

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

Injury No.: 03-066736

Employee: Wanda Storie
Employer: American Systems, Inc. d/b/a Southbrook Skilled Nursing Center
Insurer: Diamond Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 12, 2003
Place and County of Accident: Iron County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 29, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Lawrence C. Kasten, issued May 29, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of January 2009.

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

FINAL AWARD

Employee: Wanda Storie

Injury No. 03-066736

Dependents: N/A

Employer: American Systems Inc. d/b/a Southbrook Skilled Nursing Center

Additional Party: Second Injury Fund

Insurer: Diamond Insurance Company

Appearances: Ken Seufert for the employee
Juan Arias for the employer-insurer
Gregg Johnson for the Second Injury Fund

Hearing Date: February 26, 2008

Checked by: LK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? No.
- Was the injury or occupational disease compensable under Chapter 287? No.
- Was there an accident or incident of occupational disease under the Law? No.
- Date of accident or onset of occupational disease? June 12, 2003
- State location where accident occurred or occupational disease contracted: Iron County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

- Did employer receive proper notice? Yes.
- Did accident or occupational disease arise out of and in the course of the employment? No.
- Was claim for compensation filed within time required by law? Yes.
- Was employer insured by above insurer? Yes.
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee was driving home from work and had an automobile accident.
- Did accident or occupational disease cause death? No.
- Parts of body injured by accident or occupational disease: N/A.
- Nature and extent of any permanent disability: N/A.
- Compensation paid to date for temporary total disability: None.
- Value necessary medical aid paid to date by employer-insurer: None.
- Value necessary medical aid not furnished by employer-insurer: None.
- Employee's average weekly wage: \$566.50.
- Weekly compensation rate: \$377.67 per week for temporary total and permanent total disability. \$340.12 per week for permanent partial disability.
- Method wages computation: By agreement.

- Amount of compensation payable: None.
- Second Injury Fund liability: None.
- Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A.

FINDINGS OF FACT AND RULINGS OF LAW

On February 26, 2008, the employee, Wanda Storie, appeared in person and by her attorney, Ken Seufert, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Juan Arias. The Second Injury Fund was represented by Assistant Attorney General Gregg Johnson. 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

- American Systems Inc. d/b/a Southbrook Skilled Nursing Center was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by Diamond Insurance Company.
- On June 12, 2003, Wanda Storie was an employee of American Systems Inc. d/b/a Southbrook Skilled Nursing Center and was working under the Workers' Compensation Act of Missouri.
- The employer had notice of the employee's alleged accident.
- The employee's claim was filed within the time allowed by law.
- The employee's average weekly wage was \$566.50. The rate of compensation for temporary total disability and permanent total disability is \$377.67 per week. The rate of compensation for permanent partial disability is \$340.12 per week.
- The employer-insurer has not paid any medical aid.
- The employer-insurer has not paid any temporary disability.

ISSUES

- Accident
- Medical causation
- Claim for previously incurred medical
- Claim for additional or future medical aid
- Nature and extent of disability
- Liability of the Second Injury Fund for permanent partial disability or permanent total disability.
- Dependency status under Schoemehl v Treasurer of the State of Missouri, 217 S.W. 3rd 900 (Mo. 2000).

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- Medical report of Dr. Levy
- CV of Dr. Levy
- Medical records for the employee
- Medical expenses and medical bills
- Prior medical records of the employee
- Medical records of diagnostic testing.
- June 13, 2003 chest x-ray
- June 13, 2003 pelvis x-ray
- June 13, 2003 CT scan
- June 18, 2003 cervical x-ray
- June 18, 2003 MRI
- June 13, 2003 CT scan
- June 13, 2003 x-rays
- June 16, 2003 surgical records
- June 22, 2003 x-rays
- July 1, 2003 operative records
- November 11, 2002 lumbar MRI
- February 7, 2003 shoulder MRIs
- Neuropsychological evaluation by Dr. Brick Johnstone
- Supplemental report of Dr. Brick Johnstone
- CV of Dr. Johnstone
- Missouri uniform accident report dated June 12, 2003
- November 6, 2003 CT scan of the head
- Report of Jim England dated January 26, 2005
- Report of Jim England dated June 9, 2006
- CV of Jim England
- Pharmacy records
- Deposition of Dr. Brick Johnstone
- Medical records of Dr. Bramhall
- Report of Dr. Lahmeyer dated February 7, 2007
- CV of Dr. Lahmeyer
- September 13, 2006 letter from Ken Seufert to Dr. Lahmeyer.
- Deposition of Wanda Storie dated April 4, 2005
- Time records of the employee from Southbrook Skilled Nursing Center dated March 20, 2003 through June 12, 2003.
- Written statement of Bobbi Hoover
- Written statement of Karen Sitze
- Written statement of Ramona Polley
- Written statement of James Chitwood
- Deposition of James Chitwood
- Photographs of the employee's vehicle
- Deposition of Dr. Levy
- Deposition of James England
- Deposition of Dr. Cantrell
- Sleep/Wake questionnaire completed by Wanda Storie on January 3, 2007

National Highway Transportation and Safety Administration Expert Panel on Driving Fatigue and Sleepiness:
Drowsy Driving and Automobile Crashes

- Letter to Dr. Wolfgram from the employer-insurer's attorney dated October 31, 2007
- Handwritten notes of Dr. Wolfgram
- Physician's Desk Reference 2008 pages 511 through 513
- Mayo Clinic explanation of Butalbital and Acetaminophen combination
- Deposition of Dr. Lahmeyer
- Medical report of Dr. Deidiker dated June 1, 2004
- Medical report of Dr. Murphy dated June 23, 2004
- Deposition of Ramona Polley
- Deposition of Bobbi Hoover
- Deposition of Karen Sitze
- Deposition of Cheri O'Neal
- Computation of average weekly wage for past due temporary total disability and permanent total disability benefits
- Time schedule for nursing employees dated May 29, 2003 through June 25, 2003
- 2003 Payroll and timecards for Wanda Storie
- April 2001 Employee of the Month Certificate for Wanda Storie
- Deposition of John Clauser
- Certified letters from employee's attorney to employer-insurer's attorney dated September 20, 2004 and December 18, 2003
- Letter from employee's attorney to employer-insurer's attorney dated September 20, 2004 with enclosures
- Letter to the employee's attorney from employer-insurer's attorney dated September 29, 2004
- Letter to employer-insurer's attorney from the employee's attorney dated April 12, 2005
- Letter to employee's attorney from employer-insurer's attorney dated April 29, 2005 with enclosures
- Letter to employee's attorney from employer-insurer's attorney dated February 20, 2008 with copies of timecards from July 2000 through March of 2003
- Medical records of Quality Healthcare
- Pharmacy records
- Portion of the employee's personnel file including performance evaluation, pay raises and performance problems
- Portions of the employee's personnel file including evaluation report, personnel status change forms, performance improvement counseling forms and letter of Cheri O'Neal dated June 13, 2003
- Medical records of Dr. Johnson
- Medical records of Healthway Primary Care (Dr. Hartel)
- Intercard Merchant Support Page

Employer-Insurer's Exhibits

- Printout of employer's swipe card data for employee from March 6 through July 23, 2003
- Copy of punch cards for the employee from July 10, 2000 through March 27, 2003
- Wage statement and copy of check stubs
- Copy of personnel file of Wanda Storie
- Copy of personnel file of Ramona Polley
- Southbrook Medicare Aid patient records from June 10, 2003 through June 12, 2003. (The employee objected to the admission of this exhibit. The objection was taken under advisement. The objection is overruled and the exhibit is admitted into evidence.)
- Letter from the Missouri Department of Health and Senior Services to employer dated March 11, 2004
- Certified copy of records from Walgreens Pharmacy
- Deposition of Dr. Christopher Long
- Deposition of Dr. Edwin Wolfgram
- Deposition of Dr. David Peeples
- Deposition of Dr. Russell Cantrell

- Deposition of Cheri O'Neal

Second Injury Fund – No exhibits

Note: Several Exhibits had writing and highlighted portions that were present when offered and admitted

Witnesses: Employee: Karen Sitze, William Storie, and Wanda Storie. Employer-Insurer: John Clauser, Stacy Jones, and Sonja Wilson .

Briefs: The employee and the Second Injury Fund filed their briefs on the hearing date. The employer-insurer's brief was received on March 11, 2008. The employee filed a supplemental brief on March 19, 2008. The employer-insurer filed a supplemental brief on March 31, 2008. The Second Injury Fund and the employee filed letters on April 1, 2008 regarding the briefing process. On April 3, 2008, a letter was sent to the parties regarding the filing of briefs. On April 21, 2008, the employee filed an amended claim adding William T. Storie and Sonny Storie as dependents to bring the claim into conformance with the evidence and issues.

Summary of Issue of Accident and Positions of the Parties:

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On June 12, 2003, after working a double shift the employee was on her way home. She had a single car accident at approximately 11:00 to 11:30 p.m. about 1.5 miles from her home. The employer-insurer and the Second Injury Fund are disputing that the accident arose out of and in the course of employment.

The employee's position is that the employer wanted to get rid of the employee by purposely overworking her in an attempt to get her to quit her employment. As a result of the overwork, the employee fell asleep while driving home after working a double shift on June 12, 2003. There is no dispute that the employee worked each day from June 3 through June 10. There is a dispute that the employee worked on June 11, 2003. The employee is alleging that the employer has purposely hid, destroyed or changed time and/or payroll records.

The employer-insurer's position is the employee's use of prescription medication and not her work caused the employee's accident. There is a dispute as to how much Esgic and Lorcet the employee was taking prior to the accident.

