

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

Injury No.: 11-034854

Employee: Woodine A. Tidwell
Employer: Firstline Transportation
Insurer: Liberty Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award of the administrative law judge.

Introduction

The parties stipulated to the compensability of this case but submitted the following issues for determination by the administrative law judge: (1) whether employee was injured while in the course and scope of her employment; (2) nature and extent of permanent partial disability; (3) whether employee is entitled to 15 and $\frac{1}{7}$ weeks of temporary total disability benefits; and (4) whether employee is entitled to reimbursement of her medical expenses in the amount of \$10,680.00.

The administrative law judge determined that employee's claim is not compensable because employee failed to prove her injury arose out of and in the course of her employment.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge misapplied the law to the facts and erred in determining that employee was not in the course of her employment at the time of her injury.

Findings of Fact

Employee worked for employer's transport security firm as a Lead Security Officer. In addition to her security-related tasks, employee's duties included training and mentoring other employees.

Employee parks her vehicle at an employee parking lot which is not owned or controlled by employer. Employees are not required to park there, but employer pays for parking permits if employees choose to park there. Employer's offices are located in Terminal B of the airport. A shuttle takes employees from the employee parking lot to the terminal. The shuttle service is not owned, operated, or controlled by employer, but employer does pay a fee to have the shuttle deliver its employees from the parking lot to Terminal B. The shuttle bus is used by all kinds of employees working at the airport. Employer's employees "clock in" by swiping an identification card at one of many stations located in

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Terminal B. The closest of those stations is about a five to ten minute walk from where employees get off the shuttle bus.

Employee was required to arrive for work in full uniform, owing to the fact employer does not provide any location for employees to change clothes. Employer has strict policies about employee uniforms. Employee uniforms must be neatly pressed and clean, and employees are prohibited from wearing unauthorized hats, belts, or coats. These rules apply whenever an employee is in uniform, regardless whether the employee is clocked in. For example, an employee waiting for the shuttle bus would be prohibited from loosening her tie on a hot day or wearing anything but an employer-approved jacket and plain black stocking cap on a cold day. Employee once counseled another employee while on the shuttle bus because he violated employer's uniform policies by wearing a cowboy hat to work. Employee was not clocked in when she counseled the employee about his cowboy hat.

Employer's witness Karen Paris, director of human resources, explained that employees are representatives of employer whenever they are wearing the uniform. We note that Ms. Paris initially declined to provide a responsive answer to the question whether employer "required" employee to counsel another employee who was wearing a cowboy hat on the shuttle bus. But after repeated questioning, Ms. Paris conceded that employer expected employee to be mentoring other employees even when she was not on the clock. As to employee's security-related work duties for employer, Ms. Paris also conceded on cross-examination that employee was required to observe and report suspicious activities or vehicles around the airport, even if she was not clocked in.

Ms. Paris also identified a number of other policies restricting employee behavior while in uniform, even when employees are not on the clock. Such policies include restrictions on wearing employee uniforms in most public places, a prohibition against having an otherwise legal firearm in an employee's vehicle, and a prohibition against otherwise legal gambling or lottery activities. Ms. Paris testified that the policy prohibiting employees from wearing the uniform in most public places works the effect of prohibiting employees from stopping for groceries on the way to or from work. Ms. Paris explained that if the uniform got into the wrong hands, it would be a security issue.

On April 2, 2011, employee parked in the employee parking lot. She got onto the shuttle bus and rode it to Terminal B. When employee was stepping down the stairs of the shuttle bus and onto the pavement outside Terminal B, employee lost her footing. Employee believes she stepped on a rock. Employee's right knee twisted and struck a piece of metal on the bus. Employee heard a loud pop in her right knee.

The injury resulted in a torn meniscus in employee's knee. Employee's doctors took x-rays, placed her on bed rest, and gave her crutches and a brace to immobilize her knee. Employee underwent surgery to repair the torn meniscus on May 31, 2011. Employee first returned to work on August 8, 2011. Employee provided credible and un rebutted testimony identifying the exhibits containing her medical records and bills. We find employee incurred \$10,680.00 in medical expenses in connection with her right knee injury.

