

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

Injury No.: 10-050708

Employee: David Viley
Employer: Scholastic, Inc.
Insurer: Ace American 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.¹ We have read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record.² Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the May 2, 2013, award and decision of the administrative law judge.

Preliminaries

Employee injured his right knee when he fell on a snow and ice-covered parking lot while walking to his car from employer's building after his work shift. Employee claims he is entitled to workers' compensation benefits. Employee asserts his injury arose out of and in the course of his employment in that the *extension of premises doctrine* applies in this case and he has proven his injury is deemed to have arisen out of and in the course of his employment under § 287.020.3(2) RSMo. Employer/insurer argues that the *extension of premises doctrine* does not apply in this matter. Further, employer/insurer argues that we cannot deem employee's injury to have arisen out of and in the course of employment, because employee was equally exposed to the hazard giving rise to his injury outside of and unrelated to his employment.

The administrative law judge concluded, as follows:

The claimant, David Viley, has failed to sustain his burden of proof that the injury he sustained arose out of and in the course of employment. Mr. Viley failed to prove that it does not come from a hazard or risk to which workers would have been equally exposed outside of and unrelated to his employment in normal nonemployment life. The evidence reflects that the parking lot conditions when Mr. Viley fell were similar to those generally in the area in which he conducted his daily affairs with the exception of his own property which was maintained to a higher standard.

The parties stipulated that if we find the claim compensable, we should enter an award in favor of employee and against employer/insurer in the following amounts: \$26,384.56 for past medical benefits; \$2,139.20 for temporary total disability benefits, and, \$7,334.40 for permanent partial disability benefits.

¹ Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

² Chairman Larsen was not a member of the Commission at the time the oral arguments were heard.

Employee: David Viley

- 2 -

Findings of Fact

Employer leased a portion of a building from Randolph Properties Development, LLC (landlord). The building was located in a commercial complex located at 1800 Robertson Road in Moberly, Missouri. Employee worked for employer in its call center offices located in the leased portion of the building.

We recite relevant portions of the lease below:

Section 2.02 Use of Common Facilities

The use by Tenant of the Leased Premises shall include the use, in common with others entitled thereto, of the **"Common Facilities"** (as defined in Section 11.01).

Section 10.01 Control by Landlord

Notwithstanding anything set out in this Lease to the contrary, it is agreed that (i) all Common Facilities shall be subject to the exclusive control and management of Landlord, and Landlord shall have the right at any time (either before, during or after the initial construction thereof), once or more often, to change the size, area, level, location and arrangement of the entrances, access roads, parking areas and other Common Facilities, to construct buildings and other improvements thereon and therein and to permit the owners or occupants of land located outside the Commercial Complex and their invitees to use the Common Facilities; (ii) Landlord shall have the right to make alterations and additions to the Commercial Complex (including the construction of additional buildings therein) but Landlord agrees to minimize any disruption to Tenant's business, and to add and exclude areas from the Commercial Complex, and to relocate improvements, and the premises leased to any other tenant; and (iii) Landlord shall have the right to do and perform such other acts in and to the Common Facilities as Landlord shall determine to be advisable with a view to the improvement of the convenience and use thereof by tenants of the Commercial Complex and their invitees; such work shall be performed in such a way as to minimize any disruption to Tenant's business and so as not to unnecessarily or materially impede Tenant ingress or egress to said Commercial Complex or customer parking.

Section 11.01 Common Facilities

- a. The term **"Common Facilities"** shall mean all areas, space, equipment and special services in or serving the Commercial Complex, provided for the common or joint use and benefit of Landlord, the occupants of the Commercial Complex and their employees, agents, servants, customers and other invitees, as determined by Landlord from time to time. Landlord shall be responsible for upkeep and maintenance of the Common Facilities.
- b. Landlord agrees to provide security checks twice nightly, Monday through Saturday, on the parking lot and exterior of the Commercial

Employee: David Viley

- 3 -

Complex to discourage loitering between the hours of 6:00 p.m. and 10:00 p.m.

Section 13.03 Rules and Regulations

...

