

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

Injury No. 14-006600

Employee: Judy West

Employer: Phoenix Home Care

Insurer: Missouri Merchants and Manufacturing Association

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Injury by accident arising out of and in the course of employment

We agree with the administrative law judge that employee met her burden of proving that she sustained an injury arising out of and in the course of her employment when she fell at work on January 31, 2014. We write this supplemental opinion to more fully address employer's argument that employee did not sustain her injuries "in the course of" her employment.

Prior to the 2005 legislative amendments to the Missouri Workers' Compensation Law, the courts generally held that "[a]rising out of" and "in the course of" employment are two separate tests, and both must be met before an employee is entitled to compensation," *Simmons v. Bob Mears Wholesale Florist*, 167 S.W.3d 222, 225 (Mo. App. 2005), and that "[i]n the course of employment" refers to the time, place and circumstances of the injury." *Cruzan v. City of Paris*, 922 S.W.2d 473, 475 (Mo. App. 1996). Given more recent Missouri case law, however, it is somewhat unclear to what extent a "two separate tests" analysis survives the 2005 amendments. Compare, for example, *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299, 305 (Mo. App. 2009), wherein the Missouri Court of Appeals, Southern District, stated that to prove an injury is sustained "in the course of" employment an employee must show that "the [injury] occurs within a period of employment at a place where the employee may reasonably be fulfilling the duties of employment" with *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509-10 (Mo. 2012), wherein the Supreme Court of Missouri suggested that, given the legislature's sweeping abrogation in § 287.020.10 RSMo of the entire body of case law interpreting the meaning of the phrases "arising out of" and "in the course of" employment, the post-2005 language of § 287.020.3(2) RSMo (which does not refer to the time or place an injury is sustained but rather emphasizes unequal exposure to work-related risks or hazards) now constitutes the exclusive test for determining what injuries "arise out of" and "in the course of" the employment. In other words, in light of the *Johme* decision, it is unclear whether (and to what extent) an employee who satisfies the unequal exposure test under § 287.020.3(2) RSMo would be required to

Employee: Judy West

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make any additional showing in order to demonstrate her injuries arose out of and in the course of the employment.

For purposes of this case, however, we wish to make clear that we are convinced that employee's injuries were sustained in the course of her employment under any measure. It is uncontested that employee's work for employer required travelling to the homes of employer's clients. It is further uncontested that, in recognition of this condition of her employment, employer paid employee for any travel over 30 miles. Under the *Harness* decision, employee's injuries would have been sustained in the course of her employment if they had been the product of a motor vehicle accident occurring during her compensated car ride to the client's home. Employer argues, in effect, that employee was not in the course of her employment from the time she exited her vehicle to the time she clocked in because she hadn't yet performed any work activities, comparing this case to *Henry v. Precision Apparatus, Inc.*, 309 S.W.3d 341 (Mo. App. 2010).

We are not persuaded. Employer's narrow definition of employee's work activities runs contrary to the uncontested circumstances of her employment, which required travel to and from the homes of employer's clients; moreover, the performance of employee's job duties necessitated navigating the dangerous condition of the premises where her work was to be performed. In light of these circumstances, the *Henry* decision is clearly distinguishable. The *Henry* employee, a mechanic, was "volunteering his assistance to a friend engaged in a personal vehicle repair" at the time he sustained his injuries, and thus was engaged in a wholly non-work-related activity. 309 S.W.3d at 341-42. Here, on the other hand, there is no evidence of any deviation from employee's essential work activity of travelling to the home of employer's client.

With regard to "clocking in," the Commission has previously held (and the court specifically indicated in *Henry*) that an employee does not necessarily have to be "on the clock" to sustain a compensable injury. See *Curtis Leible*, Injury No. 06-094098 (LIRC, March 5, 2010), affirmed without opinion by *Leible v. TG Mo. Corp.*, 331 S.W.3d 732 (Mo. App. 2011). See also the more recent case of *Scholastic, Inc. v. Viley*, 452 S.W.3d 680 (Mo. App. 2014), wherein the court upheld an award of benefits to an employee who fell while traversing his employer's parking lot at the end of the day.