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As a result of the injury, employee is not able to bend her knee. This affects her work in that bending is an essential part of performing pat-down searches on airport customers. Employee has to straighten her leg out to the side in order to perform this job function. Employee is unable to climb stairs correctly and instead has to go sideways. Employee continues to experience knee pain which keeps her awake at night. Employee experiences horrible pain if she tries to sleep with her leg straight out and must elevate her right knee with a pillow.

Dr. Hopkins, the only medical expert to testify, opined that employee's fall on April 2, 2011, is a direct and prevailing cause of the injury she sustained to her right knee. Dr. Hopkins rated employee's injury at 30% permanent partial disability of the right knee at the 160-week level. He also opined that employee was unable to work from April 23, 2011, through August 8, 2011. We find Dr. Hopkins's uncontested testimony to be credible.

Conclusions of Law

Accident

The parties dispute whether employee sustained an accident when she fell while descending the shuttle bus stairs on April 2, 2011. The version of § 287.020.2 RSMo applicable to this claim provides the following definition of an "accident" for purposes of the Missouri Workers' Compensation Law:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

Given our factual findings, it's clear that employee's suffering a fall while descending the shuttle bus stairs on April 2, 2011, amounted to an "unexpected" and "traumatic event," that is "identifiable by time and place of occurrence," and that the event produced "objective symptoms of an injury caused by a specific event." The more difficult question is whether employee's fall occurred "during a single work shift."

Employer's position in this matter relies, to a large extent, on the premise that employee cannot have suffered an accident because she was not yet clocked in when she fell, but the courts have specifically indicated they would reject such an argument. See *Henry v. Precision Apparatus, Inc.*, 309 S.W.3d 341, 342 (Mo. App. 2010). Accordingly, we do not find such an argument persuasive in this case.

Rather, we are more persuaded by the uncontested facts that employee was required to perform duties for employer and comply with policies of the employer from the moment that she arrived at the airport in uniform. Specifically, employee was required to observe and report suspicious vehicles or activities regardless whether she was on employer's premises or clocked in. Employee was also expected to appear for work dressed in a highly particularized uniform and to counsel employees who wore unauthorized items such as cowboy hats.

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Employer argues that, even if employee was expected to engage in some activities or refrain from others before she was clocked in, employee was not actually engaged in any particular work duty when she fell. We disagree. Even if employee was not presently engaged in the physical act of apprehending a suspicious person or counseling another employee regarding their appearance, the fact remains that, at the time she fell, employee was required by employer to have been engaged in the mindset of looking out for and responding to such issues and was expected to otherwise conduct herself as a representative of employer. Given these facts, we believe that employee was unquestionably in the service of her employer as soon as she arrived in uniform at the airport, such that her fall on April 2, 2011, occurred “during a single work shift.” We conclude employee sustained an accident for purposes of § 287.020.2.

Injury arising out of and in the course of employment

This case turns on whether employee proved that her injuries arose out of and in the course of employment for purposes of § 287.020.3(2) RSMo, which provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

We have credited Dr. Hopkins’s uncontested testimony that employee’s fall on April 2, 2011, was a prevailing cause in her suffering the right knee injury at issue in this case. We conclude that, for purposes of subsection (a) above, the accident is the prevailing factor in causing employee’s injuries.

Turning to subsection (b), we note that the courts have interpreted the statute to involve a “causal connection” test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012), quoting *Miller v. Mo. Highway & Transp. Comm’n*, 287 S.W.3d 671, 674 (Mo. 2009). In *Johme*, the Missouri Supreme Court held that an employee who fell while making coffee at work did not sustain injuries that were compensable under workers’ compensation. *Id.* at 512. The *Johme* employee fell in her office kitchen after making a new pot of coffee, per workplace custom, to replace a pot of coffee from which she had taken the last cup. *Id.* at 506. The *Johme* court found that the risk or hazard that resulted in the employee’s fall was “turning and twisting her ankle and falling off her shoe.” *Id.* at 511. The Court concluded that the employee “failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her ‘normal nonemployment life.’” *Id.* at 512.