- c. Tenant and Tenant's officers, concessionaires, agents, employees, contractors, vendors, suppliers and other invitees of Tenant shall park their automobiles and other vehicles ("**Tenant's Automobiles**") only in those portions of the parking area designated for that purpose by Landlord from time to time. Tenant shall have the exclusive use for parking of Tenant's Automobiles in the existing parking lot to the west of the Main Building and the new parking lot described in Exhibit C hereto; provided, however, if Tenant ever terminates this Lease as to Suite D as provided herein for any Option Period, then, during such Option Period and any future Option Period, Tenant and Tenant's Automobiles shall be excluded from an appropriate prorata number of parking spaces in said parking lots in area(s) as selected by Landlord in Landlord's reasonable discretion.

We will refer to the "existing parking lot to the west of the Main Building" as the "south lot." We will refer to the "new parking lot described in Exhibit C" as the "north lot."

Based upon the terms of the lease, we make the following findings. The lease granted employer exclusive parking use of the north and south lots. "Exclusive," means "excluding or having power to exclude (as by preventing entrance or debarring from possession, participation, or use)...limiting or limited to possession, control, or use (as by a single individual or organization or by a special group or class)."³ "Use," means "the act or practice of using something."⁴ We find that by the lease the landlord granted to employer the power to exclude all non-employees from using (i.e., parking vehicles in) the north and south lots, including the landlord, other tenants of the complex, and visitors to the complex.

Employees of the landlord, employees of other tenants, and visitors to the complex sometimes parked in the north and south lots. This was regularly true for other workers in the complex because the only restroom in the entire complex was in the building that housed employer's leased offices. Workers from other businesses in the complex would frequently drive from their workplaces and park in the south lot when they visited the sole restroom. Individuals working for landlord or other complex occupants, as well as, visitors to the complex often drove through the north lot to get to other locations in the complex.

Because the landlord granted exclusive parking use of the north and south lots to employer, we find that the lots were not for the "common or joint use and benefit of" the landlord, other tenants, and invitees. Consequently, we find the south lot does not fall within the lease definition of "Common Facilities." Our finding is consistent with the understanding of

³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 793 (2002).

⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523 (2002).

Employee: David Viley

- 4 -

employer's operations manager who testified that employer had the power to direct uninvited vehicles to leave the parking lot and had, in fact, exercised that power.

Through the lease, landlord agreed to perform some responsibilities in relation to the north and south lots such as repairs, resurfacing, striping, and snow removal. These maintenance responsibilities were similar to landlord's lease obligations as regards the outside of the building that housed employer's leased offices. A February 25, 2010, e-mail from employer's facilities manager to the landlord's vice president reveals that shortly after employee's accident, employer's facilities manager contacted the landlord to express displeasure that the lots had not been cleared of snow and ice. The e-mail indicates that the vice president agreed that the landlord would modify the way the lots were cleared in response to employer's displeasure.

A fence enclosed the real property upon which the commercial complex sits. There were three gates providing access to the complex from Robertson Road. One gate – considered the “main gate” – was on a driveway/roadway which ran east and west between the south lot and the north lot.⁵ Employee always entered the complex by heading east through the main gate on the driveway.

Several of employer's supervisory and management employees had a key to the lock on the main gate. Employer's operations manager was typically the first person to arrive for work at the commercial complex each day. The main gate was usually locked when the operations manager arrived so he used the gate key assigned to him to unlock the gate. The gate remained open and unlocked throughout the workday. Employer's call center employees were generally the last workers to leave the commercial complex at night. A call center supervisor would lock the main gate upon leaving the complex with a key assigned to the supervisor for that purpose unless one of the security guards provided by the landlord was at the gate to do so.

Upon arriving at the main gate to the commercial complex for a work shift employee would:

- enter the commercial complex heading east on the driveway through the main gate at Robertson Road;
- turn south off the driveway and enter the south lot through another gate, which we will refer to as the “south lot gate;”
- park and exit his vehicle;
- walk east across a north-south roadway and then along a sidewalk to the entrance of the building containing employer's leased offices.

Upon entering the building, employee reported to his desk and clocked in through his computer. At the end of his shift, employee clocked out through his computer system. Employee would then exit the building and return to his vehicle along the same route by which he arrived.