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FINDINGS OF FACT FOR ISSUE 1 ACCIDENT:

Pre-Existing Medical Records regarding Esgic Plus and Lorcet Prescriptions:

In March of 2001 Dr. Bramhall's office diagnosed the employee with migraine headaches and started prescribing Esgic Plus which continued through May of 2003. In 2001 and 2002 the employee developed neck and low back pain with radiculopathy. An MRI of the low back showed a bulging disc at L2-3 and a protrusion at L5-S1. An MRI of the cervical spine showed a bulging disc. At the end of December of 2002, Dr. Bramhall prescribed Lorcet, one every six hours as needed for pain. At the end of January of 2003, Dr. Bramhall referred the employee to an orthopedic surgeon for her shoulders. An MRI of the left shoulder showed impingement and tendinopathy verses tendonitis of the rotator cuff. The MRI of the right shoulder showed subacromial bursitis and tendinopathy of the rotator cuff. On March 10, 2003, Dr. Bramhall's office refilled Lorcet for 120 pills to be taken every six hours as needed. On April 8, 2003 Dr. Bramhall's office refilled the Lorcet for 120 pills, one to be taken every six hours for pain. At the end of April of 2003, the employee had been seen a neurosurgeon and had been diagnosed with a C5-6 disc protrusion. On April 25, 2003, there was an increase on her Lorcet refill. The Esgic was refilled.

On April 25, 2003, the employee's prescription for 180 Esgic pills, one to be taken every four hours as need for headaches and 120 Lorcet pills, one to be taken every four to six hours as needed for pain, was filled at Walgreens. On May 12, 2003, Walgreens filled the employee's prescription for 180 Esgic and 120 Lorcet pills were filled. On May 29, 2003, 180 Esgic and 120 Lorcet pills were filled at Walgreens.

Personnel Records of the employee prior to June 12, 2003:

On February 14, 2003, Ms. Storie had a performance improvement counseling for excessive medication errors. She was given a warning, put on 30 days probation and a reoccurrence would result in suspension/termination. The employee was to attend an educational in service on medication administration and documentation. On February 25, 2003, the employee had another performance improvement counseling for failing to transcribe a physician's order. She was given a warning and it was noted that a reoccurrence would result in a three day suspension. A third performance improvement counseling notice was given on May 20, 2003 for failure to perform job duties as assigned with documentation and transcription errors; and a negative attitude toward the facility policy and procedures and insubordinate toward supervisors. Cheri O'Neal the Director of Nursing noted that the employee had short term improvements but continued to have difficulty maintaining the level of standards required for a charge nurse. The employee would be re-evaluated in one month. A warning was issued with a notation that a reoccurrence of the above would result in termination. The employee did not sign that notice.

Work Schedule, Time Records and Payroll Records through June 12, 2003:

Time records from July 2000 through March of 2003 show instances where the employee forgot to clock in when she arrived at work but would clock in later and the time card would be manually corrected. There were several times that employee did not clock out and the time card was manually corrected. Two days in May of 2002 the employee worked but did not clock in or clock out. Those days were manually added onto her time card. During 2001, there was a period of time where the employee worked twelve to fourteen hours per day on a fairly regular basis.

From March 6 through June 2, 2003 the employee would typically work three or four days in a row and then would usually have two to three days in a row off work. Occasionally, she would have only one day off work. On one occasion in March the employee worked five days in a row and then had three days off.

The employee was off work on May 31, June 1 and June 2. The employee was scheduled to work the day shift on June 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13. The employee was "squared" on June 5, 8, and 12th. The employee was not scheduled to work on June 11, 2003.

The timecards and payroll records show that the employee worked the following days with typically a 30 minute lunch:

Tuesday	June 3	5:42 a.m. to 2:30 p.m.	Total of 8.3 hours
Wednesday	June 4	5:42 a.m. to 2:54 p.m.	Total of 8.7 hours
Thursday	June 5	5:48 a.m. to 3:00 p.m.	Total of 8.7 hours including 1 hour of in service
Friday	June 6	5:42 a.m. to 3:06 p.m.	Total of 8.9 hours
Saturday	June 7	5:42 a.m. to 2:42 p.m.	Total of 8.5 hrs
Sunday	June 8	5:43 a.m. to 2:30 p.m.	Total of 8.3 hours
Monday	June 9	5:48 a.m. to 3:06 p.m.	Total of 8.8 hours
Tuesday	June 10	5:42 a.m. to 2:12 p.m.	Total of 8 hours

The time records did not show that the employee worked on Wednesday June 11th.

Thursday	June 12	5:42 a.m. to 10:06 p.m.	Total of 15.9 hours
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For the pay period that ended on June 11, 2003, the employee was paid by check on June 20, the week after her accident.

Records after Accident:

The Highway Patrol Accident Report shows that the employee's accident was at 11:30 p.m. on June 12, 2003. The employee's vehicle was northbound on Missouri 21, crossed the centerline, traveled off the left side of the roadway, and went down an embankment. The vehicle struck a large concrete culvert, rotated and came to rest on all four wheels.

The Arcadia Valley Ambulance received a call at 1:13 a.m. and arrived at 1:22 a.m. It was noted she had been in the accident two hours before being found. The employee was very tired and did not rouse easily. She was taken to Mineral Area Regional Medical Center in Farmington. The employee denied she had consumed alcohol and denied home medications. The lab showed alcohol/ethanol at 7 mg/dl which Dr. Deidiker stated correlated to 7-1000th of 1% or 0.007 g/deciliter. It was his opinion that that level was not significant and for all intense purposes represented a negative reading. Dr. Murphy stated that the employee had an infarction as the consequence of the accident and it had occurred after the trauma. The employee was transferred to Barnes Jewish Hospital. On June 13 at 7:40 a.m. a urine drug screen was positive for barbiturates and opiates.

On June 13, 2003, Cheri O'Neal the Director of Nursing, wrote a statement that at approximately 1:30 a.m., she received a phone call from Sonja Wilson, Assistant Director of Nursing reporting that Wanda Storie had been in a motor vehicle accident while driving home from work. Ms. O'Neal contacted Mineral Area Hospital to inquire as to the employee's condition and spoke with Wanda's significant other, Bill. In reply to asking, "How is Wanda?" He stated, "You worked her to death – this is your fault – you drove her off that ravine."

Deposition Testimony of James Chitwood:

Mr. Chitwood had previously worked at Southbrook and knew Wanda Storie. In June of 2003, he worked at T-Rex, a convenience store about three blocks from Southbrook. Wanda Storie came in maybe two times a week. On June 12, 2003, the employee came in around 10:30 p.m. She came in to see how he was doing and to see if there were any new lottery tickets. He asked her how she was doing and she said she was very tired and exhausted, and had been pulling many double shifts. It did not look like Wanda because she was not her usual spirited self. She was usually happy go lucky and joking around but was not that night. There was no color to her face and she was very pale. Her eyes were kind of tired and sagging. They looked like they were kind of hazy like she was in a daze or a fog which he had not seen before. Her overall appearance was very exhausted. She told him that she had been working a lot of hours at the nursing home, said that night she had to work a double, and stated something about losing her job. Mr. Chitwood asked her whether she meant they would fire her if she had not worked, and she did not know. He asked if she would like a cup of coffee and she said no, that she had to go home. She was in there about ten minutes. To his recollection, the employee didn't buy a soda or a lottery ticket. He told her to be careful going home because she looked tired. He saw her drive away and was headed toward her home. About an hour or so later her husband came in and asked if she had been there because she had not made it home yet. He told him that she had left about an hour ago.

Testimony of William Storie:

Mr. Storie's testified that he has a bad back, bad heart and bad lungs and is totally disabled from work. He is on Social Security Disability and receives VA benefits. He has taken various medications over the years. In 2002 and 2003 he was on several different medications including Lorcet/Hydrocodone. He received his prescriptions by mail from the VA and his refills usually took 10-15 days. He took six to eight Lorcet a day and his prescription was 60 pills a month. At the rate he was taking the medication, his prescription lasted about 10 days per month. He ran out of his pills each month.

Prior to June 12, 2003, the employee had migraine headaches; and pain in her shoulders and back; and was on Esgic Plus and Lorcet. He picked up her prescriptions for her. When he ran out of his medication, he could hardly

move, and he would take the employee's Esgic and Lorcet.

Mr. Storie stated that the employee worked on June 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12. From June 3 through the morning of June 12, the employee was dragging, tired and was hurting from working those hours. June 11 was not a normally scheduled work day. He found out that she had to work that morning, when she woke him up and told him that she had to work and for him to get their son ready for school. Mr. Storie suggested that she call her employer and tell them she was too tired to work. The employee did not call, and worked her regular 6:00 a.m. to 2:30 p.m. shift.

On June 12, 2003, the employee worked the day shift which started at 5:45 a.m. and normally ended at 2:15 p.m. The employee called him and said she had to work a double shift. The employee said she was tired but was told she had to work or be fired. When the employee did not make it home at 10:45 p.m. he called the nursing home and they told her she had left. He went looking for her. There were two ways to get to work, one was a longer route going on Highway 21 and W, and there was a shortcut which cuts off about eight miles but there are two low water bridges that are impassable in the rain. He drove the shortcut but did not find her. He went to T-Rex and was told that she had stopped there. He went back home the short way just in case he missed her but she was not there. He went the long way and found her after midnight one and a half miles from home. Her car was at the bottom of gully in a culvert. She was pinned in the car and yelling for help. At the hospital he received a phone call from Cheri O'Neal who said that she heard that she was in a wreck. She asked how she was doing and whether she was able to come in to work that morning. He called her a lying bitch and slammed the phone down because the employee had worked too many days straight.

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Testimony of the Employee:

On June 12, 2003, she was 54 years old. She and William Storie were married in 1993 but divorced in 1998 because if they did not, he would not get VA benefits because she made too much money. He is on Social Security disability. He takes medication and used her medication in 2003.