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In so holding, and in specifically contrasting a “work-related risk” versus a “risk to which the employee was equally exposed” outside of work, the *Johme* court made clear that our analysis under § 287.020.3(2)(b) must begin with an identification of the risk or hazard that resulted in the employee’s injuries, followed by a quantitative comparison whether this specific employee was equally exposed to that risk in her own normal nonemployment life. Following the Court’s reasoning, the result of that quantitative comparison should tell us whether the risk is related or unrelated to employee’s work, and in turn, whether the employee’s injuries were sufficiently causally connected to work, which finally will resolve the question whether an employee’s injuries arose out of and in the course of the employment.

Here, we conclude that the risk or hazard that resulted in employee’s injuries is that of stepping onto a rock while descending bus stairs and falling. The next question is whether employee was equally exposed to that risk or hazard in her normal nonemployment life.

The most recent court to apply the quantitative analysis identified by the *Johme* court was the Missouri Court of Appeals, Eastern District in *Pope v. Gateway to the W. Harley Davidson*, No. ED98108 (Oct. 23, 2012). In *Pope*, the employee was climbing down a staircase at the motorcycle dealership where he worked, on his way to check with his supervisor whether his duties were done for the day. *Id.* at pg. *3. The employee fell down the stairs while wearing his work boots and while carrying a motorcycle helmet. *Id.* The court quoted the employer’s counsel’s cross-examination of the employee, noted that there was no evidence that employee fell because of his boots or that employee walked down stairs while carrying a motorcycle helmet in his normal, nonemployment life, and concluded: “the record does not contain substantial and competent evidence to support a finding that Pope was equally exposed to the risk of walking down stairs while carrying a work-required helmet outside of work.” *Id.* at pg. *10. The court held that the employee’s injuries arose out of and in the course of his employment. *Id.* at pg. *15-17.

Applying the *Pope* analysis in the context of this case, we ask whether the record contains evidence sufficient to warrant a finding that employee was equally exposed to the risk of stepping onto a rock while descending bus stairs and falling in her normal nonemployment life. After a thorough review of the record, we answer that question in the negative. Employer’s attorney’s cross-examination of employee contains no questions about employee’s non-work life. In fact, no evidence relevant to employee’s non-work exposure to the applicable risk appears on the record. We conclude that, for purposes of § 287.020.3(2)(b), employee’s right knee injury does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Given the foregoing, we conclude employee’s right knee injury arose out of and in the course of her employment.

Nature and extent of permanent partial disability

Under § 287.190 RSMo, employee is entitled to permanent partial disability benefits from employer if she is able to prove the nature and extent of permanent disability resulting from her compensable work injury. Dr. Hopkins opined employee suffered a 30%

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permanent partial disability at the 160-week level of the right knee as a result of the work injury, and we have found Dr. Hopkins's testimony to be credible. We find employee suffered a 30% permanent partial disability at the 160-week level of the right knee as a result of the work injury. Applying the stipulated rate of \$418.58 for permanent partial disability benefits, we conclude employee is entitled to, and employer is obligated to pay, \$20,091.84 in permanent partial disability benefits.

Temporary total disability benefits

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ her during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997).

Dr. Hopkins testified that employee was temporarily and totally disabled from April 23, 2011, through August 8, 2011, and we have credited Dr. Hopkins's testimony. We note, however, that employee testified that she did return to work on August 8, 2011. We conclude, therefore, that employee was temporarily and totally disabled from April 23, 2011, through August 7, 2011. We conclude employer is liable for 15 and $\frac{1}{7}$ weeks of temporary total disability benefits at the stipulated rate of \$674.67 per week, for a total of \$10,216.43.

Past medical expenses

We conclude that employee met her burden of demonstrating employer is liable for her medical expenses flowing from the work injury of April 2, 2011. Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Where the parties dispute whether a particular past medical expense comes within the employer's obligation under § 287.140, the burden of proof falls on employee for each claimed past medical expense to provide 1) the medical bill, 2) the medical record reflecting the treatment giving rise to the bill, and 3) testimony establishing that the treatment flowed from the compensable injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

Here, employee provided her bills, medical records, and testimony establishing the treatments flowed from her work injury. Accordingly, we conclude employee is entitled to \$10,680.00 in past medical expenses for treatment that was reasonably required to cure and relieve from the effects of the work injury.