When employee arrived for work on February 18, 2010, snow and ice was on the south lot. Employee concluded his work shift on that day at 9:00 p.m. and clocked out through

⁵ The other two gates provided ingress to and egress from the complex via the north lot.

Employee: David Viley

- 5 -

his computer system. As was his custom, employee left the building, walked west along the sidewalk and across the roadway into the south lot, which was dimly lit. Although the south lot had been plowed or bladed to provide pathways upon which vehicles could travel, snow and ice remained on portions of the lot, including the plowed pathways and the parking spaces. The remaining snow and ice rendered the south lot in an unsafe condition by the time employee left work. Although employee was walking on a plowed portion of the south lot, employee slipped on the snow and ice and fell. Employee sustained a torn lateral meniscus as a result of the fall.

Employee worked 5 – 6 days per week so he walked upon the south lot 10 – 12 times per week. Employee visited other locations with parking lots, some of them made of poured concrete like the south lot. For example, employee visited a grocery store and/or a discount retailer once or twice a week, where he crossed a paved parking lot. Occasionally, a lot employee crossed to get to a store had snow or ice on it. Employee believed the brightness of the lighting in the grocery store lot was better than the lighting in the south lot.

After winter weather events, employee always thoroughly cleared his porch, driveway, and sidewalk of ice and snow. The lighting at employee's house provided better lighting to his porch and driveway than the lighting in the south lot provided to the south lot.

Law

The following provisions of the Missouri Workers' Compensation Law (Law) control our analysis in this matter.

Section 287.020 RSMo provides, in relevant 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.

...

5. 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,

Employee: David Viley

- 6 -

approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

...

10. 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, in relevant part:

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. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person...⁶

Section 287.800.1 RSMo provides:

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.

Discussion

We must determine if employee's injury arose out of and in the course of employment. Before we can make that determination, we must decide if the *extension of premises doctrine* applies under the facts of this case. A brief discussion of the history of the meaning of the phrase "arising out of and in the course of employment" and of the development of the *extension of premises doctrine* will lay the foundation for our analysis.

Arising out of and in the course of employment

Section 287.120.1 RSMo sets forth the workers' compensation bargain. In exchange for the promise of speedy and sure compensation from their employers in the event they sustain a work related injury, workers gave up the right to sue their employers for their injuries in court (and the higher recoveries available there). For their part, in exchange for relief from civil suit and reduced liability, employers gave up some highly effective civil defenses (contributory negligence, assumption of risk, and fellow servant).

⁶ In 2013, the legislature amended this subsection to extend its coverage to personal injuries by occupational disease arising out of and in the course of employment.

Employee: David Viley

- 7 -

The original workers' compensation act provided scant statutory guidance about what constituted a "personal injury arising out of and in the course of employee's employment."⁷ Consequently, from the earliest days of the Workers' Compensation Law, Missouri courts judicially defined the phrases "arising out of the employment" and "arising in the course of the employment." The Missouri Supreme Court first adopted the judicial definitions in *Wahlig v. Krenning-Schlapp Grocery Company*.⁸

It has been quite uniformly held that an injury arises "out of" the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury; and that an injury to an employee arises "in the course of" his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. We think we should so construe these terms as used in Section 3 [the predecessor to § 287.120.1 RSMo] of our compensation law, which says that "the employer shall be liable to furnish compensation for personal injury or death of the employee by accident arising out of and in the course of his employment."

These basic meanings controlled the determination of whether injuries arose out of and in the course of employment for over sixty years. Over those years, a large body of case law developed around these key compensability elements. Through these judicial decisions, courts established doctrines that provided a framework for analyzing the compensability of categories of injuries occurring under similar fact patterns. The doctrines primarily at issue here – the *going and coming doctrine* and the *extension of premises doctrine* – provided a framework for analyzing the compensability of injuries sustained by a worker going to or coming from the premises of the worker's employer.

In 1993, the legislature enacted a statutory framework for defining what injuries arise out of and in the course of employment with the enactment of § 287.020.3.⁹ After the 1993 amendment, courts used the judicial definitions, the judicially-created doctrines, and the statutory limits together to determine when an injury arose out of and in the course of employment.