In the last couple months before the accident, her neck, back and shoulders had more pain than normal and she had more migraines. She did not take any more medications than were prescribed. She agreed with the pharmacy records showing the last couple months of refills of Esgic and Lorcet but disagreed that she took all of the medications that were filled. She was having more problems with pain at work the last couple months but did not take any medication at work. The Esgic and Lorcet/Hydrocodone did not make her tired and sleepy.

She worked at Southbrook several different times and went back to work there in July of 2000. In 2003, Cheri O'Neal became the Director of Nursing and after that she received her first performance improvement counseling in February of 2003. She was threatened with termination or suspension. She thought it was fair for Southbrook to discipline her then. She was placed on 30 days probation. On May 20, 2003 there was another improvement counseling which she refused to sign because they were trying to find something wrong. She was told that if there was any reoccurrence she would be terminated. As a result of her evaluations, she was afraid she was going to lose her job in June of 2003.

The employee testified that Exhibit HH shows that prior to June 3, 2003, she would work four days and be off one day; or work three days and be off two; and sometimes would be off one to three days in a row. In June of 2003, Southbrook was under staffed, the employee felt like she was being pushed to quit and was fearful of losing her job. Ramona Polley told her that they were trying to get rid of her. She did not recall asking to work more than her regular schedule.

If she was working the next day, she would go to sleep at 10:30 p.m. to 10:45 p.m. and would get up at 4:30 a.m. to 4:45 a.m. She usually got to work at 5:45 a.m. and would get off at 2:15 p.m. or later. Prior to June 3, 2003, she had not worked nine or ten days in a row. When she worked, she typically got five to six hours of sleep. No one at work told her how many hours of sleep to get or when to go to bed. She usually was not too tired after working a

regular shift. When she was not working she would usually wake up at 5:30 a.m. to 6:00 a.m. and probably nap during the day.

If she had a headache when she woke up, she would take an Esgic whether she was working or not. She always took a Lorcet before she left for work. She would usually take one Lorcet before work, one after work and two at night for a total of four Lorcets per day. If she had neck, back or shoulder pain, she would take a Lorcet. She did not take her medications with her to work and did not take any medication at work including Esgic or Lorcet/Hydrocodone. She worked with pain and headaches. After work if she was hurting bad enough, she would take a Lorcet and if she had a headache she would take an Esgic. She would usually take a couple more prior to bed time. On the days off work, she would take medication for her pain and headaches. Her husband would pick up her prescription medicines. The employee never took ten Esgic a day and never took seven Lorcet a day. The employee's husband took her Esgic and Lorcet because he was hurting and did not have anything. She did not know how many he took.

She is not sure if she worked on June 11, 2003. She cannot remember due to her accident which caused a head injury and loss of memory. Southbrook's records show that she did not work but she disagrees because other people told her that she did work. When she worked, she was supposed to clock in and out but sometimes did not. She remembers a punch card system.

Before she left work on June 12, 2003, she took a Lorcet. She did not take any medication at work. She arrived at work at 5:45 a.m. After she left for work she did take or use Lorcet or Esgic. During the day she was tired and exhausted from working and ready to go home.

She was "Squared" on June 12, which meant there was a possibility that she would have to work a double shift if someone from the next shift did not work. By May 29, she knew that she was squared on June 12. If she was squared, usually she could find someone else to work the shift. She first learned of having to work a double shift around 12:30 or 1:00 p.m. Bobbi Hoover told her she had to work. The employee asked Cheri O'Neal if she had to work the whole shift and she said yes. She then asked if she could find someone to work during the shift if she could go home early and Cheri said no that she had to stay the whole shift. The employee told Cheri that she was tired and exhausted and worn out and did not think she could do the shift. Ms. O'Neal told her that if she did not stay and work, she would not have a job.

She was scheduled to work her regular shift the next day on June 13 and was to report at 5:45 a.m. If she worked a double shift and was scheduled to work the next day, Cheri O'Neal could agree for someone else to work for her but she did not ask to get off the next day because she thought she might lose her job. Ramona Polley then asked if she could work the second shift but she turned her down. No one else asked her to work her shift for her. She felt she had no options and would have to work the second shift or be fired. She did not tell anyone that she wanted to work that shift because she needed the money. During the evening of June 12, she was tired, hurt and exhausted and had a headache that was aggravated from working the second shift. When she left, she was just thinking about going home in order to get back the next morning. She did not think about calling Bill or her daughter to pick her up. When she was driving home she was not on any mission for Southbrook.

On June 12 she was tired after working that many days in a row. She was only getting five to six hours of sleep. After eight days, it caught up with her. Typically she would work three or four days in a row and be off work two or three days, where she could catch up on her sleep. On June 12, the lack of sleep and working caught up with her.

The second shift on June 12, ended about 10:15 p.m. Before she left the building she stopped at the nurses' station. She left to drive home around 10:20 to 10:25 p.m. and was hurting, tired and exhausted. She knew she had to be back at work the next day and her desire was to get home. She stopped at T-Rex which was part of her routine to get soda, coffee or buy a lottery ticket. She talked to James Chitwood, the clerk but does not remember buying anything. She did not remember him offering her a cup of coffee. She already had coffee in the car.

Since it had rained, she went the long way around because she was afraid that there would be water over the

bridge. She caught herself nodding off several times. She did not stop because she wanted to get back home due to working the next day. She did not call her husband to get her because she had no cell phone and there is no phone between T-Rex and her home. She did not remember leaving the road or having the accident. Her next recollection was waking up at Barnes Hospital.

She stated that the accident happened because she working too many days in a row. She was tired, worn out and exhausted. She was told she had to work or be fired and she did not quit because she needed the job.

With regard to the time and payroll records from March 6, through May 28, she would not disagree with the records. She does not know whether the May 29 through June 11 records are accurate showing she worked 84.7 hours. She agreed that she was off work on May 31, June 1 and June 2. She is not sure about the amount of time she worked from June 3 – June 10th. On June 12, she worked 15.9 hours from 5:42 a.m. to 10:06 p.m.

Testimony of Karen Sitze:

On September 29, 2004, Karen Sitze gave a written statement that on June 12, 2003, she overheard Wanda Storie and Cheri O'Neal talking. Wanda asked Cheri if she had to stay the full second shift and Cheri said "Yes ma'am you do". Wanda was exhausted that day and tearful and was afraid she would lose her job if she asked anyone else to cover the shift.

Ms. Sitze's deposition was on August 8, 2007. She is employed at Southbrook as an LPN charge nurse and medical records. Ms. Sitze testified the day before her accident, she thought Wanda Storie was off work but she was not sure.

Ms. Sitze worked the same shift as Wanda. On the day of her accident, Wanda was more tired than usual. Ms. Sitze stated that sometimes the employee was more tired than normal. She cannot say that she was more tired or not in the weeks and months up to the accident but on the day of the accident she was. She noticed that Wanda was tired, exhausted and tearful probably in the late morning. Wanda told her she was tired, stressed and worried about her job and teared up a bit. Ms. Sitze figured that the employee was tired and stressed over the job itself. There was a lot of tension in the overall workplace mainly due to Cheri O'Neal. Ms. O'Neal treated Ms. Sitze and the employee differently and was harsher towards them.

In the early afternoon, she became aware that Wanda was going to have to work the second shift. Wanda asked Cheri if she had to stay the full second shift and Cheri said "Yes ma'am you do". Wanda was afraid she would lose her job if she asked anyone else to cover the shift. Ms. Sitze offered to work the shift for her but Wanda told her no, that she was afraid Cheri would fire her. Ms. Sitze did not know of any plan by the administration to fire Wanda or get Wanda to quit by working her more hours. Both she and Wanda felt that the administration was trying to get rid of them.

Ms. Sitze testified at the hearing that she had been aware of the ongoing search for the timecards of Wanda Storie prior to her August 8, 2007 deposition. Ms. Sitze was in charge of medical records. Michelle Patterson who was in human resources was in charge of the timecards and asked Ms. Sitze to look for Ms. Storie's 2003 timecards. She helped search for them and they both found timecards for 2003 including through June 12. Ms. Sitze made copies of the cards and gave them to Ms. Patterson who gave them to John Clauser, the Administrator of Southbrook. The timecards were used up to the time of the employee's accident.

Testimony of Stacy Jones:

Stacy Jones testified at the hearing. She is a LPN and has worked at Southbrook for seven years. Her regular work hours are from 8:00-9:00 a.m. to 4:30-5:00 p.m. Wanda Storie worked the day shift which was 5:45 a.m. to 2:15 p.m. Leading up to June 12, 2003, she knew that Wanda Storie had back pain and took medication for it. Wanda Storie worked a double shift on June 12, 2003. Ms. Jones offered to work Wanda Storie's second shift several times and each time Wanda Storie told her no, but did not explain why. Ms. Jones asked her about working because Wanda Storie appeared tired and had her hand on her head sitting at a desk. Ms. Jones spoke to Heather Stockman about

offering to stay. In the weeks leading up to the accident, Ms. Storie had the same appearance which tired looking but did not appear exhausted or overtired. She complained of being tired but never complained of being too tired to work. She does not know of anyone trying to get rid of Wanda Storie by over scheduling her. She does not remember if Wanda Storie worked on June 11, 2003.

Testimony of Bobbi Hoover:

The deposition of Bobbi Hoover was on August 8, 2007. Ms. Hoover is currently working at County Meadows as an RN. She worked at Southbrook in 2003 on the second shift from 1:45 p.m. to 9:45 p.m.