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Award

We reverse the award of the administrative law judge. We are convinced that employee sustained an accident and that her injuries arose out of and in the course of her employment.

Employer is liable for temporary total disability benefits in the amount of \$10,216.43.

Employer is liable for permanent partial disability benefits in the amount of \$20,091.84.

Employer is liable for past medical expenses in the amount of \$10,680.00.

This award is subject to a lien in favor of Keith Yarwood, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Robert B. Miner, issued July 18, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 27th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Woodine A. Tidwell

Injury No.: 11-034854

Employer: Firstline Transportation

Insurer: Liberty Mutual Insurance Company

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

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

Hearing Date: April 26, 2012

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged: April 2, 2011.
5. State location where accident occurred or occupational disease was contracted: Alleged: Kansas City, Platte County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee stepped down off of a bus and twisted her right knee.
12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Alleged: right knee.
14. Nature and extent of any permanent disability: Not determined.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? Not determined.
18. Employee's average weekly wages: \$1,012.00.
19. Weekly compensation rate: \$674.67 for temporary total disability and \$418.58 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None. Employee's claim is denied.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

Employee's entire claim against Employer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund is denied.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Woodine A. Tidwell

Injury No.: 11-034854

Employer: Firstline Transportation

Insurer: Liberty Mutual Insurance Company

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

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

Hearing Date: April 26, 2012

Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on April 26, 2012 in Riverside, Missouri. Employee, Woodine A. Tidwell, appeared in person and by her attorney, Keith V. Yarwood. Employer, Firstline Transportation, and Insurer, Liberty Mutual Insurance Company appeared by their attorney, Jason M. Lloyd. The attorneys agreed the April 26, 2012 hearing did not involve Employee's claim against the Second Injury Fund as the Second Injury Fund had agreed to bifurcate. Keith V. Yarwood requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-trial briefs would be due on May 29, 2012.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about April 2, 2011, Woodine A. Tidwell ("Claimant") was an employee of Firstline Transportation ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about April 2, 2011, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Liberty Mutual Insurance Company ("Insurer").
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.

5. The average weekly wage was \$1,012.00, the rate of compensation for temporary total disability is \$674.67 per week, and the rate of compensation for permanent partial disability is \$418.58 per week.

6. No compensation has been paid by Employer or Insurer for temporary disability.

7. No medical aid has been paid or furnished by Employer or Insurer.

9. The medical expenses of \$10,680.00 incurred to treat Claimant's right knee injury were fair and reasonable and usual and customary, and the medical treatment Claimant received to treat her right knee injury was reasonable and necessary.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Did Claimant sustain an injury by accident on or about April 2, 2012 arising out of and in the course of her employment for Employer?
2. What is Employer's liability, if any, for past medical expenses?
4. What is Employer's liability, if any, for permanent partial disability benefits?
5. What is Employer's liability, if any, for past temporary total benefits for the period April 23, 2011 through August 7, 2011?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

- A—Copies of medical reports, medical records, and medical bills
- B—Medical expense itemization
- C—Employer denial letter

Karen Paris testified for Employer.

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

The attorneys' post-hearing briefs have been considered.

Findings of Fact

Claimant is a supervisor for Employer. She trained screeners at the Kansas City Airport.

Employees of Employer park at an employee parking lot. Claimant is not required to use that parking lot. Employer pays for its employees' parking permits, including Claimant's. There is no designated parking lot for Employees of Employer. The lot where Claimant parked is not the only place she had to park at the airport.

A shuttle takes employees of Employer to the airport terminals. It takes the shuttle bus between five and seven minutes to get to the terminals from the parking lot. The shuttle bus stops at different airport terminals. The bus is used by all airport employees.

On April 2, 2011, Claimant arrived at the employee parking lot approximately thirty minutes before her shift began. She got onto a shuttle bus used by airport employees at the parking lot. There were other employees on the bus besides employees of Employer. The bus was going to Terminal B where Claimant worked. The bus carrying Claimant arrived at Terminal B about five to seven minutes after she caught the bus.

While Claimant was exiting the bus, she stepped down off the bus and her right foot stepped on a rock. She twisted her right knee, heard a loud pop, and injured her right knee.