In 2005, the legislature amended § 287.020.3 such that it now reads as quoted above in the section entitled "Law." The legislature also abrogated all cases interpreting the phrases "arising out of" and "in the course of the employment"¹⁰ and changed the standard by which we must construe the provisions of Chapter 287 from liberally to strictly.¹¹

⁷ The guidance appeared in § 287.020.5 RSMo (2004) ("Without otherwise affecting either the meaning or interpretation of the abridged clause, 'personal injuries arising out of and in the course of such employment', it is hereby declared not to cover workmen except while engaged in, or about the premises where their duties are being performed, or where their services require their presence as a part of such service.")

⁸ 29 S.W.2d 128 (Mo. 1930)(internal citations omitted).

⁹ See § 287.020.3(2) RSMo (2004) ("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 employment is a substantial factor in causing the injury; and, (b) It can be seen to have followed as a natural incident of the work; and, (c) It can be fairly traced to the employment as a proximate cause; and, (d) 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[.]")

¹⁰ Section 287.020.10 RSMo.

¹¹ Section 287.800.1 RSMo.

Employee: David Viley

- 8 -

The Missouri Supreme Court addressed these 2005 changes in *Johme v. St. John's Mercy Healthcare*.¹² After noting the abrogation of all cases interpreting “arising out of” and “in the course of the employment” and while viewing the provisions of Chapter 287 through the lens of strict construction, the Court described the operation and effect of § 287.020.3(2), thusly:

[A claimant's] injury is compensable in workers' compensation only if it arose out of and in the course of her employment pursuant to section 287.020.3(2). The express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether [a claimant's] injury shall be deemed to have arisen out of and in the course of her employment. See sec. 287.020.10 (expressly noting the legislature's intent to abrogate prior case law definitions applicable to workers' compensation, including case law interpretations for the definitions of "arising out of" and "in the course of the employment"). And the legislature has left no doubt that the provisions of section 287.020.3(2) are to be construed strictly. See sec. 287.800 ("courts shall construe the provisions of [chapter 287] strictly").¹³

It can and has been argued that through the above language the Supreme Court ruled that the provisions of § 287.020.3 now constitute the statutory definition describing what injuries arise out of and in the course of employment. As will be explained below, we do not read the *Johme* decision so narrowly.

Extension of Premises Doctrine

History

Before the 2005 amendments to the Missouri Workers' Compensation Law, the plain language of the Law provided that an injury did not “arise out of and in the course of employment” unless the injured worker sustained the injury “while engaged in, or about the premises where [his] duties are being performed, or where [his] services require [his] presence as a part of such services.”¹⁴ Courts interpreted the provision as setting forth a necessary element of a worker's case in chief, without proof of which we could not find an injury arose “in the course of employment.”¹⁵

Over the years, the courts judicially expanded what property could be considered “the premises” under former § 287.020(5), thereby creating an exception to the general going and coming rule. This exception, known as the *extension of premises doctrine* or *extended premises doctrine* provided:

As applied to employees returning to or departing from their work (for whatever reason), the going to and from work rule permits recovery of workmen's compensation benefits provided (a) the injury-producing accident occurs on premises which are owned or controlled by the employer, or on premises which are not actually owned or controlled by

¹² 366 S.W.3d 504 (Mo. 2012).

¹³ *Johme*, 366 S.W.3d at 509-510.

¹⁴ § 287.020.5 (2004), *supra*, fn. 8.

¹⁵ See *Drewes v. TWA*, 984 S.W.2d 512, 514-515 (Mo. 1999)(superseded by § 287.020.10 RSMo (2005)) (“Workers are not ‘in the course of’ their employment ‘except while engaged in or about the premises where their duties are being performed, or where their services require their presence as a part of such service.’”)