Ms. Hoover testified that Ms. Storie worked her regular shift on June 11 because she got a one-on-one verbal report from Ms. Storie about the patients she needed to be aware when Ms. Storie was leaving after her shift ended the day before the accident. Ms. Storie worked a double shift on June 12, 2003. Ms. Hoover testified that she was the reason why Wanda Storie had to work the second shift. Ms. Hoover was scheduled to work on June 12. The day before she had had a misunderstanding with Sonja Wilson the Assistant Director of Nursing that led to her suspension prior to an investigation. Due to the June 11 incident Ms. Hoover resigned after she was asked to by Cheri O'Neal.

On June 12, 2003 when Ms. Hoover got to work she was called into the private dining room and met with Sonja Wilson and Cheri O'Neal. She was told that pending an investigation she was going to be suspended and would not be working that day. Ms. Hoover was instructed to and told Ms. Storie that she had to work the second shift. When she found out that she had to work the second shift, Ms. Storie looked like someone had punched her in the stomach. Ms. Storie had worked 9 or so days in a row and was exhausted, fatigued, and wasn't feeling well. Ms. Hoover testified that Ms. Storie was always tired. She was older and had worked eight and a half hours already that day. Ms. Storie yawned and drank coffee to stay awake. On some occasions when they changed shifts, she would appear to be tired. On June 12, Ms. Hoover assumed that Wanda Storie wasn't feeling well because she looked wrung out. She had worked a lot of days in a row, and looked tired and was exhausted. Occasionally in the past during shift changes, Wanda appeared tired and nodded off when she gave a report to Ms. Hoover.

Ms. Storie had worked several days in a row because both Ms. Storie and she had been there but did not know exactly how many days in a row. She was told that Wanda Storie had to work the second shift or would be fired. In her statement, Ms. Hoover's recollection was that Ms. Storie was also squared on June 11.

When asked whether the administration was trying to get Wanda Storie to quit or were trying to fire her. Ms. Hoover testified that they were putting the squeeze on her. She had been written up about some petty things; they were riding her, and giving her more job duties and more demands. No one in the administration told her that they were doing it.

Ms. Hoover overheard Cheri O'Neal tell Wanda that she had to stay and that is why they used the square system. Ms. Hoover stated that the people who didn't stay prior to that were fired. Ms. O'Neal never said Wanda, you will be fired if you don't stay, but it was understood. It was what was expected and what happened in the past. There was a punch card system for clocking in and out at Southbrook all the time she worked there.

Testimony of Ramona Polley:

The deposition of Ramona Polley was on August 8, 2007. Ms. Polley is retired. She is an LPN and worked at Southbrook from 2002 to 2004 as a staff developer and quality assurance person. She was a supervisor of the staff floor nurses including Wanda Storie.

Ms. Polley had a role in filling out the schedule for the nurses but Wanda did not have any input. When she took over staff development in February of 2003, Mr. Clauser, the Administrator of Southbrook, told her to work Ms. Storie 8 or 9 days in a row so she would quit. John Clauser wanted to fire Karen Sitze but he stated that since she had injured her shoulder, they could not get rid of her. They would work on Wanda to quit so she wouldn't draw unemployment. She asked him why he wanted to fire Wanda but he did not give her an answer. She did not have a choice in scheduling that many days in a row but did not do it right away because she did not agree with it. Mr.

Clauser kept asking her when she was going to do it. She talked to Cheri O'Neal about the instructions from John Clauser. Cheri said that she had to do what he said to do. Ms. Polley and Cheri O'Neal often discussed that John Clauser was trying to get rid of Wanda Storie. Ms. Polley did not tell Wanda that John had told her to do that because she thought if she told Wanda Storie she would be fired.

Ms. Polley's testified that John Clauser's reputation was that he would over work and under pay people; and use you and then fire you. His reputation in the community for telling the truth is that he is very much a liar.

At the time of the accident, it was Ms. Storie's ninth or tenth day in a row working. Ms. Polley looked at the prior two years schedule and Wanda had never worked over four days in a row. In May, the employee's appearance was fine. It was only the last two or three days before the accident, she had a very tired appearance. Her eyes were very tired, she was distraught and not the same calm, cool nurse that she usually was. Her actions were slow. She complained of being tired and that it had been a lot of days of work for her. Ms. Storie was worn out and did not need to be working because she was a danger either to herself or her patients.

In her statement, Ms. Polley stated that Wanda worked on June 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, and a double shift on June 12. Ms. Polley had to be there on June 13 and thought Wanda had to be there also. Ramona Polley testified that Wanda Storie worked on June 11, 2003. She had volunteered to work the last two days for Wanda but John would not let her. Wanda was squared on June 12 which meant she pretty much had to stay. On June 12, Wanda Storie told John Clauser that she was too tired and exhausted to work the second shift. Cheri O'Neal was present. Ms. Polley worked on June 12, and offered to work Ms. Storie's shift. John Clauser said no, that Wanda would. Ms. Polley left the facility around 4:00 or 5:00 p.m. and before she left, she checked on Wanda approximately four times.

Testimony of Sonja Wilson:

Ms. Wilson testified at the hearing. She is an RN and started working at Southbrook in April of 2003, and is now the Director of Nursing. Her regular work hours are 8:00 to 4:30 p.m. The swipe card system has not changed since she worked at Southbrook. In 2003, she was the Assistant Director of Nursing.

On June 12, 2003, Wanda Storie worked a double shift. With regard to the squaring policy, a squared nurse can find coverage for the shift, if they can. If they worked double and was suppose to work the next day, they can get someone else to work for them. Ms. Wilson was present on June 12, 2003 but John Clauser was not because he was in Las Vegas

Ms. Wilson stated that she offered to work the second shift for Wanda but Wanda declined. Ms. Wilson did not have a conversation with Cheri O'Neal about the second shift. At 4:30 p.m., the employee appeared normal which was slow paced and solemn. She never appeared overtired or exhausted and never stated she was too tired to work. Ms. Wilson was not aware of any plans or intent to get rid of the employee or to over schedule her to get her to quit. She does not know if Wanda Storie worked on June 11, 2003.

Testimony of Cheri O'Neal:

The deposition of Cheri O'Neal was on August 8, 2007. Ms. O'Neal was working at Pyramid Home Health in Desloge, as a case manager and home health nurse. She is a registered nurse. She had previously worked for Southbrook as an LPN in 1995. She worked for them again from November of 2002 to 2004. When she came back to Southbrook, she was the Assistant Director of Nursing and was a supervisor of Wanda Storie. At the time of the accident, she was the Director of Nursing. Ms. O'Neal testified at some point the facility went from an old fashioned punch clock to a card swipe but she does not know when it was and whether it was before or after the accident.

In June of 2003, leading up to that accident, she was Ms. Storie's supervisor and had counseled her a couple of times for her work performance. She had not threatened to fire her or suspend her or make any threats to demote her or put her on probation.

The nursing schedule was generated by Ms. O'Neal which would then go to the staff development coordinator

to manage the schedule' and make and document changes that were needed. Prior to the accident, the schedule would have been posted at the end of May or the beginning of June. With regard to the squaring schedule the nurses were usually squared four or five times a month but occasionally more than that. She did not square Wanda more often due to the counseling that she had been receiving. With regard to Wanda working from June 3rd through June 10th, Ms. O'Neal testified that she requested those days in succession. When making the schedule Wanda gave her input.

With regard to the employee's demeanor or physical appearance in the months or weeks leading up to the accident, it was kind of laid back. She did not appear to be fatigued or overtired. She saw no change at all, no decrease in her energy level and she was pretty much the same. Ms. O'Neal worked on June 12, and Wanda's appearance was no different than before. She did not see Wanda tearful or appear exhausted.

On June 12, after Wanda found out about having to work the second shift, she asked Ms. O'Neal if that meant she had to work; Cheri O'Neal stated that yes, unless you have someone else or can find someone else to work for you. Wanda did not indicate that she had anyone that would work the second shift for her. She was aware that Sonja Wilson, the Assistant Director of Nursing had offered to stay for Wanda but Wanda had declined. If Wanda was scheduled to work her regular shift on June 13 after working a double, she would not have expected her to work the next day. She could have called and taken the day off.

After the accident, Ms. O'Neal contacted the hospital and spoke to her husband. He was upset and called her a bitch and was yelling and screaming and saying it was all her fault. Ms. O'Neal did not call the hospital to see if Wanda could work the next day.

Ms. O'Neal stated that she did not recall if the employee worked or did not work on June 11. Ms. O'Neal agreed that there was a problem getting people to work and is why they put the squaring system in. If they did not have enough personnel, they called people in to work which was not an unusual event. Ms. O'Neal agreed that it was possible that the employee worked. If the employee was called in on June 11, Ramona Polley, being the Staff Development Coordinator would have been the one to first to identify the need and began to make contact.

She never told Ramona Polley that John Clauser was trying to get Wanda to quit. Ms. O'Neal was not aware that John Clauser wanted Wanda Storie to quit and never told her to make it hard on Wanda Storie so she would quit. He did not tell her to schedule her for as many hours as possible so she would quit.

Testimony of John Clauser:

The deposition of John Clauser was on August 9, 2007. He has been the Administrator at Southbrook for eight years. Mr. Clauser testified that in 2003 they did not have a punch time clock because it was a computerized system which was a swipe card. At no time during 2003 did they have manual punch cards. He believed the last time they used punch cards was in 2001. With regard to the computerized system, CPU, who does their payroll and the payroll person have access to it. If mistakes are made, entries can be made to correct them. Parts of the payroll records can be deleted but it will show that there was a manual deletion. If a record is created to shows that someone did not work a certain day, it would show that it was manually taken off.

He did not recall ever having a conversation with Ramona Polley to over schedule Wanda Storie to get her to quit. He never made a statement to Ramona Polley that she had to over schedule Wanda Storie or she would be fired.