We find that travelling to the homes of employer's clients was one of employee's essential duties for employer, and conclude that she was in the course of performing those duties when she fell. To accept employer's argument to the contrary would require us to artificially carve out a "zone of non-compensability" somewhere between a travelling employee's arrival at the premises and her embarking upon the duties to be performed there. We find no support for such a construct in the plain language of Chapter 287, in case law, or in sound public policy.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

Employee: Judy West

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The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 24, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

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

Given at Jefferson City, State of Missouri, this 29th day of May 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Judy West

Injury No.: 14-006600

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Phoenix Home Care

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

Additional Party: N/A

Insurer: Missouri Merchants and Manufacturing Association

Hearing Date: October 20, 2014

Checked by: MDL

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 31, 2104
5. State location where accident occurred or occupational disease contracted: St. Louis venue
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was entering a client's home when she slipped on some icy steps and fell.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Low back and right leg
14. Compensation paid to-date for temporary disability: 0
15. Value necessary medical aid paid to date by employer/insurer? 0
16. Value necessary medical aid not furnished by employer/insurer? N/A

Employee: Judy West

Injury No.: 14-006600

- 17. Employee's average weekly wages: \$525.00
- 18. Weekly compensation rate: \$350.00/\$350.00
- 19. Method wages computation: By stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable: TO BE DETERMINED

TOTAL: TO BE DETERMINED

Each of said payments to begin and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Judy West

Injury No.: 14-006600

Dependents: N/A

Before the
**Division of Workers’
Compensation**

Employer: Phoenix Home Care

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

Additional Party: N/A

Insurer: Missouri Merchants & Manufacturing Association

Checked by: MDL

PRELIMINARIES

A hearing was held on October 20, 2014 at the Division of Workers’ Compensation in the City of St. Louis, Missouri. Judy West (“Claimant”) was represented by Mr. Sam Eveland. Phoenix Home Care (“Employer”) and its insurer Missouri Merchants and Manufacturing Association were represented by Mr. Matthew Murphy. Due to the temporary nature of these proceedings, Mr. Eveland did not request a fee.

The parties stipulated that on or about January 31, 2014 Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Claimant’s average weekly wage at the time of injury was \$525.00 resulting in a rate of \$350.00 for both Temporary Total Disability (“TTD”) and Permanent Partial Disability (“PPD”) benefits; and Employer has denied the claim and paid no benefits.

The issues to be resolved are whether Claimant sustained an accidental injury arising out of and in the course of employment on or about January 31, 2014; and liability of Employer to provide future medical treatment.

SUMMARY OF EVIDENCE

On January 31, 2014 Claimant was employed by Employer as an LPN. Employer is in the business of providing home health services. Employer’s office is in Maryland Heights, Missouri. Claimant lives in Washington, Missouri.

On January 31, 2014, Claimant traveled from her home in Washington, Missouri to Fenton, Missouri to perform home health services for a patient. Claimant was scheduled to begin working at 7:00 P.M., but was running late, and didn’t clock in until 7:15 P.M. It had been icy and snowing that day. Claimant drove her own car, and it is an 83 mile round trip. Employer compensated Claimant for her mileage.

When Claimant arrived at the patient’s home, she got out of her car, and approached the residence which was a trailer. As she was going up some wooden steps that were hooked to the front door of the trailer, she slipped on some ice and fell, landing on her back and bottom. Claimant was not yet on the clock when she fell, and had not begun performing any of her patient care job duties at the time of the accident.

After Claimant fell, she remained on the ground for a while, and then was able to get into the residence. She was relieving another nurse, and normally they would have exchanged information about the patient, but because Claimant was late the other nurse left immediately. She asked the other nurse to look at her back, and it was red. The other nurse urged her to go to the Emergency Room.

Claimant finished her shift that evening. When she got home she tried taking Ibuprofen, but when she was incontinent and had blood in her urine, she went to the Emergency Room the next day.

At the emergency room Claimant gave a history of a work related fall. Claimant informed them she fell on concrete from a standing height and landed on her right shoulder, right hip, right knee, back and neck. X-rays and CAT scans were negative, and Claimant was diagnosed with low back pain, right hip pain, and a contusion of the knee. Claimant was prescribed medication.

Claimant treated at the Emergency Room again on February 6, 2014, and complained of blood in her urine. A CAT scan of the abdomen and pelvis revealed fractures of the right transverse processes of L1, L2, and L3. There was an enhancing lesion of the lower pole of the right kidney. Claimant was referred for additional treatment. Claimant has been unable to obtain additional treatment because Employer has denied the case, and her private insurance will not cover treatment because it happened at work.