Employee: David Viley

- 9 -

the employer but which have been so appropriated by the employer or so situate, designed and used by the employer and his employees incidental to their work as to make them, for all practicable intents and purposes, a part and parcel of the employer's premises and operation; and (b) if that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workmen to get to and depart from their places of labor and is being used for such purpose at the time of the injury.¹⁶

Under the law as it existed before the 2005 amendments, if the judicially-created *extension of premises doctrine* applied under the facts of a case, then the injury was deemed to have occurred on employer's premises thereby satisfying both the premises requirement of former § 287.020.5 and the judicially-created "in the course of employment" test.¹⁷

2005 amendments to §§ 287.020.5 and 287.020.10 RSMo

In 2005, the legislature amended § 287.020.5 to remove the dictate that an injury cannot arise out of and in the course of employment unless it occurs on employer's premises or where the worker's duties require him to be. Ironically, through the same enactment whereby the legislature removed the only statutory geographic requirement pertaining to work injuries, the legislature retained a portion of a judicial doctrine – the *extension of premises doctrine* – developed as an aid to determining if the erstwhile geographic requirement was satisfied.

Resolution of the conflict between § 287.020.5 and § 287.020.10 RSMo

We are faced with seemingly conflicting statutory provisions. First, the legislature abrogated all cases interpreting the meaning of "arising in the course of employment." Also, the legislature retained the rationale and holdings of some cases interpreting the meaning of "arising in the course of employment." We must try to reconcile § 287.020.10's complete abrogation of all judicial interpretations of "in the course of employment" with § 287.020.5's retention of some of those judicial interpretations.

Generally, a provision in a statute must be read in harmony with the entire section.¹⁸ Statutes relating to the same subject matter are in *pari materia* and should be construed harmoniously. This principle is all the more compelling when the statutes are passed in the same legislative session. Where two statutory provisions covering the same subject matter are unambiguous when read separately but conflict when read together, the reviewing tribunal must attempt to harmonize them and give effect to both. Where, as here, one statute deals with a particular subject in a general way, and a second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific.

In the instant case, the specific retention of a portion of the *extension of premises doctrine* must prevail over the general abrogation of all cases interpreting the meaning of "in the course of employment." Even though the legislature abrogated all case law interpreting

¹⁶ *Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 607 (Mo. App. 1968).

¹⁷ See *Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. 2000) ("If an employee is injured on extended premises while coming to or from work, the injury is in the course of employment as if 'it had happened while the employee was engaged in his work at the place of its performance.'")

¹⁸ See *Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 107-108 (Mo. App. 2008).

Employee: David Viley

- 10 -

the meaning of “arising in the course of employment,” the legislature simultaneously codified the judicial analysis applied to *extension of premises* cases. We do not think it inappropriate for us to refer to such cases for guidance and, to the extent their reasoning does not conflict with the plain language of the Law, to rely upon such reasoning.

Resulting *extension of premises statute*

We return now to the *Kunce* court’s description of the *extension of premises doctrine* quoted above. After removing the abrogated portion of the doctrine from the description – the portion pertaining to appropriated property – the surviving portion of the *extension of premises doctrine* permits recovery of workers’ compensation benefits for injuries sustained by workers going to or coming from work if (a) the injury-producing accident occurs on premises which are owned or controlled by the employer, **and** (b) that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by workmen to get to and depart from their places of labor and is being used for such purpose at the time of the injury. We believe it is this surviving portion of the judicially created *extension of premises doctrine* which, pursuant to § 287.020.5 must govern, when applicable, the determination of whether an injury arose out of and in the course of employment.

Conclusions of Law

We now must decide if the *extension of premises doctrine* applies in the instant case. Employee does not assert that employer owns the south lot upon which employee sustained his injury. Therefore, our analysis need only consider whether employer controlled the south lot. If not, the *extension of premises statute* does not apply in this case and we cannot rely upon it to establish that employee’s injury arose in the course of his employment.

For purposes of our application of the *extension of premises statute*, “control,” means “1. To exercise power or influence over.... 2. To regulate or govern.... 3. To have a controlling interest in.”¹⁹ When employer directed persons to remove their vehicles from the lots, employer exercised **power** over the lots, **regulated** the lots, and **governed** the lots. When employer contacted the landlord to request maintenance for the lots – a service the landlord was obligated to perform under the terms of the lease – employer exercised a contractually bargained-for **influence** over the lots. Employer’s rights and actions as described in this paragraph meet the definition of “control” as set forth above.

