

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

Injury No.: 12-001723

Employee: Barbara Simmons  
Employer: Mercy Hospital St. Louis  
Insurer: Mercy Hospitals East Communities  
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 § 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 § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated December 20, 2012.

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 § 287.510 RSMo.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued December 20, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 27<sup>th</sup> day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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DISSENTING OPINION FILED  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Barbara Simmons

### **DISSENTING OPINION**

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge is in error, and should be reversed.

Employee worked for employer as a billing specialist. Her duties included posting payments, receiving payments, filing insurance claims, making deposits, and collecting mail. Employee made deposits and picked up mail once per day, typically near the end of her shift.

On January 13, 2012, employee was walking down a hallway after picking up the office mail from the mailbox area located on the lobby floor of the building where she worked. Employee was on her way to the elevator which would take her to the second floor where her office was located. As employee walked toward the elevator area, she looked up and saw a doctor from her office walking toward the elevators. Employee picked up her pace in order to catch up to the doctor. Employee offered no explanation at the hearing as to why she wanted to catch up with the doctor.

When employee reached the end of the hallway, she slowed her pace to turn a corner to the elevator area. As employee was walking toward the elevators, her feet stuck to the linoleum floor, and she fell forward and landed on her right shoulder. Employee suffered a right proximal humerus fracture as a result of her fall.

Employee was unable to provide any explanation as to why her feet stuck to the floor. Employee testified there was nothing on her shoes that caused her feet to stick to the floor, and that there was nothing about the floor itself that caused her to fall. Employee agreed that there was no sticky substance on the floor, and that there were no defects or uneven spots on the floor that caused her to fall. Employee explained that the shoes she was wearing at the time of her accident were shoes she chose to wear; they were not required by employer.

Employee agreed that she walks on linoleum floor outside of work, and that she also carries items with both of her hands. Employee only walks at work when she is making deposits, picking up mail, or retrieving files. Employee typically picked up the mail only once per shift. Employee did not provide any evidence to show she walks more at work than outside of work, nor that she carries mail at work more often than she does at home.

William Stogner, a security officer who responded to the incident, testified that he inspected the area where employee fell, and did not find any foreign substances, liquids, or defects in the floor.

Given the foregoing facts, I am convinced that employee has failed to demonstrate that her injuries arose out of and in the course of employment. The courts have interpreted § 287.020.3(2)(b) RSMo to involve a "causal connection" test. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012). In specifically contrasting a "work-related risk" versus a "risk to which the employee was equally exposed" outside

Employee: Barbara Simmons

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of work, the *Johme* court made clear that our analysis under § 287.020.3(2)(b) should begin with an identification of the risk or hazard that resulted in the employee's injuries, followed by a quantitative comparison whether this employee was equally exposed to that risk in normal nonemployment life. *Id.* at 512. Following the court's reasoning, the result of this quantitative comparison should reveal whether employee's injuries resulted from a risk unrelated to the employment.

Here, I find that the risk or hazard that resulted in employee's injuries is that of employee's shoe sticking to a linoleum floor. The next question is whether employee was equally exposed to that risk or hazard in her normal nonemployment life. I am convinced that employee was so exposed. Employee agreed that she walks outside of work, and that she walks on linoleum floors. Employee also agreed that her job does not involve a lot of walking, and that she typically only does so if she is getting the mail or making a deposit, events that happen once per shift, at most. Nothing about employee's work as a billing specialist caused employee to fall down on January 13, 2012. As the Missouri Supreme Court has made unmistakably clear:

An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved ... is one to which the worker would have been exposed equally in normal non-employment life.

*Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 511 (Mo. 2012), quoting *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 674 (Mo. 2009).

I believe the majority's reasoning imputes liability to employer merely because employee was injured *at work*, and fails to address the relevant question whether her injuries resulted *because of work*. I am convinced that employee's injuries 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.

For the foregoing reasons, I would reverse the award of the administrative law judge and enter a final award denying employee's claim. Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

## PARTIAL AWARD

Employee: Barbara Simmons

Injury No.: 12-001723

Dependents: N/A

Employer: Mercy Hospital St. Louis

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Mercy Hospitals East Communities

Hearing Date: October 3, 2012

Checked by: KOB

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No, due to limited nature of the award.
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: January 13, 2012
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? 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 occurred or occupational disease contracted: Claimant was walking on laminate floor in rubber clogs while clutching mail when she fell.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: Not determined.
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

- 17. Value necessary medical aid not furnished by employer/insurer? To be determined
- 18. Employee's average weekly wages: To be determined.
- 19. Weekly compensation rate: To be determined.
- 20. Method wages computation: To be determined.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: To be determined.
- 22. Second Injury Fund liability: To be determined.
- 23. Future requirements awarded: To be determined.