Claimant reported the injury to her Supervisor, Mike Gentry, when she got to the terminal on April 2, 2011. Claimant was told to write an Incident Report, which she did. She did not see a doctor that day. Claimant stated she did not realize on April 2 how bad she had hurt her knee.

Claimant went to Urgent Care after the accident. She did not ask Employer for permission to treat there. She did not ask Employer for treatment.

Claimant received a denial letter from Employer, which she identified as Exhibit C. She then obtained medical treatment on her own.

Claimant injured a meniscus in her right knee. She rested at home and had an immobilizer. She was restricted and stayed in bed.

Claimant filed for FMLA on May 16, 2011. She marked the box that the accident was not work related because Employer's HR person told her to mark that box. Claimant

received short-term disability for a time while she was off work. She was not sure the days she received it.

Claimant's treating doctor did not place Claimant on any restrictions when she was released on July 26, 2011. Claimant returned to work on August 8, 2011 and was paid for working on August 8, 2011.

Claimant is not able to bend down when she does pat downs and steps out. She has trouble sleeping because of pain in her right knee. She has sharp pains in her knee and has to use a cushion with a pillow. She cannot sleep with her legs straight.

Employees of Employer represent Employer when in uniform on airport property. As a trainer, Claimant is to make sure employees follow Employer's rules. Employee uniforms need to be pressed and clean. If Claimant sees a screener with a shirt not buttoned, she is to tell the employee to button up. If the employee does not button up, Claimant reports the employee to her supervisor.

Claimant told an employee of Employer who wore a white cowboy hat to work to take off the hat. When he did not, Claimant reported him to the supervisor. The supervisor then told the employee to take off the hat.

Employees are not allowed to change their uniforms even if a day is very hot or very cold. Employees are required to wear Employer-provided coats at work.

A co-employee of Claimant was written up when he fell and broke his foot while on airport property while running to catch a bus after he had clocked off.

Claimant saw Dr. Hopkins and has seen his report.

Claimant requests an award for 15 and 1/7ths weeks of temporary total disability from April 23, 2011 through August 7, 2011, unpaid medical expenses in the amount of \$10,680.00, and Dr. Hopkins' rating of 30 percent of the knee.

I find Claimant's testimony to be credible.

Employer called Karen Paris as a witness. Ms. Paris is Corporate Director of Human Resources for Employer. She has been in that position for 10 years. She oversees the human resources functions for Employer. She is familiar with Employer's policies.

Ms. Paris is aware of the parking for Employer's employees at the airport. In the past, new employees of Employer used to pay for parking. Later, Employer began buying parking cards and giving them to Employees. Employees are not required to use the

cards. Employees can use the cards as they wish. They return the cards when they leave Employer's employment.

Employer does not own or lease the parking lot where its employees park. Employer just pays for the cards. Employer does not have any reserved spaces in the parking lot. Employer does not direct where its employees park in the parking lot. Employees can park in short-term parking lot if they are late to work.

Employer does not provide security for the parking lot where its employees park. Employer does not control the parking lot or control where its employees park. Employer did not own or control the parking lot where Claimant parked. Employer has no right to control the parking lot where Claimant parked. Employer does not clear snow on the parking lot where its employees park. Employer does not carry general liability insurance for the parking lot where its employees park.

Employer does not own or operate the shuttle bus that transports its employees to the terminals. Employer does not own, control, or operate the shuttle bus that Claimant was on when she was injured. Employer has no right to control the bus that Claimant was on when she was injured.

Employer does not control the hiring or firing of the shuttle bus drivers. Employer does not clean the shuttle buses, does not maintain the shuttle buses, does not set the shuttle bus schedules, and does not decide who can ride on the buses. Employer has no lease agreement regarding the shuttle buses.

The shuttle buses stop at Terminal B where Employer's office is located. Terminal B is not owned or operated by Employer.

Employees of Employer are required to return their uniforms to Employer when they leave employment. Employees cannot wear their uniforms out to bars or Royals games. Employer's uniform policy requires that employees are to be fully dressed when they arrive at work. An employee can get in trouble for wearing the uniform away from work for safety reasons and because of federal TSA requirements. Employer does not want the uniforms to get into the wrong hands. Employees have an obligation to protect their uniforms from getting into the wrong hands.