Employer argues that we cannot hold employer liable for employee’s injury on the south lot for several reasons. Landlord had the contractual obligation to provide maintenance for the lot. Employer asserts that landlord’s contractual maintenance obligation defeats a finding that employer controlled the south lot.²⁰ We disagree. We need not determine whether landlord jointly controlled the south lot because § 287.020.5 does not state that an employer must have sole, exclusive, or complete control over a premises before the *extension of premises statute* is triggered. A strict construction of the statute forbids us from adding any such requirement to § 287.020.5. Employer asserts that employer locked the gate as a courtesy to the landlord and not for the purpose of controlling the

¹⁹ *Hager v. Syberg's Westport*, 304 S.W.3d 771, 776 (Mo. App. 2010), citing BLACK’S LAW DICTIONARY (8th ed. 2004).

²⁰ The landlord was also contractually obligated to maintain the roof of the building housing employer’s leased premises. It could not reasonably be argued that the landlord’s failure to carry out its contractual obligation to maintain the roof would absolve employer from workers’ compensation liability if a worker at her desk sustained injury as a result of a roof failure or collapse.

Employee: David Viley

- 11 -

north and south lots. We agree. The landlord wanted the gates locked to protect landlord's personal property situated in another location in the complex. We do not rely on employer's locking of the main gate in reaching our conclusion that employer controlled the south lot.

For the forgoing reasons, we conclude that employer controlled the south lot for purposes of our application of § 287.020.5. The first prong of the *extension of premises* test is satisfied because employee's injury-producing accident occurred on premises controlled by employer.

The second question we must answer is whether the portion of the south lot where employee fell was a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by employer's workers to get to and depart from their places of labor and was being used for such purpose at the time of employee's injury. Employer told its workers the north and south lots were available for their use in parking their vehicles. In fact, the north and south lots were the only designated parking surfaces on the west side of the building near employer's leased offices. Employee always parked in the south lot as did all other call center workers on his shift. For the foregoing reasons, we conclude that the south lot was a part of the customary, expressly or impliedly approved, permitted, usual and acceptable route or means employed by employer's workers to get to and depart from their places of labor and was being used for such purpose at the time of employee's injury. The second prong of the *extension of premises* test is satisfied.

Since employee sustained injury on employer's extended premises while going from work, his injury is in the course of employment as if it had happened while the employee was engaged in his work at the place of its performance.²¹ Consequently, if we find employee has proven the other statutory elements of compensability, employee may recover for his injury notwithstanding that he sustained his injury while going from work.

The parties agree that employee's accident was the prevailing factor in causing his injury so we need not further discuss § 287.020.3(2)(a). We proceed to a consideration of § 287.020.3(2)(b). If employee's injury did 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, then we will conclude that his injury arose out of and in the course of employment.

Because the *extension of premises statute* applies, we have concluded that employee was in the course of his employment at the time of his injury. As he was crossing the south lot to his vehicle, employee was exposed to the risk of slipping on snow and ice that was not cleared from the south lot. In light of the forgoing, we find that employee was in an unsafe location due to his employment. Employee succumbed to the unsafe condition at that location by slipping on that snow and ice, thereby sustaining injury to his knee.

Missouri judicial decisions instruct us how to apply § 287.020.3(2)(b) when a worker in the course of his employment sustains an injury resulting from being in an unsafe

²¹ See *Wells*, supra, fn. 17.

Employee: David Viley

- 12 -

location due to his employment. In *Duever v. All Outdoors, Inc.*,²² Mr. Duever fell on ice while in the course of his employment. The *Duever* court compared Mr. Duever's exposure to the hazard of slipping on *that* ice in *that* particular parking lot with the exposure of workers in general to the hazard of slipping on *that* ice in *that* parking lot and found that Mr. Duever had the greater exposure.²³

The court in *Dorris v. Stoddard County*²⁴ relied upon the holding in *Duever*. The *Dorris* court held that, in the context of a worker injured due to an unsafe condition of the workplace, we are to compare the worker's work-related exposure to the particular hazard presented by the unsafe location against the worker's non-work-related exposure to the particular hazard presented by the unsafe location.