Mr. Clauser testified at the hearing that the manual punch card system was changed in the middle of March of 2003 to a computerized swipe card system. He recalled in his deposition that he testified that there were no manual time cards in 2003 and he thought 2001 was the last time they used them. He stated that those answers were not correct or true. He stated that during his deposition, he was not trying to mislead, and answered to the best of his knowledge but he gave an incorrect answer.

He testified that Employer-Insurer Exhibit 2 is photocopies of the manual time cards they used to have. He is not sure how that exhibit was prepared and assumed that the payroll roll clerk made copies of the cards and sent them to their attorney. On the time cards, there are handwritten notes and the payroll clerk

manually went through them to verify the hours, overtimes and wages. Southbrook stopped using manual punch cards on March 27, 2003.

For his deposition, he had been asked to produce original time cards of Wanda Storie for 2003. He asked the payroll clerk Loretta to get the time cards. They searched thoroughly for the time cards, more so by the payroll clerk, and he thought they were never found. He was told that they could not find time cards on Wanda Storie. At the time of deposition, he did not know the photocopy of time cards in Exhibit 2 existed. At time of deposition, he produced all of the documents in his possession. The copy of the time cards, Employer-Insurer Exhibit 2, was later found to be in possession of their attorneys. In his deposition, he was asked when they last used manual time cards and stated that they had gone to a computerized system in 2001. When he answered he did not think they found in manual time cards in 2003, and had only found prior manual time cards. They have not found any original time cards for Wanda Storie. They did produce time cards but he does not know where they came from or how they appeared.

With regard to the computerized system, if any changes were made to the data including a deletion, it would show something was edited. If employee forgets to swipe the card but worked, there was a system of punch slips that were required to be filled out. If the employee worked on June 11 but did not swipe her card, to get credit for working, the employee would have to go to the payroll clerk and sign slips. He is not aware that Wanda Storie ever complained of not being paid. Neither he nor anyone else he was aware of erased information from Wanda Storie and he has not instructed anyone to erase information.

Based on the records, Mr. Clausen testified that for the pay period May 29-June 11, Wanda Storie worked on May 29 (8.3 hours), May 30 (8.2 hours), June 3 (8.3 hours), June 4 (8.7 hours including 1.0 hours of in service), June 5 (8.7 hours), June 6 (8.9 hours), June 7 (8.5 hours), June 8 (8.3 hours), June 9 (8.8 hours) and June 10 (8.0 hours). She was off work on June 11. On June 12, the employee worked at double shift due to being squared. She clocked in at 5:42 a.m. and clocked out at 10:06 p.m. She worked 8.0 regular hours and 7.9 overtime hours. She had a 30 minute unpaid lunch and two 10 minute breaks for each 8 hour shift. The purpose of the squaring system is to give the staff notice of the possibility of a double shift.

He was aware of the employee's motor vehicles accident because Cheri O'Neal called him on the Friday after the wreck. Monday through Wednesday of that week he was at a Nursing Home Administrator Meeting at Lake of the Ozarks. He was in Las Vegas on vacation from Thursday to Sunday. He was not at Southbrook on June 12.

Ms. Clausen testified that Wanda Storie was laid back and always seemed to be tired but never appeared overly tired. She never complained of being overtired or too tired to work. He never had planned to get rid of her or over schedule her to get her to quit.

He never told any employee including Ramon Polley that wanted to get rid of Wanda Storie or Karen Sitze. He never threatened to fire any employee including Ramona Polley if they did not over schedule Wanda Storie. He never had a policy or told any employee including Ramona Polley if someone was not available to work a shift that Wanda Storie had to work in their place. He never told any employee including Ramona Polley that he wanted to do everything possible to get Wanda to quit. He never instructed any employee including Cheri O'Neal to write up Wanda Storie to get her to quit. He never had any conversation on June 12, 2003 with Ramona Polley, Cheri O'Neal, or Wanda Storie, where Wanda Storie told him that she was too tired or with any other nurses on June 12, in the presence of Ramona Polley, Cheri O'Neal or Wanda Storie where they agreed to work the second shift of Wanda Storie; or which he said that they could not work the second shift for Wanda Storie. He could not recall any employee including Ramona Polley ask him if they could work a shift for Wanda Storie or tell them that they could not work a shift for Wanda Storie.

Employer-Insurer Exhibit 6 is the nurse's notes on June 10, 11 and 12 of 2003 on the three Medicare

residents that they had during that period of time. Wanda Storie made notations on June 10 and June 12 but did not make notations on June 11. He testified that if Wanda Storie was working on June 11, she should have made a notation since she was a charge nurse. He testified that it was possible that on June 11, Ms. Storie could have worked and not made a notation since there was another charge nurse that worked that day. All three of the residents were on same end of hall, and if Wanda was not assigned to that hall, she would not have made a notation.

Mr. Clauser stated that if Wanda Storie worked from June 3-June 11 on a regular 8 hour shift and then worked a double shift on June 12, that would have been excessive and that he would have been exhausted but he did not know if Wanda would have been exhausted.

Opinion of Dr. Lahmeyer:

Dr. Henry Lahmeyer's report was dated February 7, 2007 and his deposition was on May 14, 2007. He is board certified in psychiatry, neurology-forensic psychiatry, sleep medicine, and sleep disorders. He is board certified by the American Board of Sleep Medicine. He is a fellow of the American Board of Sleep Medicine and Clinical Polysomnography (sleep disorders). Dr. Lahmeyer is in private practice and is a clinical professor of psychiatry and behavioral studies at the Chicago Medical School. As a clinical professor, he teaches about sleep disorders, circadian rhythms, psychopharmacology and research.

Dr. Lahmeyer interviewed the employee on December 21, 2006 by telephone for a little over an hour which he felt was appropriate to make his evaluation. In addition, the employee filled out a sleep/wake questionnaire on January 3, 2007, which was based on the employee's status before June 12, 2003. The questionnaire showed that the employee had been having excessive daytime sleepiness for the last three weeks which had been continuous for one week. She usually slept less than seven hours a night. On week days, she usually went to bed at 10:30 p.m. and fell asleep in ten minutes. On weekends she went bed at 11:00 p.m. and fell asleep in about ten minutes. After an average nights' sleep, she was usually drowsy and/or tired. She never took a nap during the afternoon or evening. When asked if she felt very sleepy while driving, she stated no except for the accident and staying up for the birth of her granddaughter. She sometimes felt sleepy reading and watching television. She never drank alcoholic beverages. She drank coffee, tea or other caffeinated beverages including four big cups of coffee or tea and two 12 ounces of caffeinated soda a day. She had migraine headaches two to three times per week. Before the accident she was taking Lorcet two to three times per day for pain and Esigic two to three times per week for headaches.

Dr. Lahmeyer stated that the employee's normal shift at Southbrook was from 6:00 a.m. to 2:00 p.m. She usually started work at 5:45 a.m. and got up around 4:45 a.m. in order to prepare for and drive to work. Her nighttime habits were to turn off the local news around 10:30 p.m. and fall asleep between 10:30 and 11:00 p.m., on average around 10:45 p.m. In reviewing the payroll records, she would have to go through periods of work but there always seemed to be extended periods up until June 3, 2003 when she would have time to recover her sleep debt. Dr. Lahmeyer stated the employee was sleep deprived or was accumulating sleep debt and on her days off she would sleep extra hours to recover.

The employee rarely left earlier than 2:15 p.m. and normally left around 3:00 p.m. The facility had a policy of squaring, which meant that the "squared" employee might have to work the subsequent shift. Between June 3, 2003 and June 10, 2003 the timesheet records indicated that the employee clocked in everyday between 5:42 a.m. and 5:48 a.m. and clocked out between 2:12 p.m. and 3:06 p.m. On June 11, 2003, the employee did not clock in according to the work records. However, co-workers recall her working that day. The employee told him that she had worked that day. However in her deposition she could not recall whether she worked. For purposes of the evaluation, Dr. Lahmeyer assumed that it was unknown whether she worked on June 11, 2003. On June 12, 2003, the employee clocked in to work at 5:42 a.m. The night before she went to bed between 10:30 and 10:45 p.m. and fell asleep between 10:45 and 11:00 p.m. The Missouri State Highway Patrol estimated her accident happened around 11:30 p.m. The Arcadia Ambulance EMT described the employee as very tired and did not arouse easily. The employee did not remember falling asleep behind the wheel. She remembers nodding off several times prior to the accident and jolting herself awake. The next thing she remembers is waking up in Barnes Jewish Hospital.

The employee reported on the night of the accident she was very tired from working her double shift. She was in a hurry to get home since she had to be up at her normal time the next morning to start her 6:00 a.m. shift. She feared that if she did not get to bed quickly, she would not obtain enough sleep to function and that could lead to her being fired. The employee stated that she requested that she be allowed to go home due to intense fatigue which was refused and was threatened with immediate dismissal if she refused to work the afternoon shift.

Dr. Lahmeyer stated that the employee fell asleep and lost control of her car. The evidence that her job contributed substantially to her falling asleep while driving home is based on: 1) The employee reported several classic sleep attacks while driving. She did not stop to take a nap or get help because she had to get to bed as soon as possible to work the next day. 2) The accident occurred about one hour after her normal bed time and put her at high risk for falling asleep because sleepiness increases dramatically in individuals who are driving when they would normally be sleeping. Uncontrollable sleepiness while driving is increased by fatigue, previous sleep loss, sleep restriction or driving while one would normally be asleep. The employee indicated that on the previous nine days she had sleep restriction and did not recall going to bed earlier on the night before she worked the double shift. She was clearly trying to drive while sleep deprived and at least one hour past her usual sleep time.

Dr. Lahmeyer said the cycle of sleep accumulated sleep debt for her when she worked because she was only getting about six hours of sleep on her days of work and preferred around eight hours. On her days off, she would sleep ten hours or more to catch up on her sleep. Prior to June 3, 2003, she had adequate time to recover. Starting on June 3, the employee had nine consecutive days of limited sleep and extreme fatigue. While working on the day of the accident she had increased fear and anxiety due to her supervisor's behavior that all led directly to her continuing to drive despite the high risk of doing so. It was his opinion that her work schedule in the nine days prior to the accident and working a double shift the day of the accident produced excessive exhaustion, fatigue and uncontrollable sleepiness that was a substantial factor in causing her to fall asleep on June 12, 2003 which led to her vehicle leaving the highway, her crash and her resulting injuries.

There was an issue as to whether she worked June 11, 2003. Dr. Lahmeyer stated that as the employee got to June 11, she was accumulating a sleep debt from all of her work. She did not have a normal period of time of being off work to recover. Dr. Lahmeyer said assuming she was off work on June 11; she may have slept eight hours, which would not have been sufficient to eliminate her sleep debt. Dr. Lahmeyer said that it requires a minimum of two or three of days but preferably more, if she was running that much of a sleep debt.

On June 12 her normal routine was to get up at 4:45 a.m. She clocked in at work at 5:42 a.m. Her normal shift would have ended at 2:00 p.m. but since she was squared, she had to work the second shift. Her perception was that she had to work the second shift or she was going to be fired. Dr. Lahmeyer said the employee already had a lot of sleep debt and was fatigued. She was required to go through the afternoon which was another period of intense sleepiness when she had sleep deprivation, and she was required to push through that afternoon and go into the evening into a period where it would be time for her to go to sleep. The last eight hours of the second shift was very difficult for her, her body was aching and she felt fatigued.

The employee was scheduled to work the next day which meant she would have had to been back to work at 5:45 a.m. and clock in by 6:00 a.m. The employee told Dr. Lahmeyer that she was in a hurry to get home because she knew she had to work the next shift and needed to get some sleep and if she didn't she could lose her job if she was late or could not do her job.

It is Dr. Lahmeyer's opinion that when the convenience store clerk, Mr. Chitwood said that her eyes were "hazy" and looked tired that meant that she was sleepy enough so that it could be observed by an external observer and was an automatic behavior of a drowsy person. Dr. Lahmeyer stated that the fact that she went into a convenience store and walked in and purchased nothing and left was, as if she was out of it and probably already started to zone out and into light sleep.

Due to the double shift, the need for sleep had increased quite significantly. She was driving home in the period when she would normally be asleep. She had a lot of sleep debt that was pressuring her brain to go to sleep.

When she got into her vehicle, she started to have sleep attacks and felt herself dropping off to sleep. She had a couple episodes of nodding off before the accident. The employee could have pulled off and gone to sleep but she could not call anybody because she didn't have a phone. She recognized she was having a problem and thought she could get home. She could have tried to have taken a nap but it was not an option for her because she wanted to go home to get to sleep. Dr. Lahmeyer stated her sleep debt accumulated due to her work schedule and the double shift on June 12 increased the sleep debt and the fatigue factor where the body responds with needing to go to sleep earlier and the brain is saying you need to go to sleep immediately.

Dr. Lahmeyer reviewed Employee Exhibit SS, a report from the National Highway Transportation Safety Administration about drowsy driving and automobile crashes. Dr. Lahmeyer is familiar with the study which states that single car accidents that are due to sleepiness pretty much follow one pattern which is that the car drives off the road frequently at high speeds and there is usually no skid or brake marks because the person is asleep. The circadian rhythm is the predominant factor in determining when the accidents occur. The second most important factor is sleep debt and the big risk factors are the use of alcohol, shift work and working overtime. The characteristic of drowsy driving crashes occur late night hours which is the circadian rhythm. The employee's crash meets all of those characteristics. The accident report showed no skid marks which is indicative of falling asleep at the wheel.

It was Dr. Lahmeyer's opinion on June 12, 2003 while she was driving home, the employee was sleep deprived. She was approaching the peak of her circadian rhythm tendency to fall asleep and was driving when she normally would fall asleep or be asleep. The employee was sleep deprived because she had been working so many shifts in a row, she worked a double shift and she presumably had a day off, but it was insufficient to recuperate the sleep debt. Dr. Lahmeyer stated that the employer did not control the employee's activities away from work including when to go to bed, when to wake up and how much sleep she got each night.

It was Dr. Lahmeyer's opinion that the employee fell asleep while driving home from work on June 12, 2003 around 11:00 – 11:30 p.m. resulting in the crash of her vehicle. It is his opinion that the cause of her sleepiness was due to working nine shifts in a row; working a double shift when she clearly was too fatigued to work the double shift; and did take a nap when she felt the sleepiness because she had to hurry home to go to sleep so she could go to work the next morning because she was afraid of losing her job. If the accident occurred at 11:30 p.m. it raises the probability that she would fall asleep because of the circadian rhythm factors. Dr. Lahmeyer concluded that the employee fell asleep behind the wheel but there is no direct evidence of what actually happened. He based his conclusion on the fact that it was a single car accident with no skid marks; there was virtually no other explanation for what happened based on research done by the National Traffic Safety Bureau; and all the work that he has researched and read about over twenty years.

Dr. Lahmeyer stated that since they had threatened to fire her, if she didn't get home and get sleep she was going to lose her job. In her mind there was no choice. She was being coerced to get home and go to sleep as quickly as possible because of the threatened discharge. He assumed that her employer told her that she had to work that second shift. If she was not asked to work that second shift in a way she felt she had the option to go home and she could come in significantly later for the next morning shift that would change his opinion.

The time records show that on Tuesday, June 3, she worked approximately 8.3 hours. On June 4, she worked 8.7 hours. On June 5, she worked 8.7 hours. On June 6, she worked 8.9 hours. On June 7, she worked 8.5 hours. On June 8, she worked 8.3 hours. On Monday, June 9, she worked 8.8 hours and on Tuesday June 10, she worked 8 hours. It appears she didn't work on June 11 and that is the day in dispute. In the previous ten to twelve weeks before her accident, she had not worked any double shifts. According to the time sheet entries, she averaged approximately 80 hours every two weeks or less in those previous ten or twelve weeks.

Prior to the accident, the employee was prescribed Esgic and Lorcet. The positive drug screen for barbiturates and opiates was consistent with her use of those medications. The employee denied taking any medication the day of her accident. Esgic has a combination of Acetaminophen, caffeine and Butalbital. It is an anticonvulsant and can also be used as a pain reliever and for sleep because it makes one sleepy. Lorcet is an opiate and can make you sleepy. The combination of Esgic and Lorcet can make you even sleepier.

There was a non-significant level of alcohol in her system. She had barbiturates and opiates in her system but since there was not a quantitative analysis it was unknown what levels she had. If there were significant levels, that can increase her risk for falling sleep. He did not know whether the levels of barbiturates or opiates were high enough to affect her driving. Esgic and Lorcet have metabolites that last up to two or three days. Unless there is a quantitative measure of the level, all the test shows it that the medications were taken within the last two or three days. It was speculative as to whether or not she was under the influence or had sufficient amounts in her body to have any suggestion on any of the outcomes. The alcohol was such a low level that it did not play any role. Dr. Lahmeyer said that the medications had no affect on his opinion one way or the other including whether or not the crash was caused by fatigue and whether or not a substantial factor of her work was the cause of the accident.

Opinion of Dr. Long:

Dr. Long's report is dated January 2, 2008 and his deposition was on February 22, 2008. Dr. Long is a PhD and has a doctorate in toxicology and is a board certified forensic toxicologist. He employed at the Forensic Toxicology Laboratory at St. Louis University School of Medicine, Department of Pathology.

Dr. Long noted the pharmacy records show that the employee filled prescriptions for Esgic (180 pills each) on April 25, May 12, and May 29, 2003. Lorcet was filled (120 pills each) on April 25, May 12 and May 28. Dr. Long noted the frequency of the prescriptions having been filled demonstrated a significantly greater use than prescribed. The prescriptions were filled about every seventeen days for either 180 Esgic or 120 Lorcet which shows that the employee was consuming about 10 Esgic per day and seven Lorcet per day.

After the accident, the employee had a blood alcohol and urine drug screen. The alcohol test resulted in a 0.007 gm and the urine test was positive for barbiturates and opiates. The alcohol was considered as negative because it is less than 10 mg which is a standard deviation around the negative and was not significant. The urine test supports that the employee was taking her prescribed medicines. Dr. Long stated that the night of the accident, the employee was clearly tired and it was after 10:00 p.m. Given the excessive amount of prescription medications she was taking, it is clear that they were contributing to her drowsiness.

Dr. Long stated that considering the excessive consumption of both Esgic and Lorcet and their respective toxicities, they contributed to the employee's accident. Even with as few as four to five Lorcet pills that the employee consumed in a day, she would have been at a blood concentration reported to result in erratic driving. This does not include the additional Lorcet or Esgic set forth in the pharmacy prescriptions would increase the drug impairment. It was Dr. Long's opinion that the drugs facilitated or contributed to the employee's accident.

The pharmacy records show that she was filling her prescriptions about every two to three weeks instead of once a month. Esgic is a sedative due to the Butalbital and relaxes and can make one sleepy. It is very relaxing but does not necessarily put you to sleep until the caffeine in it wears off. Butalbital is a barbiturate which is a hypnotic sedative, is long acting and has a long half life of 35-88 hours.

Lorcet/Hydrocodone is an opiate and an analgesic/pain reliever which produces sedation. Dr. Long did not calculate out an estimate as to the concentration of the Lorcet that the employee had at the time of her accident. Dr. Long stated that if the 100-110 pound employee consumed seven Lorcets and ten Esgic per day, it would produce a significant concentration in excess of .1 micrograms per milligram of the Lorcet. Studies have shown that erratic driving has been reported with a concentration of Hydrocodone that exceeds .1. It was Dr. Long opinion that the employee's use of prescription medications was a substantial factor in causing her motor vehicle accident. His opinion is based on the prescription renewals. Seven Lorcet pills a day would be 50-60 milligrams which is a significant concentration and would produce an elevated blood concentration in a small woman easily within the range consistent with erratic driving.