Employees are required to be in full uniform in the parking lot because there is no place to change clothes in the airport. An employee wearing a cowboy hat on the parking lot could be disciplined. Employees should not wear cowboy hats when they are on their way to work in the parking lot. If an employee was wearing a cowboy hat, a lead, such as Claimant, is not required to tell the employee not to wear the cowboy hat. The lead could

tell the employee that he or she was out of uniform because the employee would not be in full uniform when he or she entered the terminal.

Employees should be in proper attire in the terminal even before they swipe into work for Employer. Employees should not change into their uniforms in the bathroom in the terminal.

Employees are not allowed to have firearms in their vehicles because of a TSA requirement. The rule regarding possession of firearms and vehicles comes from the parking lot.

Employees of Employer are not allowed to use illegal drugs, drink within eight hours of work, or gamble. Employees should not do a pool for a lottery. The gambling rule applies to places where employees work. The gambling rule would apply to Claimant in the parking lot because she is a lead. There is a rule regarding soliciting while a lead. Rule 852 states that an employee shall not participate in gambling while on the premises of the airport. Employees are not allowed to participate in a lottery pool in the parking lot. Employees should not gamble when on the parking lot or in the bus because of the perception it would create.

Employees of Employer are required to report suspicious activities or suspicious vehicles in the parking lot even if they are not on the clock. Any employee is required to report suspicious activity. Employees of Employer are responsible to secure travelers.

Employees are not on the clock when they are in the parking lot, or in the shuttle, or when they get off the shuttle. They are only on the clock for Employer when they swipe their cards in. It takes about five to ten minutes to walk from where an employee gets off the shuttle bus to the place where the employee swipes in to begin work.

Employer had the letter denying Workers' Compensation sent to Claimant because the accident happened on the bus that is not controlled by Employer and Claimant had not been swiped in yet. If an employee has an accident on the way to work, Employer does not consider that a compensable injury. Employer does not deny that Claimant was injured.

I find Ms. Paris' testimony to be credible.

Records of Saint Luke's Northland—Barry Road in Exhibit A include an Emergency Physician Record dated April 23, 2011 that states in part under "HPI", "Stepping off bus—twisted." The St. Luke's records also include an Emergency Department Chart dated April 23, 2011 that states in part: "PT states she fell injuring right knee. No PCP or ortho follow-up."

A record of Northland Bone and Joint dated April 29, 2011 in Exhibit A states in part: “Summary: Ms. Tidwell is here complaining of right knee pain. She states that she has had right knee pain for approximately a month when she was at work, slipped on a rock, she felt her knee pop immediately afterward and had pain in it immediately afterward.”

A report of Ortho KC Sports Medicine and Joint Reconstruction dated May 24, 2011 in Exhibit A states in part, “How injured: stepped off step onto rock, twisted leg, knee popped ‘loud.’”

A report of Dr. Greg Folsom of Ortho KC dated May 26, 2011 in Exhibit A states in part: “History of present illness: she works for the TSA at the airport. She was on her way to work when the injury happened. She stepped off of a curb after getting off of the transport bus at the airport and that is when her knee twisted, and she felt and heard a loud pop in her knee.”

Dr. Hopkins’ September 14, 2011 report in Exhibit A regarding “History of Present Illness” states: “On the date of this injury on or about April 2, 2011, she was getting of [sic] an employee bus. As she stepped off the bus, she stepped on a rock sustaining a twisting injury to her right knee. She evidently hit her right knee against a metal support on the bus. She felt a large pop with an immediate onset of pain.”

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence and the application of the Workers’ Compensation Law, I make the following Rulings of Law:

Did Claimant sustain an injury by accident on or about April 2, 2012 arising out of and in the course of her employment for Employer?

Section 287.808, RSMo¹ provides:

¹All statutory references are to RSMo Supp.2011, the most recent version of the statute unless otherwise indicated. The statute has not been changed since its enactment in 2005. In a workers’ compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam’s Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.800, RSMo provides:

1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3, RSMo provides in part:

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
- (2) An injury shall be deemed to arise out of and in the course of the employment only if:
 - (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.5, RSMo provides in part:

The extension of premises doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

Section 287.020.10, RSMo provides:

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

Section 287.120. 1, RSMo provides:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

The workers' compensation claimant bears the burden of proof to show that her injury was compensable in workers' compensation. *Johme v. St. John's Mercy Healthcare*, --- S.W.3d ----, 2012 WL 1931223 (Mo.) (citing *Sanderson v. Producers Comm'n Ass'n*, 360 Mo. 571, 229 S.W.2d 563, 566 (Mo. 1950)).

Prior to the 2005 amendments, the act's provisions were required to be construed liberally in favor of compensation. § 287.800, RSMo 2000. In 2005, the act was revised to provide that its provisions are to be construed strictly and to require the evidence to be weighed impartially without giving any party the benefit of the doubt. § 287.800. *Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671, 673 (Mo. banc 2009).

The court in *Simmons v. Bob Mears Wholesale Florist*, 167 S.W.3d 222 (Mo.App. 2005) states at 225:

An injury is 'in the course of' the employment when it occurs within the period of employment at a location where employee would reasonably be while engaged in fulfilling the duties of employment or something incidental thereto. *Pullum*, 871 S.W.2d at 97. 'In the course of employment' refers to the time, place and circumstances of an employee's injury. *Johnson v. Evans & Dixon*, 861 S.W.2d 633, 635 (Mo.App.1993), *overruled on other grounds by Hampton*, 121 S.W.3d at 229. Each case must be decided on its own facts and circumstances. *Pullum*, 871 S.W.2d at 97.

The court in *Hager v. Syberg's Westport*, 304 S.W.3d 771, 2010 WL 623685 (Mo.App. 2010) states at 775-76:

Prior to the 2005 amendments, Missouri courts recognized the extended premises doctrine as an exception to the general rule that "accidents occurring on the trip to or from work are not deemed to arise out of and in the course of employment." *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 535 (Mo. banc 1996). In 2005, the Legislature abrogated the extended premises doctrine "to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment." Section 287.020.5. *Hager* 304 S.W.3d at 775.

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Section 287.020.10 abrogates *Wells*, *Cox*, and *Roberts* because they interpret the meaning or definition of “arising out of” and “in the course of employment” for claimants who fell in an employer's adjacent parking lot. *See Wells*, 33 S.W.3d at 192; *Cox*, 920 S.W.2d at 535; *Roberts*, 58 S.W.3d at 69.

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Section 287.020.5 expressly limits the application of the extended premises doctrine to those cases in which accidents occur on property owned or controlled by the employer. To determine whether the Commission erroneously interpreted and applied Section 287.020.5 in finding Claimant's injury did not arise out of and in the course of his employment, this Court must consider whether: (1) Employer owned the parking lot where Claimant's injury occurred; or (2) Employer controlled the parking lot where Claimant's injury occurred.

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When a court is directed to strictly construe a statute, it must consider the plain and ordinary meaning of the words used. *See Ahern*, 254 S.W.3d at 135; *see also Allcorn*, 277 S.W.3d at 829. “When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary.” *Harness*, 291 S.W.3d at 304 (defining “principal” using Black's Law Dictionary). The word “control” is defined by Black's Law Dictionary (8th ed.2004) to mean: “1. To exercise power or influence over.... 2. To regulate or govern.... 3. To have a controlling interest in.”

Employer did not control the parking lot where Claimant's injury occurred because it did not exercise power or influence over the parking lot.

The *Hager* court concludes at 777:

The Commission also found Syberg's testimony credible that Employer did not have control over parking decisions, but rather Landlord permitted Employer, its employees, and its guests to choose their own parking spaces. Accordingly, Employer did not control the parking lot and Claimant cannot rely on the extended premises doctrine pursuant to Section 287.020.5.

See also *McClain v. Welsh Co.*, 748 S.W.2d 720 (Mo.App. 1988) where the court states at 724-25:

The general, long-standing principle is that an employee does not suffer injury arising out of and in the course of employment if the employee is injured while going or journeying to or returning from the place of employment. Going to or returning from employment is one of those essential conditions of employment that every worker must present oneself to perform duties at the assigned location for which he was hired and depart therefrom when the work day is ended. Going to or returning from employment is a personal act, akin to dressing, grooming and presenting oneself for work. (*Omitting citations*). In other words, a trip to or from one's place of work is merely an inevitable circumstance with which every employee is confronted and which ordinarily bears no immediate relation to the actual services to be performed.