Dr. Berkin examined Claimant on April 14, 2014, and prepared a report. Dr. Berkin opined the industrial accident that occurred in January, 2014 when Claimant slipped on icy steps and fell, striking her lower back was the prevailing factor in causing the lumbosacral strain/contusion with right sided radiculopathy and right transverse process fractures of the third, fourth, and fifth vertebrae. He opined Claimant has not yet reached maximum medical improvement, and she requires additional treatment. He recommended she be referred to an occupational medicine physician or to a psychiatrist for further evaluation.

Claimant currently has pain and tenderness to her lower back that shoots into her right leg. She has numbness and tingling to her right foot with muscle spasms that wake her from sleep. She cannot kneel, squat, sit for long periods, or walk for long periods of time. She has mild urinary incontinence, and has tingling to the fingers of her right hand. Claimant is requesting Employer provide her with additional treatment.

FINDINGS OF FACT AND RULINGS OF LAW

Claimant met her burden of proving she sustained an accident arising out of and in the course of employment on or about January 31, 2014, and she is entitled to, and Employer shall provide additional medical treatment to cure and relieve from the effects of that injury.

§281.120.1 RSMo.¹ States: “Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this

¹ All statutory reference to RSMo. 2014, unless otherwise stated.

chapter for personal injury or death of the employee by accident **arising out of and in the course of the employee's employment...** (Emphasis added).

§287.020 RSMo states:

2. 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 of precipitating factor.

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.

(Emphasis added).

§287.020.10 RSMo states: "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 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. 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo. 1999) and all cases citing, interpreting, applying or following those cases."

§287.020.5 RSMo states: "Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. 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."

There is a dispute as to whether the incident giving rise to this claim occurred in the course and scope of employment and whether the accident is compensable under the Missouri Workers' Compensation Law. There is no question an accident occurred. Claimant's fall was definitely an unexpected traumatic event identifiable by time and place of occurrence which produced at the time objective symptoms of an injury caused by a specific event during a single work shift. There is also no question the accident occurred on property that is neither owned nor controlled by Employer. Employer argues that the accident did not arise out of or in the scope of her employment because Claimant had not yet arrived at or clocked in for work.

Generally, an accident occurring while an employee is going to and from work is not compensable. Harness v. Southern Copyroll, Inc., 291 S.W.3d 299 (Mo.App. S.D. 2009) An exception exists, however, where the employer furnishes the employee's transportation, compensates the employee for use of his own vehicle, or pays the employee for travel time. See Reneau v. Bales Electric Company, 303 S.W.2d 75, 79 (Mo.1957). This exception, known as the Reneau doctrine, is generally interpreted to mean that an employee whose work entails travel away from the employer's primary premises is held to be in the course of employment during the trip, except when on a distinct personal errand. Harness at 305 (citations omitted)

The 2005 amendment to Section 287.020.5, abrogated the Reneau doctrine to the extent that injuries in a company-owned or subsidized automobile are not compensable while traveling from: (1) the employee's home to employer's principal place of business; or (2) the employer's principal place of business to employee's home. Unless one of these exceptions applies, the Reneau doctrine remains in effect to allow compensation. It is clear Claimant was not traveling from her home to Employer's principal place of business, or vice versa, and thus the case is compensable.

Claimant's work injury did not come from a hazard or risk unrelated to her employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. Claimant had no reason in her nonemployment life to leave her home on a winter's evening to drive 40 miles to a trailer to care for a sick patient. It was impossible for Claimant to perform her job duties unless she climbed the stairs to the client's home. Claimant's job duties required her to climb those specific stairs, in the specific condition they were in (old, wet and/or icy) at the specific time she climbed them.² This was not a hazard she encountered outside of work.

CONCLUSION

Claimant is entitled to, and Employer shall provide medical treatment in the form of a referral to an occupational medicine specialist or physiatrist of Employer's choosing. Employer shall provide such treatment as is deemed necessary by that specialist including, but not limited to office visits, diagnostic testing, physical therapy, medication, and additional specialist referrals if deemed necessary. In the event Claimant is taken off work, Employer shall furnish TTD benefits.

Made by: _____
MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

² Contrast the Findings in Miller v. Missouri Highway and Transportation Commission, 287 S.W.3d 681 (Mo. banc 2009), and Johme v. St. Johns Mercy Healthcare, 366 S.W.3d 504 (Mo. banc 2012) where the Court found equal exposure while simply walking on level ground and slipping off ones own shoe, respectively, with the findings in Duever, *supra*, distinguishing both Miller and Johme as the employee in Duever was exposed to a particular hazard (icy conditions).