Dr. Long did not do any testing, did not take any samples, and did not interview the employee or obtain a history of prescription drug use from her. Dr. Long did not know the actual usage of any of the medications by the employee on a day to day basis. Dr. Long agreed that any type of drug will have different reactions in different people. Someone might or might not be drowsy from the medications. The only way to know is by interviewing that

person and obtaining a history. He made some assumptions including that she used all of the Lorcet by June 12, 2003 but did not know if there were any left on that date. The Walgreen records do not show whether she took one pill everyday or ten pills everyday. Dr. Long had no documentation as to how many pills she took.

The blood screen at Barnes Jewish was positive for opiates, which is the Lorcet/Hydrocodone. However, it does not mean she took Hydrocodone on June 12. Dr. Long stated he did not believe that the tests would have been positive if she took it on June 10 but it could have been possibly been taken late on June 11, but it was more reasonable that it would have been on June 12 due to the cross reactivity of the drug. It was possible for her to have taken two pills on June 11 for her to test positive but it is not likely. Dr. Long does not know what percent was in her system because it was not a quantitative result. There was nothing in the records that he saw to suggest that she was under the influence of a narcotic. The employee tested positive for barbiturates. Dr. Long testified that the employee could have used Esgic two, three or four days before June 13 and still tested positive. Dr. Long stated that he doesn't know anything about her usage. She was authorized to take up to 180 per month.

In his report Dr. Long stated that the excessive amount of the prescription medication she was taking was contributing to her drowsiness. Dr. Long stated that if the number of pills she was taking is not accurate, then his opinion is incorrect. Drowsiness is a know side effect of the medication and more likely than not the medicine would cause drowsiness. Beside the prescription records, he does not have any evidence that supports his assumption that she took four to five Lorcet pills on June 12. If his assumptions are completely wrong then his opinions are wrong.

Opinion of Dr. Wolfgram:

Dr. Wolfgram prepared a report dated August 28, 2007. Dr. Wolfgram stated that he did not interview the employee because the issues of secondary game, intoxication with mood altering substances and indeterminate complications of June 12, 2003 injuries all make her an unreliable informant. Dr. Wolfgram stated he identified the issues that reject the claim that the accident of June 12, 2003 was caused by her work schedule. Dr. Wolfgram stated that he would identify the mood altering substances that resulted in the event of June 12, 2003. The complications of the event are indeterminate due to continued exposure to mood-altering substances and quests for secondary gain.

Dr. Wolfgram stated that based on the records from Dr. Johnson from 1977-1983, the employee had a somatic or complaint oriented approach to life. The next available records were the 2001 records of Dr. Bramhall. Dr. Bramhall prescribed Esgic for headaches which contains a barbiturate and has addictive qualities.

In the heading "Pathways to Addiction" Dr. Wolfgram noted that the employee had a long term addiction of a pack of cigarettes a day and had an addiction to caffeine with large amounts of coffee a day. Dr. Bramhall started prescribing Lorcet which is a narcotic. Dr. Wolfgram noted the employee's personality make up is psychosomatic but not anti-social. He did not believe she would sell the drug and most likely took the drug four times a day.

In the heading "The event of June 12, 2003" Dr. Wolfgram noted that the employee went off the road leaving no skid marks. Dr. Wolfgram stated that although a work related sleep deprivation was proposed as the cause, a suicide attempt may be an explanation. Dr. Wolfgram identified the use of addicting substances as the cause of the accident. Blood studies after the accident indicated barbiturates, alcohol and opiates. Dr. Wolfgram stated that the presence of the drugs is a very significant finding and even apart from blood tests, the records show that the employee was exposed to caffeine, nicotine, barbiturates and opiates on a regular basis. Dr. Wolfgram stated that even negative tests for all the substances would not rule out the substances as causative factors because the substances can have an affect even six to eight months after a complete abstinence because the metabolic, physiologic, physical and mental effects continue. Matters such as shift changes, double duty and work environment must all be considered, but Dr. Wolfgram stated that the work expectation of the employer was routine.

In the heading "Issues following the event of June 12, 2003", Dr. Wolfgram noted for the past four years the employee had been on Xanax, Hydrocodone, and Esgic. The use of ingested substances in the 100 pound employee are enough to render her dysfunctional. Dr. Wolfgram stated that the employee's present debilitating state is due to addictive substances. The employee's impaired mental and physical function before and after June 12, are due to the addictive substances.

In the heading “Dr. Lahmeyer’s evaluation of the employee”, Dr. Wolfgram stated it was difficult for Dr. Lahmeyer to interview the employee by phone because she was taking large doses of psychoactive drugs. Dr. Wolfgram stated that assigning damage to the underlying traumatic injury contrasted with the effect of drugs on brain function would have challenged even Solomon. Dr. Wolfgram stated that the employee extensive use of mood altering drugs before June 12, 2003 could induce sleepiness.

In his heading “Writer’s Comment”, Dr. Wolfgram stated that “This is a classic example of drug addiction. Trying to reward the use of drugs before and after June 12, by seeking money from the employer is grievous. Drug addiction led to the accident and drug addition perpetuates the illness. The courts should not honor such activities. The new United States Surgeon General promises to ban advertising prescription drugs. Good!” Dr. Wolfgram stated that the employee could have a self induced traumatic brain injury but you cannot know because of the paralyzing haze of drugs. Under Axis I, Dr. Wolfgram diagnosed somatization disorder which has existed since 1977. The employee demonstrated vague somatic symptoms in a persistent matter. Such individuals play a role insisting on relief of symptoms, in this case, the employee played a role in her own addiction. Under Axis II Dr. Wolfgram diagnosed sedative – hypnotic or anxiolytic – induced sleep disorder and polysubstance dependence. Dr. Wolfgram noted that the employee had multiple addictions that predisposed her to the event of June 12, 2003. It was Dr. Wolfgram’s opinion that the somatization disorder was the source of the employee’s medical problems at the time of event of June 12, 2003. It was further Dr. Wolfgram’s opinion that the claimant’s work schedule was not a substantial contributing factor causing her to fall asleep while driving home from work on June 12, 2003.

Under Axis IV Psycho Social Stressors, Dr. Wolfgram stated she had 1) underlying somatoform disorder, 2) multiple addictions that set the stage for the clinical findings before and after June 12, 2003 and the complications’ thereof, 3) her employment was not a significant stressor in causing the event of June 12, 2003. Under Axis V, global assessment of function, he noted the employee was presently at 30 but that was due to her addictions and once the addictions are removed the physical problems would not be significant.

Dr. Wolfgram stated it is a dangerous precedent to reward persons who addict themselves; holding physicians that participate in the addictions harmless; blaming employers and seeking financial gain from employers; and that clients, patients, plaintiffs bear a large share of the responsibility.

On November 8, 2007, Dr. Wolfgram prepared an addendum report noting that he had received the requested Walgreen’s pharmacy documentation of the employee’s prescription drug use. Dr. Wolfgram stated that during the weeks and days preceding the accident, if the filled prescriptions were taken, the Esgic was taken at the rate of ten a day and the Hydrocodone at the rate of seven a day. It was his opinion the drug use was the cause of the accident. He stated that the claimant’s work schedule leading up to the accident was not a substantial factor in causing her to fall asleep while driving home from work.

Dr. Wolfgram’s deposition was on January 28, 2008. Dr. Wolfgram is a board certified general psychiatrist. Dr. Wolfgram did not personally interview or physically examine the employee because there was an abundance of medical records and other material that was made available to him. He understood that at that particular time the employee was on large doses of mood altering drugs and as such an interview would not be productive of meaningful material.

Dr. Wolfgram indicated that her prior medical history showed complaints that represented a somatic or compliant oriented approach to life. The significance of that was the physicians needed to be very careful about what kind of treatments were used to treat a chronic and a physical symptom driven problem and to particularly avoid the use of addictive substances. Dr. Wolfgram stated that Esgic, is habit forming and every increasingly large doses are necessary to accomplish the same therapeutic effect. Lorcet is a narcotic often referred to as Hydrocodone and has addictive qualities.

Based upon the review of the records, Dr. Wolfgram stated he was able to determine her functional level prior to June 12, 2003. The employee was on nicotine, caffeine, barbiturates and opiates. These particular medications as used would impair her ability to function and her ability to drive an automobile. In the five weeks before the accident,

there was a marked increase in the use of the Esgic and the Lorcet. On the basis of the medications that were being dispersed during the five weeks before June 12, the employee was taking ten of the Esgic per day and at least seven of the Lorcets which are large doses. The employee weighs between 100 and 120 pounds so the toxic medication would affect her ability to concentrate; and affect her physical motor function and the use of appropriate judgment.

After reviewing the records and documents, it was Dr. Wolfgram's opinion that the excessive use of mood altering drugs was the over whelming cause of the June 12, 2003 accident and the work schedule and whatever stress that she had from there was not the causative factor. Dr. Wolfgram stated that the drugs that she was on even in therapeutic amounts which would have been 40-50% of what she taking would have enough of an effect to affect her cognition, alertness and physical function to drive effectively. The drugs that she was taking and which were identified in the blood studies are the causative factors. The sedative-hypnotic or anxiolytic-induced sleep disorder he diagnosed is a problem with people that are under the influence of the drugs which is capable of producing a disturbed level of consciousness and can induce sleep.

During cross-examination, Dr. Wolfgram stated that he could have interviewed the employee but did not. Dr. Wolfgram did not talk to the employee and therefore did not obtain any information as to her actual use of Esgic and Lorcet. He assumed that she took all the pills that were prescribed. His opinion is based on the information that she was taking the medication. Dr. Wolfgram stated that the employee was certainly drugged and when asked how he would know if he didn't meet her, he said apparently she has been on drugs and Mr. England's report describes someone who was stoned.

When he was asked that he felt that it wasn't important to meet her to discuss her present status and how she was doing, Dr. Wolfgram answered by stating that he had charged enough on the case and it was not really not that complicated. He stated that the employee was on almost lethal doses of drugs and drove off the highway. He said his report should have been a couple of paragraphs and he was embarrassed that he wrote a ten page report. When asked if he meant his report was verbose so he could charge a fee, Dr. Wolfgram stated that it had to look good but it really is not that complicated.

Dr. Wolfgram stated that Dr. Bramhall committed medical malpractice when he prescribed Esgic and Lorcet Plus for the employee.

When asked how he could make a diagnosis that the employee was psychosomatic without meeting her, he stated that he could from the history because she had every imaginable symptom and that is what happens to people that have a somatization disorder.

Dr. Deidiker's report stated that the findings of the alcohol result should be considered a negative. Dr. Long stated that the amount of alcohol was a standard deviation of negative. Dr. Wolfgram disagreed with both Dr. Deidiker and Dr. Long. Dr. Wolfgram stated that just because it is negative it can have an affect. When asked if the lack of alcohol meant that the employee could be under the influence of alcohol, Dr. Wolfgram stated absolutely.

In his report, Dr. Wolfgram stated that the employee was a zombie. When asked if he would have to see someone before he could say that they were a zombie, he stated no that Mr. England had described it perfectly in his record. Dr. Wolfgram stated that because the employee was taking or prescribed certain drugs, he believed that she was stoned. He stated that the employee was on drugs and Mr. England did not know what was wrong with her.

Dr. Wolfgram did not think much of Dr. Levy, Dr. Cantrell and Dr. Peoples. When asked if everyone else was wrong and he was right, Dr. Wolfgram stated that they were all hedging. Dr. Wolfgram stated that he does not hedge when he knows and understands something.

RULINGS OF LAW:

Issue 1. Accident Arising Out Of and In The Course of Employment.

The employer-insurer's position is that the employee's accident was caused by her excessive use of prescription

Esgic and Lorcet. There was a factual dispute as to how much medication the employee was taking. The post accident lab tests showed that the employee had those medications in her system but it was not a quantitative analysis so the actual levels were not known.

I find that Dr. Wolfgram's opinions and statements have absolutely no credibility.

It was Dr. Long's opinion that the excessive amount of the prescription medication the employee was taking contributed to her drowsiness. Dr. Long based his opinion on the amount of prescription medications that had been filled and on the assumption that all the medications that had been filled had been taken by June 12, 2003. However, Dr. Long did not know the actual usage of the medications by the employee. Dr. Long stated that there was nothing in the records to suggest that she was under the influence of a narcotic. Dr. Long stated that if the numbers of pills that he based his opinion on was not accurate, his opinion was incorrect.

Dr. Lahmeyer stated that both Esgic and Lorcet can cause sleepiness and the combination of the two can increase the effect which would increase the risk for falling asleep if there were significant levels in her system. All that the test showed was that the medications had been taken within the two or three days prior to the accident. Dr. Lahmeyer stated that it was speculative as to whether or not the employee was under the influence or had sufficient amounts in her system to have any affect on her driving.

The employee's use of prescription medications could have been a factor in the employee's accident. However, based on the evidence, it is difficult and speculative to determine how much of an impact, if any, that the use of prescription medications had on the accident.

The employee's position is that due to the employee's excessive work schedule, the employee fell asleep while driving home after working a double shift, and sustained an accident that arose out of and in the course of her employment.

The general rule is that an employee does not suffer an injury that arises out of and in the course of employment if she is hurt while going to or returning from the place of work because it is the inevitable condition of employment that every worker present herself or himself at the assigned location to perform the task for which she/he was hired and depart from there when the work is over. The employer usually controls neither the place where the employee resides nor their mode of transportation. Therefore the employer plays no part in the relative extent of risk incurred by the employee traveling to and from work. See Garrett v. Industrial Commission, 600 S.W. 2d 516, 519 (Mo. App. 1980).

An exception to that general rule is the "Special Hazard" doctrine which was originally applied in Hunt v. Allis-Chalmers Manufacturing Company, 445 S.W. 2d 400 (Mo. App 1969) .

The Supreme Court in Snowbarger v. Tri-County Electric Cooperative, 793 S.W.2d 348 (Mo. banc 1990) held that the exception to the general rule of non-liability for injuries incurred by an employee traveling to and from work applied to a fatal automobile accident which occurred 22 miles from the place of employment. The employee fell asleep driving his automobile and drove head-on into another vehicle as a result of working exhaustingly long overtime hours at the bidding of the employer. During an emergency created by an ice storm, the employee worked 86 hours out of a 100.5 hour period between Saturday, November 30, and Thursday, December 5, 1985. The overtime work was required by his employer and included cutting up trees with chain saws, digging holes by hand, and resetting poles. At 1:00 a.m. on December 6, he went off duty. While returning home the employee fell asleep, his car went across the center line and crashed into a vehicle.

This was a case of first impression and the Supreme Court cited cases from other jurisdictions that held that employees falling asleep from fatigue while driving after working unusually long hours were compensable injuries arising out of and in the course of their employment. The Court cited a case where the employee worked 26 consecutive hours on the job and fell asleep from fatigue after driving 20 minutes and a case where the employee had worked 27 hours without sleep.

The Missouri Supreme Court held that a special situation or condition may exist where there is a peculiar or abnormal exposure to a peril whose risk is incident to or inseparable from the scene of employment. The Court held that Tri-County more than acquiesced in causing the condition of complete fatigue owing to the draining and grueling overtime hours spent in manual labor in extreme cold. The Court stated that Mr. Snowbarger encountered an abnormal exposure to an employment related peril because he had worked for 86 of the 100.5 hours preceding the fatal accident. His physical exhaustion engendered an unusual risk of an automobile accident. The condition was incident to his employment because the work was at the bidding of and for the benefit of his employer. The cause of the accident was the unusually long overtime hours.

In Ms. Storie’s case, there is a factual dispute as to whether the employee worked on June 11, 2003. The records from the employer show that the employee did not work. Stacy Jones does not remember and Sonja Wilson does not know if the employee worked. Karen Sitze thought the employee was off work but was not sure. Cheri O’Neal did not recall if the employee worked but agreed that it was possible that she did. Due to her head injury, the employee was not sure if she worked on June 11. Ramona Polley, Bobbi Hoover and William Storie stated that the employee worked her regular shift on June 11. Based on a review of the evidence, I find that the employee worked her regular 8 hour shift on June 11, 2003.

I find that the employee worked the following hours from June 3 through June 12, 2003:

<u>Date:</u>	<u>Time</u>	<u>Hours</u>
June 3	5:42 a.m. to 2:30 p.m.	8.3
June 4	5:42 a.m. to 2:54 p.m.	8.7
June 5	5:48 a.m. to 3:00 p.m.	8.7
June 6	5:42 a.m. to 3:06 p.m.	8.9
June 7	5:42 a.m. to 2:42 p.m.	8.5
June 8	5:43 a.m. to 2:30 p.m.	8.3
June 9	5:48 a.m. to 3:06 p.m.	8.8
June 10	5:42 a.m. to 2:12 p.m.	8.0
June 11	Regular Shift	8.0
June 12	5:42 a.m. to 10:06 p.m.	15.9

It was Dr. Lahmeyer’s opinion that the employee’s work schedule prior to the day of the accident and working a double shift the day of the accident produced excessive exhaustion, fatigue and uncontrollable sleepiness that was a substantial factor in causing her to fall asleep on June 12, 2003 which led to her vehicle leaving the highway and crashing. It is important to note that Dr. Lahmeyer stated that the employee’s cycle of sleep made her accumulate sleep debt and she became sleep deprived because on the nights before she worked she was only getting about six hours of sleep and she preferred around eight hours of sleep. On the nights when she was off work she would sleep more to catch up on her sleep.

The employer did not control when the employee went to bed, when she woke up, and how much sleep she got. When the employee was working the next day, the employee went to sleep between 10:30 and 10:45 p.m. and got up between 4:30 and 4:45 a.m. The employee was sleep deprived as a result of her own sleeping habits which was not caused by her employment.

In Snowbarger, the employee worked 86 out of the last 100.5 hours before the accident performing heavy manual labor in extreme cold weather. The facts in this case are substantially different. Ms. Storie worked 40.7 out of the last 100 hours before the accident which is less than ½ of what Mr. Snowbarger worked. Ms. Storie did not perform heavy manual labor and was not working in extreme temperatures. In the 10 days prior to the accident, Ms. Storie worked a total of 92.1 hours or 38.375% out of 240 hours. This is contrasted to Mr. Snowbarger who worked 85.5% of the time in the approximate 4 days before the accident.

I find that the employee did not work exhausting long overtime hours. I find that a special situation or condition did not exist and there was not a peculiar or abnormal exposure to a peril whose risk was incident to or inseparable from her employment. I find that the "Special Hazard" exception to the general rule that accidents going to or returning from the place of work are not compensable is not applicable in this case. I find that on June 12, 2003 Wanda Storie did not sustain an accident those arose out of and the course of her employment.

The employee's Claim against the Employer-Insurer and the Second Injury Fund is denied. Given the denial of the employee's claim on the issue of accident, the remaining issues are moot and will not be ruled upon.

Date: _____

Made by:

Lawrence C. Kasten
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Jeff Buker
Division Director
Division of Workers' Compensation