Inherent in the *Duever* and *Dorris* holdings is the proposition that where the hazard giving rise to the injury is a dangerous condition of the location where the worker's duties require him to be, the hazard is (almost by definition) a hazard related to employment to which this worker or workers in general are not equally exposed outside of that workplace.

We find the circumstances of the instant case indistinguishable from the circumstances of *Duever* as regards the application of the equal exposure test. Both Mr. Duever and our employee were traversing an ice-covered parking lot while in the course of his employment. Both Mr. Duever and our employee suffered an injury attributable to the unsafe condition of the parking lot he was traversing.

The evidence in the instant case establishes that employee was exposed to the hazard of slipping on the ice on employer's extended south parking lot premises only while he was coming to work or going from work. Employee traversed the lot 10-12 times per week. There is no evidence in the record to suggest that employee (or workers in general) was exposed to the hazard of falling on ice in the south lot as often, or at all, in non-employment life.

Based upon the foregoing, we find that employee has proven that his injury did not come from a hazard or risk unrelated to employment to which workers would have been equally exposed outside of and unrelated to employment. Employee has satisfied the requirement of § 287.020.3(2)(b).

In summary, under the facts of this case, the *extension of premises statute* applies such that we can consider the south lot employer's extended premises. Employee fell due to an unsafe condition on employer's premises. Employee's injury came from a hazard related to his employment. Employee fell *because* he was at work, not merely *while* he was at work.²⁵ Employee's injury arose out of and in the course of employment.

²² *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012).

²³ The Missouri Workers' Compensation Law has never required that the injury-producing hazard be unique to the workplace, only that there be something in the nature of the work that exposes the worker to a greater danger of falling victim to the hazard than the danger faced by workers in non-employment life. See *Morris*, supra, fn 23.

²⁴ *Dorris v. Stoddard County*, SD32830 (Mo. App. S.D. 2014)(January 31, 2014).

²⁵ See *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315 (Mo. App. 2012); *Miller*, supra.

Employee: David Viley

- 13 -

Award

We reverse the award of the administrative law judge. Employee's injury arose out of and in the course of his employment.

We direct the employer/insurer to pay to employee the sum of \$26,384.56 for past medical expenses.

We direct the employer/insurer to pay to employee \$2,139.20 for temporary total disability benefits.

We direct employer/insurer to pay to employee \$7,334.40 for permanent partial disability benefits.

Jonathan D. McQuilkin, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

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

The May 2, 2013, award and decision of Administrative Law Judge Hannelore D. Fischer is attached hereto solely for reference, except for the Stipulations of the Parties which we incorporate herein by this reference.

Given at Jefferson City, State of Missouri, this 16th day of April 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

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

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: David Viley

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

I supplement the administrative law judge's reasoning to express that I do not believe § 287.020.3(5) RSMo is triggered in this case such that it may be said that employer's premises are extended to include the south parking lot. Employer's power over the lot was principally limited to the power of its workers to park there. Unlike the majority, I do not believe it was the legislature's intent that an employer's infrequent exercise of minor influence over an area (such as the instant employer's request that interlopers leave the south lot on two or three occasions) be considered "control" as that term is used in the statute.

I would affirm the award of the administrative law judge. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

James G. Avery, Jr., Member

AWARD

Employee: David Viley

Injury No.: 10-050708

Dependents: N/A

Employer: Scholastic, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Ace American Insurance Company

Hearing Date: April 18, 2013

Checked by: HDF/scb

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 February 18, 2010
5. State location where accident occurred or occupational disease was contracted: Alleged Randolph 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:
See award
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Alleged right knee
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: David Viley

Injury No. 10-050708

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$458.40
- 19. Weekly compensation rate: \$305.60 per week for all benefits
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: - 0 -
- 22. Second Injury Fund liability: - 0 -
- 23. Future Requirements Awarded: None

Employee: David Viley

Injury No. 10-050708

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Viley

Injury No: 10-050708

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Scholastic, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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

Insurer: Ace American Insurance Company

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on April 18, 2013. Memoranda were submitted by April 26, 2013.

