo, and in pertinent part, are as follows:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.
3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
  - (2) An injury shall be deemed to arise out of and in the course of the employment only if:
    - (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
    - (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

In addition, the 2005 amendments include the following additional legislation contained in Section 287.020.10, RSMo, which is as follows:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

In denying liability, and contending that the accident did not arise out of and in the course of employment, the employer and insurer present two arguments. First, the employer and insurer assert that the injury was not caused by specific event during a single work shift. Since Mr. Roemisch had not checked in at the registration desk, the accident did not occur during the work shift. Secondly, the employer and insurer assert that the injury came 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.”

Historically, the phrase “arising out of and in the course of employment” has been viewed as two separate and distinct tests. The “arising out of” test is construed to refer to cause or origin of the injury, and is examined in context of medical causation – whether the accident is the prevailing factor in causing the resulting injury (medical condition and disability). See, *Leible v. TG Missouri Corporation*, 06-094098 (March 5, 2010).

The employer and insurer’s argument, as it pertains to the “in the course of employment” test, refers to the time, place and circumstances of the accident in relation to the employment. *Leible*, at 3. The argument, as presented in this case, falls in the category of “going to and from work” cases.

“The general rule of law is that injuries occurring to employees going to and from work are not compensable unless the injuries occur on premises owned or controlled by the employer.” *Leible*, at 3. Notably, in examining this rule in context of the 2005 amendment, the Labor & Industrial Relations Commission in *Leible* propounded the following comments:

The rule permits recovery of workers’ compensation benefits provided the injury-producing accident occurs on premises owned or controlled by employer and if that portion of the premises is a customary, approved, permitted, usual and accepted route or means employed by employees to arrive and depart from their place of employment.

Upon reviewing the current statutory scheme as amended in 2005, the Commission does not find a legislative intent to abolish this general rule.

The Commission further noted that the 2005 amendments addressed specifically the extended premises doctrine. This new statutory language contained in Section 287.020.5, RSMo states in part:

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.

Although expressly limiting the application of the extended premises doctrine, the statute allows the doctrine to apply to cases “in which accidents occur on property owned or controlled by the employer.” *Leible* at 4, citing, *Hager v. Syberg's Westport and Treasurer*, No. ED 93420 (Mo. App. E. D. February 23, 2010).

### Consideration of 1<sup>st</sup> Argument

The employer and insurer argue that Mr. Roemisch did not sustain an injury due to an accident arising out of and in the course of employment because Mr. Roemisch had not “checked in”: therefore, the accident did not occur during his work shift.

In *Leible*, the Commission addressed a similar case involving an injury occurring prior to the employee “clocking in.” In resolving this issue, the Commission noted that “the accident and injury must “arise” out of and in the course of employment, and it does not require that the accident and injury “occur” in the course of employment.” *Id.* at 4. The Commission further observed, “The term “during a single work shift” in Section 287.020.2, RSMo is not defined and there is no requirement an employee must have clocked in for his work shift in order to be eligible for workers’ compensation benefits due to an accident.” *Id.* at 4. See also, *Henry v. Precision Apparatus*, No. SD29772 (Mo. App. S. D., February 16, 2010).

In the instant case, I find and conclude that at the time of the accident, Mr. Roemisch was on the employer’s premises. Further, at the time of the accident Mr. Roemisch was following the directions of Greene County and was proceeding to the courthouse with the intent to enter the employer’s building (courthouse), check in, and begin his assigned duties as a juror. I thus find and conclude that Mr. Roemisch was engaged in a work activity when injured and all elements of Section 287.020.2 were proven.

### Consideration of 2<sup>nd</sup> Argument

The employer and insurer further argue that the injury sustained by Mr. Roemisch came 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.” Section 287.020.3, RSMo. The essence of this argument is that the injury from the slip and fall was not caused by or attributable to a condition of Mr. Roemisch’s employment, nor was there a causal connection between the injury and any work activity.

Notably, in making this argument the employer and insurer do not specifically challenge or dispute that the slip and fall caused Mr. Roemisch to sustain an injury to his right upper extremity. The evidence is supportive of such a finding, and I find and conclude that the slip and fall on the parking lot caused Mr. Roemisch to sustain an injury to his right upper extremity. This injury is in the nature of a three part right proximal humerus fracture, which necessitated receipt of two surgical repairs, including open reduction and internal fixation. Further, Mr. Roemisch has developed arthrofibrosis as a result of this injury and surgical treatment. And is developing early post-traumatic arthritic changes as a result of the injury.