Each of said payments to begin and be subject to modification and review as provided by law. 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.

**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.**

The compensation awarded to the claimant shall be subject to a lien in the amount of TBD of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Christopher Wagner

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

Employee:	Barbara Simmons	Injury No.: 12-001723
Dependents:	N/A	
Employer:	Mercy Hospital St. Louis	Before the <b>Division of Workers’ Compensation</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Mercy Hospitals East Communities	Checked by: KOB

**PRELIMINARIES**

The matter of Barbara Simmons (“Claimant”) proceeded to hearing to determine whether Claimant’s accidental injury arose out of her employment. Attorney Christopher Wagner represented Claimant. Attorney Patrick Hinrichs represented Mercy Hospital St. Louis (“Employer”) and its Insurer. The Second Injury Fund is a party to the claim, but because the parties submitted this case for hearing on the limited issue of arising out of employment, the Fund did not attend the hearing.

The parties stipulated that on January 13, 2012, Claimant sustained an accidental injury. The parties agreed Claimant was an employee of Employer, venue is proper in the City of St. Louis, Employer received proper notice, and Claimant filed her claim within the time required by law. Employer has denied the claim as not compensable. Because of the limited scope of the hearing, there were no other stipulations.

The limited issue to be determined is whether Claimant sustained an injury that arose out of and in the course of employment. If Employer prevails, the parties have requested a final award. If the issue is resolved in favor of Claimant, a temporary and partial award will result.

**FINDINGS OF FACT**

The underlying facts are undisputed. Claimant was billing specialist for an office of pulmonologists located on the second floor in Tower A at Mercy Hospital. It was her habit, but not a job requirement, to wear snug fitting, slip resistant rubber clogs that she bought at the Mercy Hospital uniform store. She only wore the clogs at work. Among her duties was making deposits with the hospital cashier and collecting the office mail, which she often combined into one trip. On January 13, 2012, Claimant had made the deposit and collected the mail from the mailboxes located by the Tower B elevators. As she made her way back to the office, Claimant walked down the corridor clutching magazines and envelopes of multiple sizes with both hands pressed to her chest. Looking up, she saw Dr. Paranjothi, one of the pulmonologists from her office, and quickened her pace to join him on the elevator.

As Claimant rounded the corner at the end of the hall, her shoes stuck to the uncarpeted, laminate floor, and she lunged forward. She did not encounter any foreign substance and did not

slip or trip. As she pitched forward, her arms remained clutched to the mail at her chest, and she landed directly on her right shoulder. The risk source of injury was walking on laminate floor in rubber clogs while clutching mail. The fall was not idiopathic. Claimant was taken directly to the Emergency Room, and was diagnosed with a proximal humeral fracture/dislocation. She underwent an open reduction and internal fixation of a comminuted right proximal humerus fracture. She has had complications and now requires more surgery.

Claimant walks for exercise and otherwise in her daily life away from work. She also receives and transports mail at home. There is no evidence to establish how much of each activity she does at home compared to at work, and there is no evidence that she walks on laminate flooring while not at work. She only wears the shoes at work, and wears other shoes away from work.

### **RULINGS OF LAW**

The sole issue is whether Claimant's injury occurred in the course and scope of her employment. If so, the claim is compensable, and if not, there are no benefits due under the Workers' Compensation Act ("Act"). In 2005, the Act was amended to require strict construction and to require the evidence to be weighed impartially without giving any party the benefit of the doubt. *Pope v. Gateway to West Harley Davidson*, 2012 WL 5207529, 6 (Mo.App. E.D.,2012). Under the revised Act, an employer "shall be liable, irrespective of negligence, to furnish compensation under the provisions of [the Workers' Compensation Act] for personal injury ... of the employee by accident arising out of and in the course of the employee's employment...." § 287.120.1.

Section 287.020.3(2) governs whether an injury arises out of and in the course of employment. It states 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.

Here, Claimant satisfies the requirements of § 287.020.3(2)(a), because the fall is the prevailing factor in causing the injury for which she seeks workers' compensation benefits. The outcome of this case thus depends upon the correct application of § 287.020.3(2)(b).