The parties stipulated that on or about February 18, 2010, the claimant, David Viley, was in the employment of Scholastic, Inc. (Scholastic) The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by Ace American Insurance Company. The employer had notice of the injury. A claim for compensation was timely filed. The claimant's average weekly wage was \$458.40 per week; the appropriate compensation rate \$305.60 per week for all benefits. No temporary disability benefits have been paid to the claimant to date nor has any medical aid been provided.

The only issue to be resolved by hearing is whether the injury arose out of and in the course of employment, including whether the claimant would have been equally exposed to the risk of injury outside of employment.

The claim against the Second Injury Fund is to remain open. The parties agreed to benefits as described in the attached "stipulation" which is incorporated herein in the event of a favorable ruling to the claimant on the issue presented.

FACTS

The claimant, David Viley, slipped and fell on the snow and ice covered parking lot, injuring his right knee, while walking to his car after finishing his shift at 9:00 pm for Scholastic on February 18, 2010.

Mr. Viley testified that he used a time clock on his computer to log in and out of work at the beginning and end of his shift and that he had logged out before he left the Scholastic building to walk to the adjacent parking lot. Mr. Viley testified that the parking lot had been plowed but that there were still patches of snow and ice in areas such as parking spaces where the snow had not been plowed. Mr. Viley was walking on a plowed or bladed area when he fell, although there was still snow and ice on the plowed area. In his deposition testimony, Mr. Viley described walking in the bladed area because it had been cleared. Mr. Viley said that the entire city had received the same amount of snow. Mr. Viley went on to explain that he was meticulous about his own snow

Employee: David Viley

Injury No. 10-050708

removal at home and that he completely and expertly shoveled and cleared his front porch, front porch steps, driveway, and sidewalk. Mr. Viley also mentioned the lighting in the parking lot as a potential factor in his fall but testified that other parking lots he frequented, such as the grocery store parking lot, had similar lighting conditions. Although Mr. Viley shopped for groceries and occasionally went to a restaurant to eat or went out to a basketball game and encountered parking lots when he did so, by far the majority of his parking lot walking was in conjunction with his work at Scholastic where he worked the five days of the work week and many Saturdays. Mr. Viley testified that the other parking lots he encountered were similar to the parking lot at Scholastic. Mr. Viley testified that when he fell his feet just went out from under him and he fell backwards.

APPLICABLE LAW

RSMo Section 287.020.3 (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.

There are two Missouri appellate court cases dealing with a fall on a snow and ice covered parking lot since the 2005 changes to the Missouri workers' compensation law.

In Hager v. Syberg's Westport, 304 S.W.3d 771 (Mo.App. E.D.2010) the Eastern District found a claimant's fall on an ice covered parking lot after leaving work and walking to his vehicle not compensable under Missouri's workers' compensation law where the claimant could have slipped and fallen on an ice covered parking lot anywhere; the court found that the resulting injury, therefore, came from a hazard or risk unrelated to his employment.

In Duever v. All Outdoors, Inc., 371 S.W.3d 863 (Mo.App. E.D.2012) the Eastern District held that the claimant's fall on an ice covered parking lot was compensable under Missouri's workers' compensation law since it occurred during the workday immediately after the claimant was providing instruction on the same ice covered parking lot to his employees on the importance of properly functioning tail lights on company trailers. The court specifically rejected a comparison to the Hager case stating that the claimant in Hager sustained his injury after work while the claimant in Duever sustained his injury on the job.

Employee: David Viley

Injury No. 10-050708

AWARD

The claimant, David Viley, has failed to sustain his burden of proof that the injury he sustained arose out of and in the course of employment. Mr. Viley failed to prove that it does not come from a hazard or risk to which workers would have been equally exposed outside of and unrelated to his employment in normal nonemployment life. The evidence reflects that the parking lot conditions when Mr. Viley fell were similar to those generally in the area in which he conducted his daily affairs with the exception of his own property which was maintained to a higher standard.

All other issues raised for resolution are hereby rendered moot, including the ruling on the objection in Mr. Porting's deposition which goes to the issue of control of the parking lot.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation