

TEMPORARY AWARD ALLOWING COMPENSATION
(Affirming Temporary Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 08-118457

Employee: Tina M. Shearer
Employer: Convergys Corporation
Insurer: Fidelity & Guarantee Insurance
c/o Gallagher Bassett Services, Inc.

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having heard the parties' arguments, reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the temporary award and decision of the administrative law judge dated September 17, 2009, as supplemented herein.

The administrative law judge concluded that employee sustained a compensable accident under the Missouri Workers' Compensation Law. Accordingly, the administrative law judge ordered employer to pay employee's past and future medical expenses, and awarded temporary total disability benefits to employee. We agree with the conclusions reached by the administrative law judge. We offer this supplemental opinion in order to discuss the award in light of the recent case of *Hager v. Syberg's Westport*, No. 93420 (Mo. App. E.D., February 23, 2010).

Discussion

Injury Arising Out Of And In The Course Of Employment

Here, employee's claim for compensation stems from injuries employee sustained when she was struck by a vehicle while walking in the parking lot outside of employer's building at the end of her work day on December 18, 2008. In *Hager v. Syberg's Westport*, No. 93420 (Mo. App. E.D., February 23, 2010), the Court of Appeals for the Eastern District of Missouri was faced with a similar "going to and from work" case. In *Hager*, the employee was injured when he slipped and fell on ice in the parking lot while walking to his car after work. The *Hager* court found that the employee's injury could not be deemed to arise out of and in the course of employment under the current statutory scheme because "[c]laimant 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." *Id.* at *10.

Here, the administrative law judge found that employee's injury arose out of her employment, because "there is no evidence that Employee would have 'crossed paths' with the co-employee who failed to clean his windshield and failed to keep a careful lookout but for Employee's employment." *Award*, pg. 14. We agree with the conclusion of the administrative law judge.

Because the issue is whether employee sustained an injury arising out of and in the course of her employment, we briefly mention two other recent cases analyzing the 2005 amendments to § 287.020.3(2), RSMo.¹ In *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo.

¹ Section 287.020.3(2) provides, in relevant part: "(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

Employee: Tina M. Shearer

- 2 -

2009), the Missouri Supreme Court affirmed this Commission's finding that the injury did not arise out of employment where the risk involved was "walking." *Id.* at 674. Also in *Miller*, there was testimony from the employee that he frequently walked briskly outside work and that his work did not require him to walk briskly. *Id.* at 672. In *Bivins v. St. John's Reg'l Health*, 272 S.W.3d 446 (Mo. App. 2008), the court affirmed this Commission's finding that the injury did not arise out of employment where the employee "just fell" and was unable to articulate any reason for falling. *Id.* at 450.

We find that *Hager*, *Miller*, and *Bivins* are each distinguishable from the case at hand. Here, the risk involved was not a generic environmental risk such as black ice, was not a universal non-work activity such as "walking," nor did employee "just fall," without explaining a reason. Here, the hazard or risk was unique and one that employee was exposed to each day as a condition of her employment: the careless driving of a coworker in employer's parking lot at the end of a work day. We affirm the conclusion of the administrative law judge that employee sustained an injury arising out of and in the course of her employment.

Employer's "Control" Over The Parking Lot

The *Hager* court found that the employee's injury did not occur on premises controlled by the employer because the employer "did not exercise power or influence over the parking lot." *Hager, supra*, at *16 (emphasis added). The *Hager* court examined the employer's lease and the testimony of employer's witness, and found the following factors determinative: under the lease, the landlord (1) was responsible for "managing and maintaining" the parking areas; (2) had "sole discretion to change, rearrange, alter, or modify the parking areas"; and (3) had the power to "make reasonable rules and regulations pertaining to the use of such parking areas by [Employer], its guests, invitees, and suppliers." *Id.* The *Hager* court also cited testimony that the employer did not have control over parking decisions, but that the landlord permitted employer, its employees, and its guests to choose parking spaces. *Id.*

Here, the issue is whether employer exercised sufficient "power" and "influence" over the parking lot so as to constitute "control" for purposes of § 287.020.5, RSMo.² We agree with the conclusion of the administrative law judge that employer had control of the parking lot.

The facts of this case differ from those in the *Hager* case in several important respects. Here, the landlord was responsible for "maintaining" the parking areas, but the landlord did not have the sole discretion to change, alter, or modify the parking areas. In fact, because employer leased more than 50% of the building, the landlord was prohibited under the lease from making any improvements or changes to the parking lot without first obtaining employer's written consent. Further, nowhere in the lease did the landlord retain the right to make rules governing the parking lot. Specifically, Exhibit H of the lease, which outlines rules, is absent any mention of the parking lot.

Other factors not present in *Hager* tend to demonstrate that employer exercised "power" and "influence" over the parking lot. For example, the lease grants to employer the "exclusive use" of at least 585 parking spaces. This "exclusive use" is tied to employer's status as the sole

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."

² Section 287.020.5 provides, in relevant 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" (emphasis added).

Employee: Tina M. Shearer

tenant, using all of the rentable space in landlord's building. The lease provides that if, at any time, employer leases less than all of the rentable space in the building, employer shall have the "nonexclusive use" of all of the parking spaces in the parking lot. There is no evidence that employer was ever required to share use of the lot with any other business or tenant of the building. Employer contracted with a security firm to provide guards who monitored video of the parking lot. Employer's sign was posted at the entrance to the parking lot, and there is no evidence that anyone other than employees and visitors of employer ever parked in the parking lot. Human resources required employees to register the vehicle they would be driving to work. Taken together, we are convinced that the foregoing factors indicate that employer exercised a degree of power and influence over the parking lot arising to the level of control.

Based on the foregoing, we agree with the conclusion of the administrative law judge that, at the time employee was injured, employer controlled the parking lot for purposes of § 287.020.5 RSMo. Because we otherwise agree with the findings, conclusion, and analysis of the administrative law judge, we affirm the award.

Conclusion

The award and decision of Administrative Law Judge Matthew W. Murphy, issued September 17, 2009, is affirmed, and is attached and incorporated by this reference.

This award is only temporary or partial. It 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 § 287.510 RSMo.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 24th day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Tina M. Shearer Injury No.: 08-118457
Dependents: N/A
Employer: Convergys
Additional Party: Gallagher Bassett Services
Insurer: Fidelity & Guarantee Insurance
Appearances: Joseph Montecillo for Employee
Loretta Simon for employer/insurer
Hearing Date: July 20, 2009 Checked by: MM/kh

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the law? Yes.
4. Date of accident or onset of occupational disease? December 18, 2008.
5. State location where accident occurred or occupational disease contracted: Arnold, Jefferson County, MO.
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? Yes.
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: Employee was injured when she was struck by a vehicle in the employer's parking lot.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Body as a whole, bilateral lower extremities.
14. Compensation paid-to date for temporary total disability: \$0.00.
15. Value necessary medical aid paid to date by employer-insurer? \$0.00.
16. Value necessary medical aid not furnished by employer-insurer? \$70,936.53.
17. Employee's average weekly wage: \$677.67.
18. Weekly compensation rate: TTD/PTD: \$451.80, PPD: \$404.66.
19. Method wages computation: Stipulation.
20. Amount of compensation payable:

Unpaid medical expenses: \$70,936.53

Additional Medical Aid: Such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

TTD: \$2,127.99 (12/19/2008 – 1/20/2009, 4 5/7 weeks)

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

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

FINDINGS OF FACT AND RULINGS OF LAW

On July 20, 2009, the employee, Ms. Tina M. Shearer, appeared in person and by her attorney, Mr. Joseph Montecillo, for a hearing for a temporary award. The employer was represented at the hearing by its attorney, Ms. Loretta Simon. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. **Covered Employer**
Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully funded by: Fidelity & Guaranty Insurance.
2. **Covered Employee**
On or about the date of the alleged accident, the employee was an employee of Convergys and was working under the Workers' Compensation Act.
3. **Notice**
Employer had notice of employee's accident.
4. **Statute of Limitations**
Employee's claim was filed within the time allowed by law.
5. **Average Weekly Wage and Rate**
Employee's average weekly wage rate was \$677.67. The rate of compensation for temporary total disability and permanent total disability is \$451.80. The rate for permanent partial disability is \$404.66.
6. **Medical Causation**
Employee's injury was medically causally related to the incident which is the subject of this hearing.
7. **Medical Aid Furnished**
Employer/Insurer has not paid any medical aid.
8. **Temporary Total Disability Paid**
Employer/Insurer has paid \$0.00 as temporary total disability benefits for 0 weeks of disability.
9. **Mileage or other medical (287.140 RSMo)**
There is no claim for mileage or other medical expenses under 287.140 RSMo.
10. **Permanent Total Disability**
There is no claim for permanent total disability benefits for the purpose of this hearing.
11. **Permanent Partial Disability**
There is no claim for permanent partial disability benefits for the purpose of this hearing.

ISSUES

1. **Accident/Occupational Disease**

There is a dispute as to whether the employee sustained an accident arising out of and in the course of her employment.

2. **Previously Incurred Medical**

Employee is claiming previously incurred medical in the amount of \$70,936.53. There is a dispute as to authorization.

3. **Additional or Future Medical**

Employee is claiming additional or future medical aid.

4. **Additional TTD or TPD**

Employee is claiming additional TTD in the amount of \$13,811.53.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records - Mercy Trauma and Surgery Group
- B. Medical Records - St. John's Orthopaedic Trauma Services
- C. Medical Records - St. John's Mercy Center
- D. Medical Records - St. John's Mercy Health Care

Employer-Insurer's Exhibits

- 1. Police Report
- 2. Lease Agreement

SUMMARY OF EVIDENCE

Employee's Testimony

Ms. Shearer (hereinafter referred to as "Employee") testified that she was born on February 13, 1966 and her Social Security Number is **XXX-XX-XXXX**. She began working at Convergys on October 13, 2008 in the customer service department. Her duties included receiving calls regarding AT&T services and solving disputes for customers. Her normal shift was either 12:00 P.M. noon to 8:30 P.M. or 10:00 A.M. until 6:30 P.M., Monday through Friday, depending on the call volume. She was also required to work two Saturdays a month.

Employee arrived at work by either driving herself or car-pooling with another employee. On the date of the accident, December 18, 2008 Employee was car-pooling with Amanda Mansen, who drove on that particular day.

Employee testified that her daily routine was arriving at the Convergys building and when she got to the main entrance of the building she had to enter by swiping her electronic badge to get in the front door. She said they are only allowed to use the front doors of the building. She described the building as a two story building and once she swipes her card she has to pass the security desk and then swipe her card again to get to her work station. Once she arrives at her work station she logs into her computer when she begins working. At the end of her shift she logs off her computer. During the day she is given two fifteen minute breaks along with a lunch break. She has to log off the computer when taking breaks.

Employee went through training with Chris Stone before beginning her job, where upon she received her ID badge and had extensive training on various AT&T policies, Convergys policies, human resources, payroll, and parking policies. Employee stated that no badge was needed for parking in the parking lot, but employees gave their license number to human resources.

On the day of the accident, Employee testified that she left at 6:30 P.M., her regular time. She logged off her computer and went out through the front doors. She said she made a left onto the sidewalk and was walking onto the parking lot on the side of the building as opposed to the parking lot in the front of the building. When she was about five feet from the sidewalk, standing in the parking lot, she was hit by an SUV.

Employee testified that she recalled the Arnold Police issuing a Police Report and then she was transported to St. John's Mercy Trauma Unit.

Employee further testified on direct that she is currently not working and it is her understanding that she has been terminated. She found out by logging onto her computer and noted her termination date is August 26, 2009.

On cross-examination, Employee reiterated her job title is customer service analyst. She testified that her duties as an analyst do not include traveling. She simply sits down at a desk talking on the phone and never has to leave the building. Employee explained that each employee must log into the computer in order to get paid and they must log out at the end of the day. Employee is paid by the hour. She is not a salaried employee.

With respect to the parking lot, Ms. Shearer testified that there is no requirement that she park on the parking lot and she is not assigned a particular place to park. She does not need a parking tag, pass or sticker to get onto the lot. There is also no gate on the entrance to the parking lot and she does not have to pay for her parking.

Employee stated that there are no other places to park besides the parking lot which is at the end of a dead end street. She also stated that there were signs posted on the street that the City of Arnold will tow parked cars. She said she personally witnessed cars being towed. She did indicate that employees could try to park by the IT&T College or Theater off Meyer Drury Drive which is the street leading up to the parking lot.

It was pointed out to Employee that other witnesses/employees of Convergys will disagree with her that there are no signs restricting parking for cars on Meyer Drury Drive, only signs restricting parking for trucks and trailers over a certain weight, however, she insisted that there were signs.

With respect to the accident, Employee testified that on the date of the incident she had completed her work and had been logged out and was off the clock. She agreed that she was hit by an SUV and that he did not have his headlights on. She stated that it had sleeted earlier in the day and the driver had not cleaned off his windshield and he was also talking on his cell phone at the time.

Testimony of Sue Gibson

Ms. Gibson testified that she is the Facilities Manager for CV Richard Ellis Group which is a TPA for facilities that was hired by Convergys. She handles all of the facility management duties. She manages both the Arnold and the Hazelwood locations. She stated her job duties include overseeing the actual facility, coordinating security, organizing housekeeping, catering and electricity.

With respect to the parking lot, Ms. Gibson testified that the property owner, not Convergys, hired Reit Property Management and Leasing Company to deal with the parking lot. If there was a problem with the parking lot it was her job to contact Gayla Martin at Reit Property and she would take care of any issues with the parking lot. She testified that Reit Property negotiated a contract with a landscape company to take care of the lot. It was the landscape company's job to take care of the grass, irrigation, trimming of trees and shrubs, mulching, snow removal, et cetera. They also take care of trash and other maintenance issues.

With respect to the parking lot, Ms. Gibson testified that the employees of Convergys are allowed to park anywhere they want on the lot other than in a handicapped spot or the spots reserved for Visitors. There are no restrictions on where they can park and there are no signs on the parking lot telling them where to park. She also testified that the employees are not required to have any type of parking card or tag and there is no security gate or any other type of gate at the entrance of the parking lot. In fact, she testified that the parking lot is open to the public. She also testified that the employees can park elsewhere such as on the street leading up to the lot. She confirmed that there is no sign on Meyer Drury Drive restricting cars from parking. The only signs on that street is a sign that restricts the parking of trucks and trailers over a certain weight. In fact she testified that she has seen IT&T employees park on that street.

On re-direct Ms. Gibson testified that Reit Property does not deal with any of the problems in the building. CV Richard Ellis, her employer, takes care of the building issues. The landlord and Reit Property Management take care of parking lot maintenance and issues.

Testimony of Jason Disko

Mr. Disko testified that he has been the Operations Manager for Convergys for the past three years. He takes care of the day to day operations of projects, attendance and performance. He reports directly to Kristen Ranik.

With respect to the parking lot, Mr. Disko testified that there is a parking lot located in the front of and on the side of the building that Convergys leases. He stated that employees enter through the front door and the side door is mostly for vendors. Mr. Disko stated there was a Convergys sign and no other signs on the parking lot.

Mr. Disko further testified that there was a security desk inside the building, which was contracted out by Convergys, that monitors the cameras that are located on the parking lot. Disko stated that Convergys had to get permission from the landlord to use the security cameras. Finally, he stated that there were a sufficient number of parking spaces in the lot to allow parking for all employees and there was no shuttle to transport employees from other parking locations.

Testimony of Chris Stone

Mr. Stone is a Core Trainer for Convergys. He has been in this position for the last eight months, although he has worked for them for the past 2 ½ years. His current job duties include initiating employees into the program, teaching AT&T and Convergys policies and new employee orientation. Mr. Stone testified that new employees had to complete a new hire packet and classes that gave instructions regarding logging on and off of computers, expectations for breaks and lunches and other daily policies.

With respect to parking he stated that the only restriction is no parking in the visitor or handicapped spots. He did not know if employees from other businesses located off Meyer Drury Drive also used that particular parking lot.

Testimony of Marsha Wood

Marsha Wood testified that she is a Senior Manager of Employee Relations for Convergys and has been for the past three years. She handles all the employee issues. She has no role in developing employee procedures. She said she also parks on the parking lot.

On cross-examination Ms. Wood stated that there were no signs on Meyer Drury Drive restricting parking other than a sign that does not allow trailers and trucks to park there if they are over a certain weight. She also stated that the general public was allowed to park in the parking lot of the building that Convergys leases.

Testimony of Mike McGurn

Mr. McGurn testified that he has been working at the Convergys headquarters in Cincinnati, Ohio since June 2001 as the Director of Corporate Real Estate. His responsibilities include leasing transactions with landlords. With regard to the Arnold Convergys, Mr. McGurn was involved with the renewal of the lease in 2008.

Mr. McGurn testified that Hub Properties Trust owns the building that Convergys rents in Arnold. He said that in October 1998 Convergys entered into a lease with the owner and Convergys was the first tenant of that particular building.

Mr. McGurn went through certain provisions of the lease that dealt with the landlord/tenant responsibilities regarding the parking lot. Mr. McGurn explained that Page 11 of the lease, Section 7 deals with maintenance and provides that the landlord shall maintain and make all necessary repairs and/or replacements to the building and also shall maintain the property including all common areas, landscaping, and parking areas.

Mr. McGurn further testified that Exhibit A, Sub-section 2 of the lease states that the landlord will provide all site work, utilities and infrastructure. It will provide parking at a minimum of nine spaces per 1,000 square feet. It will provide that the building design will meet all codes. It further provides that parking lot security will be addressed with ample parking lot lighting and perimeter chain link fence. The landlord will also provide landscaping and irrigation and finally the landlord will also provide concrete paving at the loading dock.

Mr. McGurn further testified that Exhibit G of the lease states that the landlord is responsible for the maintenance of the building and property, specifically they are responsible for: parking lot sealing/re-striping; pest control; and fire protection.

Exhibit G further provides that the landlord shall provide landscape maintenance including weekly grass mowing; bi-annually irrigation start-up/shut-down; annually trimming of trees and shrubs; semi-annually mulching; and finally seasonal fertilization and weed control.

Mr. McGurn further testified that Exhibit I of the lease, Section 1 states that nothing shall be displayed, painted or affixed by the tenant on any part of the exterior or interior of the building or the leased property without the prior consent of the landlord, and then only the size, color, style and materials shall be approved by the landlord. Exhibit I, Section 4 further provides that the common areas of the building shall not be obstructed by the tenant or used in any way except for the ingress and egress to and from the offices. Finally it provides that the tenant shall not place any objects outside of the leased property. Mr. McGurn further clarified that everything needs prior consent and approval of the landlord.

On cross-examination Mr. McGurn agreed that the lease calls for nine spaces per 1,000 square feet of the building. He further clarified that Convergys does not lease the parking lot they are only entitled to use it. They only rent space within the building. He further testified on cross that Convergys is entitled to the exclusive use of 585 spaces on the parking lot. However he was not able to testify to exactly how many total parking spaces were on that lot.

ADDITIONAL EVIDENCE

The **Arnold Police Report** reflects that an accident occurred on December 18, 2008 at which time Employee and a witness, Ms. Mansen, were walking on the parking lot. A vehicle, specifically a silver 2004 Jeep Grand Cherokee, struck Employee while she was walking in the parking lot. The report notes that the driver stated he did not clear all the ice off the windshield

of his vehicle. Employee was transported to St. John's Mercy by ambulance. (Employer Exhibit 1).

The **Lease Agreement** reflects that a lease was entered into with the landlord and Convergys to lease the premises of a building in Arnold, Missouri. The lease reflects that the landlord will lease to the tenant the premises plus the exclusive use of at least nine parking spaces per each 1,000 square feet of the premises. (Employer Exhibit 2, Section 2 page 4).

Section 7, page 11 of the lease notes that the landlord shall maintain and make all the necessary repairs to the building, its structural elements, equipment, elevators, common areas and shall also maintain the building and the property including all the common areas, landscaping, and parking areas, consistent with similar buildings in St. Louis, Missouri. Section 8C of the lease provides that the landlord reserves the right and has sole discretion and has sole cost from time to time and without the consent of the tenant to make changes in the interior and exterior common areas of the building. (Employer Exhibit 2, page 14).

Exhibit A of the lease provides that the landlord will provide all site work; parking; building design that will meet building codes; parking lot security with ample parking lot lighting and fencing; landscaping and irrigation; and concrete paving at the loading dock.

Exhibit G of the lease provides that the landlord will be responsible for maintenance including parking lot sealing/re-striping; pest control; fire protection; landscape maintenance; grass mowing; irrigation; trimming of shrubs and trees; mulching; and fertilization.

Exhibit 1, Section 1 of the lease provides that nothing shall be displayed, painted or affixed by the tenant on any part of the exterior or interior of the building or leased property without prior consent of the landlord. Exhibit 1, Section 4 provides the common areas of the building shall not be obstructed by tenant or used in any way except for ingress and egress to and from the offices.

MEDICAL EVIDENCE

St. John's Mercy Medical Center records note that Employee was admitted on December 18, 2008. At that time she gave a history of leaving the parking lot and walking across it when she was struck head-on with a car running over her legs as well as her pelvis with the front wheel. The speed of the car was approximately 45 miles an hour. Employee denied loss of consciousness. She was having abdominal pain, pelvis pain and pain in both knees. On admittance the doctor also noted a history of substance abuse ten years prior and also a prior history of left knee surgery.

On December 22, 2008, Dr. Cannada performed an open reduction internal fixation of the right lateral tibial plateau fracture using a Zimmer plate.

On a follow-up visit with Dr. Cannada on January 20, 2009 the doctor notes that in addition to the right tibial plateau fracture Employee experienced a left knee sprain involving the MCL and PCL ligaments along with a right foot drop. On her follow-up visit the doctor noted that she had been ambulating with a walker with non-weight bearing on her right lower extremity. On that

visit Employee was complaining of right ankle pain so new x-rays were obtained and did not reveal any evidence of fractures. The doctor ordered some physical therapy noting that she should continue non-weight bearing on her right lower extremity but may tolerate weight on her left lower extremity. He also advised her to continue wearing her AFO for her right foot drop and her hinged knee brace permitting full range of motion for the left knee. (Employee's Exhibit C).

The **Mercy Trauma & Surgery** records reflect an initial visit with Dr. Srivastava on January 20, 2009 at which time he notes Employee sustained a right tibial plateau fracture as well as an injury to her anterior and posterior ligament of the left knee. She was in a significant amount of pain in both knees and the doctor noted she was ambulating with a walker. He noted on that visit that she was in mild discomfort and that her right knee incision looked fine. He refilled her Oxycontin and wanted to see her again in three weeks.

The last medical from Dr. Srivastava is dated February 13, 2009. At that time the doctor noted on exam she ambulated with a walker without any weight on her right lower extremity. He further noted that Employee had a past history of post-traumatic stress disorder as well as anxiety and she had previously seen a psychiatrist in the past in Maryland. He gave her a prescription for Xanax and recommended a referral to a psychiatrist. (Employee Exhibit A).

FINDINGS OF FACT AND RULINGS OF LAW:

Issue 1. Accident

There is a dispute as to whether the employee sustained an accident arising out of and in the course of her employment. The facts giving rise to this claim do not appear to be in dispute. Employee was injured when she was struck by a vehicle in the parking lot on the property of the building leased to her employer causing injury and resulting disability. As will be discussed below, liability of the employer turns on the issue of whether or not the employer "controlled" the parking lot at the time of the injury. **§287.020.5¹**. It is found that Employer did control the property where the injury occurred and as such the accident referred to in the evidence was sustained in the course and scope of Employee's employment. **§287.020.**

Prior to the 2005 amendments to The Workers' Compensation Law, when analyzing claims in which the employee was in transport to and from work, Missouri courts were guided by the so-called "extended premises doctrine." "Generally, injuries during transport to and from work [were] not compensable." **Wells v. T.J.Brown, D.D.S., 33 S.W.3d 190, 192 (Mo. Banc 2000), internal citations omitted.**

Under the 'extended premises' doctrine, however, injuries while going to or from work [were] compensable if:

¹ The incident giving rise to this claim occurred on December 18, 2008. Therefore, all statutory references are to RSMo. Cum Supp 2008 unless otherwise stated.

- (a) the injury-producing accident occurs on premises which are :
- (1) owned or controlled by the employer, or
 - (2) not actually owned or controlled by the employer but which have been
 - (A) so appropriated by the employer or
 - (B) so situate, designed and used by the employer and his employees incidental to their work as to make them, for all practical intents and purposes, a part and parcel of the employer's premises and operation; *and*
- (b) that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workers to get to and depart from their places of labor and is being used for such purpose at the time of the injury. **Id., internal citations omitted, emphasis supplied.**

Included in the 2005 amendments to The Workers Compensation Law was a partial abrogation of the extension of premises doctrine. "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." §287.020.5.

"Administrative law judges, ... the labor and industrial relations commission, ... and any reviewing courts shall construe the provisions of this chapter strictly." §287.800.1. "[A] strict construction of a statute presumes nothing that is not expressed." 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008). The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. 82 C.J.S. Statutes § 376 (1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008). The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008)." **Allcorn v. Tap Enterprises, Inc., 277 S.W.3d 823, 828 (Mo.App. S.D., 2009).**

Applying strict construction to §287.020.5 as instructed by **Allcorn**, the 2005 amendment abrogated paragraph (a) (2) and all subparagraphs thereof of the extended premises doctrine as stated in **Wells** and its progeny and nothing more. The remainder of the extended premises doctrine remains intact. Therefore, the current state of the extended premises doctrine is:

Under the 'extended premises' doctrine, however, injuries while going to or from work are compensable if: the injury-producing accident occurs on premises which are:

- (a) Owned or controlled by the employer, and
- (b) That portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workers to get to and depart from their places of labor and is being used for such purpose at the time of the injury.

Taking these elements in reverse order, there can be no question that the accident giving rise to this claim occurred on “premises [that was] part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workers to get to and depart from the places of labor and [it was] being used for such purpose at the time of the injury.” Employee was injured in the parking lot of the building in which she was employed. There was a sign at the entrance of the parking lot with her employer’s name on it. The second element is satisfied.

Employer did not own the building or parking lot where the incident occurred. The building was leased by Employer from the landowner. The only question that remains is whether or not Employer “controlled” the parking lot. It is found the Employer, as a matter of law and pursuant to the lease agreement with the landowner, did control the parking lot where this incident occurred.

Employer suggests that the landowner leased the building, not the parking lot, thereby not granting control of the parking lot to Employer. While a cursory read of the lease (Employer’s Exhibit 2) may suggest such an arrangement, a more thorough reading of the lease language and the legal implications of that language suggest just the opposite.

Lease Language

“Landlord, in consideration of the rents, covenants, terms and conditions of this Lease, leases to [Employer] the Premises.” **Employer’s Exhibit 2 at Section 2.** “Premises” is defined according to the lease as “the approximately 65,000 rentable square feet of the Building. **Employer’s Exhibit 2 at Section 1a.** “In addition, throughout the Term (but only during the period [Employer] occupies all of the rentable space in the Building), [Employer] shall be entitled to the exclusive use of at least nine (9) parking spaces per each one thousand (1,000) square feet of the Premises.” **Employer’s Exhibit 2 at Section 2.** Mike McGurn testified that Employer was the only tenant of the building and they occupied the all of the rentable space at the time of the injury giving rise to this claim. Based on this provision, Employer had the exclusive use, or control, of 585 spaces (9 x 65,000 / 1000). According to the testimony, it was unknown if the parking lot had more than 585 spaces. In either event, the lease granted Employer exclusive use of some or all of the parking lot based on this provision.

Additionally, Employer was “entitled to the nonexclusive use (together with other tenants in the Building, if any) of all common areas and facilities of the Building and Property, including without limitation sidewalks, driveways, parking areas, grounds, landscaping, hallways, stairways, common entries, common lobbies, public rest rooms, and other public areas and access ways as shall exist from time to time.” **Employer’s Exhibit 2 at Section 2.** This provision clearly gives Employer exclusive use of the entire property, including the parking lot, since there was no other tenant with whom Employer had to share. Any question regarding the interpretation of this provision is cleared up by the testimony presented at the hearing. Employer exercised their right of exclusive use and control of the “hallways, stairways, common entries, common lobbies, [and] public rest rooms” by controlling access to the building with a security force. Employees had to use a security badge to gain access to the building. Clearly, Employer was exercising control and the exclusive right to use the hallways, stairways, common entries,

common lobbies, and public rest rooms of the building. As such, Employer had the option of exercising similar control regarding the parking lot because grant of control that was exercised inside the building was commensurate with the grant of control of the “sidewalks, driveways, parking areas, [and] grounds.” **Id.** The evidence indicated that Employer did, in fact, exercise such control. There was no security gate restricting entrance to the parking lot and apparently members of the general public were allowed to park on the lot. However, Employer did restrict some of the parking spaces by reserving them for visitors. Such a restriction does not appear in the lease and is an example of the unilateral control that Employer had the right to exercise over the parking lot. Employer had control of the parking lot.

Finally, since Employer leased more than fifty percent (50%) of the rentable space in the Building, Landlord had to get prior written permission from Employer before Landlord could “construct other improvements on the Property”, “grant easements, impose restriction and dedicate portions of the Property”, “close temporarily and work upon any portion of the Property”, or “do and perform such other acts and make such other changes in, to, or with respect to the Property and Building as Landlord may ... deem necessary, appropriate or desirable.” **Employer’s Exhibit 2 at Section 8c.** Such right of refusal clearly demonstrates the lease’s intent to convey control of the parking lot and grounds as long as Employer was the sole tenant of the building.

Employer’s evidence regarding the maintenance responsibilities concerning the parking lot and grounds is acknowledged. The lease provides that Landlord is responsible for contracting and providing maintenance and grounds keeping on the parking lot. **Employer’s Exhibit 2 at Section 7a.** However, the cost of these services is borne by Employer. **Employer’s Exhibit 2 at 5d, 5a(i), and 5h.** Landlord’s obligation to contract for maintenance does not overcome Employer’s control of the property, including the parking lot.

For the foregoing reasons, it is found that the lease agreement between the owner of the property at issue and Employer conveyed a controlling interest in the parking lot, including, but not limited to, the location of Employee’s accident.

Landlord-Tenant Law

As demonstrated, Employer’s Exhibit 2 conveyed a controlling interest in the parking lot to Employer. It may also be demonstrated that Employer controlled the parking lot as a matter of law.

“A ‘common area’ is one reserved by the landlord for the common use of more than one tenant or by himself and a tenant or tenants, as opposed to an area demised to a particular tenant for the tenant’s sole and exclusive use.” **Caples v. Earthgrains Company, 42 S.W.3d 444, 449 (Mo.App. E.D.2001), citing Dean v. Gruber, 978 S.W.2d 501 (Mo.App. W.D.1998).** “If an area is solely used by one tenant, it is not a ‘common’ area.” **Id.** “The theory is that the portion of the premises subjected to common use is not part of the tenant’s leasehold estate, the landlord not having let it to any one of the tenants but having reserved control to himself.” **Id., citing Fitzpatrick v. Ford, 372 S.W.2d 844, 849 (Mo. 1963).** Conversely, that portion of the premises that is NOT subjected to common use IS part of the tenant’s leasehold estate.

There is nothing in the record that suggests that the landlord reserved any portion of the building, parking lot or otherwise to itself for its use. As stated previously, Employer was the sole tenant in the building or on the property. Therefore, the parking lot is not subjected to common use with another tenant or the landlord. The parking lot is part of the leasehold estate irrespective of the presence, or lack thereof, of such language in the lease.

For the foregoing reasons, it is found that Employer controlled the parking lot and the entire property on which its business sat for the purposes of The Workers' Compensation Law. While it does not appear from the record that the parties are in disagreement regarding the other elements necessary for finding that Employee sustained a compensable accident pursuant to §287.020, for clarity and completeness, the following additional findings are made:

(1) Employee sustained an "accident" in that she sustained 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, to wit, she was run over by a vehicle in the aforementioned parking lot;

(2) The vehicle running over Employee was the prevailing factor in both the resulting medical condition and disability, to wit, among other injuries, her broken leg, and;

(3) The vehicle running over Employee was not a hazard or risk unrelated to the employment to which Employee would have been equally exposed outside of and unrelated to the employment in normal nonemployment life, to wit, there is no evidence that Employee would have "crossed paths" with the co-employee who failed to clean his windshield and failed to keep a careful lookout but for Employee's employment.

For the reasons stated herein, Employee sustained a compensable accident under The Workers' Compensation Law and is entitled to the benefits found therein.

Issue 2. Previously Incurred Medical

Employee is claiming previously incurred medical in the amount of \$70,936.53. There is a dispute as to authorization.

Employee presented evidence of medical care for the treatment of injuries sustained when she was struck by a vehicle in the parking lot of the building in which she was employed on December 18, 2008. At the hearing of this matter, Employee offered Exhibits A-D² which document the care and charges for treatment of the injuries. Employer objected to the admission of those exhibits solely based on "seven day rule." The objection was taken under advisement. That objection is overruled for the following reasons.

² Employee's Exhibit List indicates Exhibit D is "Medical Records - St. John's Mercy Health Care" and it is noted as such in the introductory material to this award. However, inspection of the exhibit reveals that it would be more accurately described as "Medical bills from various providers".

The “seven day rule” is found in **§287.210.3**, and states, “The exchange of medical reports shall be made at least seven days before the date set for the hearing and failure of any party to comply may be grounds for asking for an receiving a continuance, upon proper showing by the party to whom the medical reports were not furnished.” Without getting to the question of whether or not medical records and bill constitute a “medical report”, Employer did not ask for a continuance. In fact, Employer was offered a continuance but did not accept the offer.³ There is nothing in Chapter 287 that suggests that otherwise admissible exhibits should be excluded for failure to provide the exhibits more than seven days prior to hearing. The sole remedy for “surprise exhibits” is a continuance. Employer opted not to enjoy that remedy. Employer did not make any foundational or other objection to the Exhibits. Therefore, Exhibits A-D are admitted.

The sole issue for consideration regarding the cost of the prior medical treatment is lack of prior authorization by Employer. Reasonableness, necessity, and causal relationship to the injury were not placed at issue by the parties.

“In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” **§287.140.1**. “The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider...” **§287.140.10**.

There is nothing in the record that indicates that Employer attempted to exercise its right to control the medical care for Employee’s injuries. There is no evidence that Employer authorized any care for Employee. There can be no doubt that Employer was almost immediately aware of the injury and the need for medical care. However, Employer has denied this case at all times based on Issue 1, supra. Employer’s failure to exercise its right to direct the care as provided in **§287.140.10**, does not relieve Employer of its duty to provide the care as provided in **§287.140.1**. Therefore, it is found that Employer is responsible for the medical care received to date in spite of lack of authorization by Employer. Employee offered competent and substantial evidence that the value of the medical care received as of the date of the hearing was \$70,936.53. Employer is ordered to pay that amount.

Issue 3. Additional/Future Medical care

Employee is claiming additional or future medical aid. Employee did not provide any evidence regarding the necessity of additional care. However, **§287.140** mandates that Employer shall provide appropriate medical care. As stated, supra, the accident which occurred on December 18, 2008 which was the subject of this hearing was a compensable accident and the prevailing factor causing both the injury and disability. As such, pursuant to **§287.140.1**, Employer is ordered to provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the Employee’s injury of December 18, 2008, to cure and relieve from the effects of that injury.

³ Presumably and understandably, Employer did not want a continuance because one of its witnesses had travelled to the hearing from out of state.

Issue 4. Additional TTD Benefits

Employee is claiming additional TTD in the amount of \$13,811.53, representing 30.57 weeks for the period from the December 18, 2008 through the date of the hearing.

“For temporary total disability the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made.”
§287.170.1. Employee did not testify regarding her disability or her ability to be gainfully employed in the open labor market. There was no evidence presented of any restriction on her activity. Employee was in a wheelchair at the hearing, however, Employee did not and the medical records do not indicate whether she is restricted to the wheelchair.

Employee was temporarily totally disabled (herein after referred to as “TTD”) from employment from the date of the injury while she was inpatient at the hospital. Employee’s Exhibit C contains a document titled: Adult Discharge Plan/Home Discharge Instructions. The document provides activity instruction of “Return to work after follow up.” Therefore, here TTD continued upon discharge until “follow up”, unless competent medical evidence suggested extension beyond “follow up”. According to the records, Employee’s first follow up appears to have been on January 20, 2009 with Dr. Srivastava. Dr. Srivastava does not order Employee to stay home from work or otherwise refrain from any activity. Employee testified that her duties at work were primarily sedentary in that she worked on the phone. Employee did not describe any physical labor that she had to perform at work. There was no testimony or evidence that Employer refused to provide employment that would accommodate her medical condition.

For these reasons, Employee should have received TTD benefits for the period of inpatient care in the hospital, immediately following the injury of December 18, 2008 and continuing until her first follow up after discharge. The period of TTD is not extended beyond the first follow up because there is no evidence that her total disability ran beyond the follow up. That period is from 12/19/2008 – 1/20/2009 (4 5/7 weeks)⁴. The parties stipulated that Employee’s compensation rate for TTD benefits is \$451.80. Therefore, Employer is ordered to pay \$2,127.99 (\$451.80 x 4.71 weeks) in unpaid TTD benefits.

ATTORNEY’S FEE

⁴ Employee had already clocked out on the date of injury and presumably received compensation for that day of work. Therefore, the period of TTD payments begins on the following day.

Employee: Tina M. Shearer

Injury No.: 08-118457

Mr. Joseph Montecillo, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Date: _____