A recent line of cases addresses the requirements of § 287.020.3(2)(b).<sup>1</sup> In *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671 (Mo. Banc 2009), the claimant, who was repairing a section of road, was walking briskly toward a truck containing

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<sup>1</sup> The most recent case, *Pope v. Gateway to West Harley Davidson*, 2012 WL 5207529, 6 (Mo.App. E.D.,2012) , was decided after the parties submitted their post-trial briefs. Given the similarities of this case to the *Pope* case, this award draws from the analysis of the *Pope* decision.

repair materials when he felt a pop in his knee. *Id.* Miller admitted that his work did not require him to walk briskly, he normally walks briskly at home, and he did nothing out of the ordinary when walking at work that day. *Id.* Additionally, nothing about the road surface, his work clothes, or the job caused him to slip, and he did not fall from the pop in his knee. *Id.*

The Missouri Supreme Court determined that the injury, while it occurred in the course of employment, did not arise out of employment. *Id.* at 673.

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

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

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

In *Pope v. Gateway to West Harley Davidson*, 2012 WL 5207529, 6 (Mo.App. E.D., 2012), the court faced a case with a fact pattern remarkably similar to this case. Pope had just finished moving motorcycles to the showroom and was returning to his supervisor as ordered. Pope was descending the steps between the showroom and service department, carrying his helmet and wearing work boots, when he lost his footing and fell, breaking his ankle. The *Pope* court held:

Under the guidance of *Miller* and *Johme*, Pope's injury is compensable only if his injury had a causal connection to his work activity other than the fact that it occurred at work. More simply stated, we consider whether Pope was injured *because* he was at work as opposed to becoming injured merely *while* he was at work. This analysis requires us to

consider whether the risk source of Pope's injury—here, walking down steps while wearing work boots and carrying a work-required helmet—is a risk to which Pope is equally exposed in his non-employment life. If Pope is equally exposed to this risk outside of his employment, then the injury does not arise out of the employment, and is not compensable under Missouri's workers compensation laws. *Johme*, 366 S.W.3d at 509–10; *Miller*, 287 S.W.3d at 673; *Pope* at 5.

The court found his work required Pope to descend steps while holding his helmet, which increased his risk of falling and sustaining injuries. These facts reasonably support a finding that Pope's injury was causally connected to his work activity, i.e., a risk related to his employment as opposed to a risk to which he was equally exposed in his normal, non-employment life. *Pope* at 5.

After a careful review of the record, I find sufficient evidence to support a finding that Claimant's injury had a causal connection to her work activity. I find the risk source of injury was walking on laminate floor in rubber clogs while clutching mail. As in *Pope*, and as required by the job, Claimant was traveling from point A to point B, with her hands filled, when the injurious fall occurred. As in *Pope*, the requirement of carrying work-related items while walking increased Claimant's risk of falling and sustaining injuries. Unlike *Pope*, but more like *Johme*, Claimant's footwear was an essential element of the risk of injury – the fall began when the distinctive rubber clogs stuck to the floor. Claimant was denied the opportunity to catch her balance or break her fall because her hands were clutched to the mail, which increased the chance of sustaining a more severe injury. There is a causal connection between the injury and work.

Claimant was not equally exposed to the risk source of walking on laminate floor in rubber clogs while clutching mail in her normal, non-employment life. While she certainly walks in her non-employment life, there is no evidence Claimant did so on laminate floors. Her personal mail was not shown to be of the same sort or carried in the same way as the work-related mail. Most importantly, Claimant only wore the rubber clogs at work, so she was not equally exposed to the risk of the clogs in her normal, non-employment life. Even though work did not require the clogs, Employer made the clogs available for purchase, and Claimant only wore then clogs at work. The *Miller* case is distinguished from the case at hand since there is no evidence Claimant's individual physiology somehow contributed to the fall. *Johme* is distinguishable because, despite the similar involvement of footwear, Claimant only wore her clogs at work, while *Johme* wore the problematic shoes in her non-employment life.

In sum, Claimant was injured *because* she was at work as opposed to becoming injured merely *while* she was at work. Claimant has established a sufficient causal connection to her employment beyond a mere temporal relation. Her injury arose out of and in the course of her employment.

Dated: \_\_\_\_\_

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

KARLA OGDRODNIK BORESI  
 Administrative Law Judge  
 Division of Workers' Compensation