Rather, the contention of the employer and insurer is that the injury merely occurred on the employer’s premises and the risk involved is one to which the employee would have been exposed equally in nonemployment life. Independent research by the undersigned reveals a similar case, wherein the Court of Appeals for the Eastern District of Missouri accepted an argument similar to the argument Greene County is now making in this case. See, *Hager v. Syberg's Westport and Treasurer*, No. ED 93420 (Mo. App. Feb. 23, 2010) (Mo. App. E.D. 2010).

In *Hager*, the employee (a cook) clocked out and departed the employer's premises (a restaurant). While walking to his vehicle, and on a parking lot leased by the employer, the employee slipped and fell on black ice, injuring his left ankle. In applying Section 287.020.3(2)(b), RSMo, but without giving guidance in their application of the statute, the Court in *Hager* stated, "Claimant could have slipped and fallen on an ice-covered parking lot anywhere, and thus, his injury comes from a hazard or risk unrelated to his employment." The Court thus concluded that the slip and fall did not satisfy Section 287.020.3(2)(b) and did not arise out of and in the course of employment.

If the decision in *Hager* governs this case, Mr. Roemisch did not sustain an accident arising out of and in the course of his employment with Greene County. Yet, in *Hager* the Court did not rely solely on their decision that the slip and fall on ice, and resulting injury, came from a hazard or risk unrelated to his employment. The Court further examined the question of whether the parking lot fell within the extended premises doctrine. Applying a detailed analysis of the extended premises doctrine under the 2005 amendments, the Court further concluded that the employer did not own or control the parking lot because "it did not exercise power or influence over the parking lot." Finding the extended premises doctrine not available to the employee under Section 287.020.5, RSMo, the Court in *Hager* thus affirmed the Commission's decision denying liability.

Moreover, in a very recent decision of the Missouri Court of Appeals for the Southern District of Missouri the Court provided an instructive approach to analyzing Section 287.020.3(2)(b) – whether an employee's injury is "from a hazard or risk unrelated to the employment in normal nonemployment life." See, *Pile v. Lake Regional Health System*, No. SD30153 (Mo. App. September 1, 2010) (Mo. App. S.D. 2010). In *Pile*, the Court stated that the application of this subsection of the statute involves a two-step analysis.

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.* at 6.

In examining the first step of this analysis, the Court in *Pile* noted that "[a] worker's activity can provide the nexus needed to show an injury came from a hazard or risk related to employment." Applying this reasoning, the Court determined that the worker's activity provided the necessary nexus "between the risk or hazard of injury, the injury itself and her employment," and thus found the injury to be compensable. Further, while the Court in *Pile* was not required to engage in further inquiry, the Court noted that like the "worker's activity," the "physical condition of the work environment" can provide the nexus needed to show an injury came from a hazard or risk related to employment. In this context, the Court stated, "Where the physical

condition of the work environment creates the hazard or risk giving rise to an injury, the physical condition provides the nexus needed to show the injury came from a hazard or risk related to employment.” *Id.* at 6.

The parties appeared for trial and presented the case for adjudication without the benefit of analysis and approach to analyzing Section 287.020.3(2)(b) – whether an employee’s injury is “from a hazard or risk unrelated to the employment in normal nonemployment life” – under the guidance provided by the Court in *Pile*.<sup>4</sup> Further, the employee is seeking a temporary or partial award and is not asking for a final award. Although the employer and insurer are seeking a final award, and case law provides discretion for issuance of a final award, I believe prudence and fairness dictate that the parties be given opportunity to develop fully the evidence and adjudicate this issue in context of the guidance recently provided by the Court in *Pile*. Therefore, I decline to issue a final award at this time.

In light of the foregoing, all issues not addressed by this award shall be deferred pending further hearing. The case shall be returned to the Prehearing Conference Docket pending further hearing or resolution by agreement of the parties.<sup>5</sup>

Made by:                    /s/ L. Timothy Wilson  
   L. Timothy Wilson  
   *Administrative Law Judge*  
   *Division of Workers' Compensation*  
   (Signed September 17, 2010)

This award is dated and attested to this 23<sup>rd</sup> day of September, 2010.

                                 /s/ Naomi Pearson  
                                 Naomi Pearson  
                                 *Division of Workers' Compensation*

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<sup>4</sup> The decision in *Pile* was issued on September 1, 2010, subsequent to the hearing in this case, which was held on August 12, 2010. This case falls within the jurisdiction of the Southern District.

<sup>5</sup> The medical evidence presented by the parties suggests that the employee is at or near maximum medical improvement. Rather than proceeding with a second hearing for a temporary or partial award, the employee may wish to proceed forward with a hearing, wherein all parties are present (including Second Injury Fund) and seek a final award.