Claimant has the burden to prove she sustained a compensable injury. I find and conclude she has failed to meet her burden of proof.

Claimant worked at Terminal B of the Kansas City International Airport. Employees of Employer are not on the clock when they are in the parking lot, or in the shuttle, or when they get off the shuttle. They are only on the clock for Employer when they swipe their cards in.

Claimant was exiting a shuttle bus at the time she sustained her injury. The bus was used not only by employees of Employer, but by other airport employees. Employer did not own or control the bus Claimant was descending at the time she sustained her injury.

There is no evidence that Employer owned or controlled the property where Claimant sustained her injury. I find and conclude that Employer did not own or control the property where Claimant sustained her injury.

Claimant had not clocked in or swiped in and had not begun her work for Employer at the time she sustained her injury on April 2, 2011. She was not inside the terminal building at the time she sustained her injury. She was a five-to-eight minute walk from where she sustained her injury to where she was to swipe in at Terminal B to begin work.

I find and conclude that Claimant cannot rely on the extended premises doctrine to establish compensability in this case.

Claimant's post-hearing brief states in part:

Her position as a lead put her in service to the employer from the time she approached the airport property thereby making her an "employee" as defined by sec. 287.020. Riding with co-workers, "mentoring" them on proper First Line attire and reporting potential threats on the airport property were reasonably incidental to the commencement of her work as required under Sec. 287.120.1.

Finally, Ms. Tidwell's injury occurred as she descended the employee bus stairs *after* her obligations as a lead commenced for the day. Her responsibilities as a lead and a mentor continued from the time she entered the parking lot to the time she left it in the evening. She was reasonably expected to fulfill her duties the entire time she was there. She, therefore, was injured while in the course and scope of her employment.

I disagree with Claimant's position. I find and conclude in the case at hand that Claimant was not engaged in, performing, or fulfilling any duties of her employment for Employer, or something incidental to her duties of employment for Employer, at the time she sustained her injury on April 2, 2011. I find and conclude Claimant was not performing any service which benefitted Employer at the time she sustained her injury.

Claimant was not disciplining another employee or reporting suspicious activity at the time she sustained her injury. She was not "mentoring" co-workers on proper First Line attire or reporting potential threats at the time of the injury. She was not rushing off the bus to observe a suspicious person or to confront an employee of Employer about the employee's dress at the time she sustained her injury. She was merely on her way to work. Further, there is no evidence that the uniform or shoes Claimant was wearing caused her to sustain her knee injury.

I find and conclude the fact that Claimant had the duties as a lead of "mentoring" co-workers on proper Employer attire or reporting potential threats in the parking lot and on the way to Terminal B does not in and of itself result in the conclusion that her injury arose out of and in the course and scope of employment.

I find and conclude Claimant failed to prove her injury arose out of and in the course of her employment for Employer.

Because I have found Claimant's claim is not compensable for the reasons previously stated, it is not necessary to determine, and I do not determine, whether

Claimant showed her injury was caused by a risk to which she was not equally exposed in her normal non-employment life. Section 287.020.3(2)(b), RSMo; *Johme v. St. John's Mercy Healthcare*, --- S.W.3d ----, 2012 WL 1931223 (Mo.); *Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671 (Mo. banc 2009).

In conclusion, based upon substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find in favor of Employer and deny Claimant's request for benefits. I find that Claimant failed to sustain her burden of proof that she sustained an injury by accident arising out of and in the scope and course of her employment for Employer. Claimant's entire claim for benefits against Employer is denied.

Because I have found that Claimant failed to sustain her burden of proof that she sustained an injury by accident arising out of and in the scope and course of her employment for Employer, Claimant's claim against the Second Injury Fund must also be denied. Section 287.220, RSMo. Claimant's entire claim for benefits, including her claim against Employer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund, is denied, and all other issues are moot. Claimant's attorney is not allowed any attorney's fee. This award is final and is subject to immediate appeal.

Made by: /s/ Robert B. Miner

Robert B. Miner

Administrative Law Judge

Division of Workers' Compensation