

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

Injury No.: 05-096794
Medical Fee Dispute No.: 05-01767

Employee: Phillip Wood
Employer: Gann Asphalt, Inc.
Insurer: Auto Owners Insurance Company
Health Care Provider: Liberty Hospital

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

Scope of stipulations and disputed issues

At the outset of the hearing, after identifying the parties and their respective counsel, the administrative law judge recited the following as if it were a stipulation by the parties:

The case involves injuries on or about September 14, 2005, while the employee was in the employ of [employer] and sustained injuries by accident arising out of and in the course and scope of employment in Platte County, Missouri.

Transcript, page 3.

Moments later, the administrative law judge stated that "[t]he issues to be resolved today include whether the accident arose out of and in the course and scope of employment." *Id.* Before this Commission, employee does not argue that the parties intended to stipulate that employee's injuries arose out of and in the course of employment; for this reason, we do not believe the administrative law judge's initial confusing statements preclude us from resolving this dispute.

We would caution that, in the future, parties would be better served by ensuring that the record contains a complete, accurate, and precise statement of the parties' stipulations as well as the issues in dispute.¹ This is because the administrative law judge and this

¹ Typically, the administrative law judge will ask the parties to confirm whether the stipulations and issues have been correctly recited; however, this did not occur in this case.

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Commission are duty-bound to both give effect to the parties' stipulations and confine our review to the particular issues the parties identify as in dispute, see, e.g., *Hutson v. Treasurer of Mo.*, 365 S.W.3d 269 (Mo. App. 2012), *Boyer v. National Express Co., Inc.*, 49 S.W.3d 700 (Mo. App. 2001), and *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991).

*Injury arising out of and in the course of employment*²

Section 287.020.3(2) RSMo 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.

On September 14, 2005, employee wrecked his motorcycle in employer's parking lot while executing a turn in the process of attempting to position his motorcycle so that he could wash it using employer's power washer.³ He claims that the wrist fracture he sustained in that event should be found compensable as a workers' compensation injury. In his brief, employee does not cite or discuss the foregoing statutory test. Instead, he argues that, because he was a new employee, he reasonably understood from the conduct of his coworkers that washing his motorcycle while on the clock was permissible, and that his injuries should be deemed compensable because he thus remained within the "course and scope" of his employment when he wrecked his motorcycle. Employee fails to cite statutory authority or case law that would suggest a "course and scope" showing is sufficient (or even necessary, for that matter) to support an award of benefits. Nor does employee acknowledge or cite the line of recent reported decisions applying § 287.020.3(2).

In the case of *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the court described the test under § 287.020.3(2) as consisting of two steps:

² Although the administrative law judge framed the issue as whether employee sustained an *accident* arising out of and in the course of the employment, the appropriate statutory test is whether employee's *injuries* arose out of and in the course of the employment. The distinction is not merely academic where both "accident" and "injury" enjoy their own specific definitions under Chapter 287, and where we are required under § 287.800.1 RSMo to construe those definitions strictly.

³ Employee suggested, in his brief and at oral argument, that he might have been moving his motorcycle *anyway*, regardless of his desire to wash it, because he'd been asked by coworkers to move the motorcycle out of the way. We are not persuaded to so find, because employee forthrightly admitted at hearing that the accident happened as he was turning his motorcycle to position it behind another coworker's vehicle for the purpose of washing it.

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[T]he application of [§ 287.020.3(2)(b)] involves a two-step analysis. The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

Id. at 467.

Turning back to the case at hand with the foregoing in mind, we first ask whether employee's injuries came from a hazard or risk *related* or *unrelated* to his employment. We note that, at oral argument, employee advanced a somewhat different theory than that set forth in his brief. Citing *Dorris v. Stoddard County*, 436 S.W.3d 586 (Mo. App. 2014), employee asks the Commission to find that he wrecked his motorcycle owing to a dangerous condition at work; namely, the existence of water accumulating on the surface of the parking lot as coworkers washed their own vehicles. Employee, however, fails to cite the transcript for evidence to support a finding that water was collecting on the surface of the lot, or that this condition, if it existed, was unusually hazardous. Nor does employee cite any evidence that would support a finding that water on the surface of the lot ultimately played any role in the motorcycle accident.

We cannot and will not search the transcript for evidence to make employee's argument. However, a cursory review of employee's own testimony reveals that he merely acceded to his attorney's leading questions, posed on redirect examination, suggesting that his motorcycle tires were wet and that he "thought" this "played a role" in the motorcycle falling over. *Transcript*, page 47. This appears to have been the first time a theory of wet tires causing the accident was advanced on the record; at his deposition, employee did not identify wet tires as causing the motorcycle accident.

After careful consideration, we are not persuaded to make a finding that water on employer's parking lot played any role in the motorcycle accident. Instead, we find that the risk or hazard from which employee's injuries came was simply that of wrecking his motorcycle while executing a turn in order to position his motorcycle to be washed. Although employee asks us to find that washing his motorcycle was sufficiently related to his work because other employees were doing it and employee was new to the workplace, this theory stands in contrast to employee's own testimony on the subject. At both the hearing and in his deposition, employee admitted that a coworker told him it was only okay to wash his motorcycle provided he wasn't "caught." In other words, to

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the best of his knowledge, employee understood that his employer would not approve of his washing his personal vehicle during work time—even though other coworkers were doing so.

Given this circumstance, we cannot conclude that employee's injuries came from a hazard or risk *related* to the employment, and we must proceed to the question whether employee's work involved an unequal exposure to the risk of wrecking his motorcycle while executing a turn.

In that regard, we find instructive the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012), wherein the employee, a billing representative, fell while making coffee in her employer's kitchen. 366 S.W.3d at 506-07. The *Johme* employee's fall resulted from turning her ankle and falling off her shoe. *Id.* The Court denied the claim because "[n]o evidence was presented to show that [her] 'normal nonemployment life' exposed her to a lesser risk of turning, twisting her ankle, or falling off her shoe as compared to the risk she faced the day she fell in the workplace."⁴

With regard to the second, equal exposure step of the analysis, we conclude that *Johme* controls the result herein. Employee's job for employer was that of a general laborer. Typical duties included cleaning parking lots for resurfacing, spreading tar, or cleaning the shop. Nothing about this employment required employee to operate a motorcycle, and there is no evidence on this record to suggest that the employment exposed employee to this risk to a degree unequal to the exposure faced by workers outside of and unrelated to the employment in normal nonemployment life.⁵ In other words, employee was not injured *because* of work, but rather merely *while* he was at work. See *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315, 320 (Mo. App. 2012).

In sum, employee's wrecking his motorcycle while executing a turn is, in our view, as unrelated to the employment as was the *Johme* employee's turning her ankle and falling off her sandal. Consequently, following *Johme*, this case must be denied.

Decision

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

⁴ Notably, the *Johme* court did not overrule *Pile* or even explicitly distinguish it, but instead proceeded directly to the equal exposure analysis because "[the employee's] injury was not *caused* by making coffee," (emphasis in original) and there was no need to discuss whether the *actual* causative risk or hazard (turning one's ankle) was related to employee's work as a billing representative—it clearly was not. *Johme*, 366 S.W.3d at 511-12. Where our highest Court declined to overrule *Pile* (upon which the Commission and lower court expressly relied) we do not read *Johme* to diminish the precedential value of the *Pile* two-step analysis.

⁵ If, for example, employee's job for employer was that of a motorcycle courier, our equal exposure analysis herein might be different.

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The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 23, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 1ST day of August 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Phillip Wood Injury No. 05-096794
Dependents: N/A
Employer: Gann Asphalt, Inc.
Insurer: Auto Owners Insurance Company
Additional Party: N/A
Hearing Date: May 5, 2015 Checked by: MSS/pd

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 September 14, 2005
5. State location where accident occurred or occupational disease was contracted: Riverside, 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: During the course and scope of Employee's employment, he was moving his motorcycle and in the process was injured when the motorcycle fell.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Nature and extent of any permanent disability: None
15. Compensation paid to date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0
17. Value necessary medical aid not furnished by employer/insurer? \$71,462.67
18. Employee's average weekly wages: \$444.38
19. Weekly compensation rate: \$296.25/\$296.25
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable from the Employer: \$0

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phillip Wood Injury No. 05-096794
Dependents: N/A
Employer: Gann Asphalt, Inc.
Insurer: Auto Owners Insurance Company
Additional Party: N/A
Hearing Date: May 5, 2015 Checked by: MSS/pd

On May 5, 2015, the Employer and the Employee appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Phillip Wood, appeared in person and with counsel, Mr. Mark E. Kelly. The Employer and Insurer appeared through their attorney, Mr. Mike Halloran. The Health Care Provider, Liberty Hospital, appeared by Mr. Michael Ternus. The evidence at trial consisted of the live testimony of Phillip Wood and Brian Gann, together with all documentary evidence set forth.

STIPULATIONS

The parties stipulated to the following:

1. On or about September 14, 2005, Gann Asphalt, Inc., was an employer operating under the provisions of the Missouri Workers' Compensation Law;
2. On or about September 14, 2005, Phillip Wood was an employee of Gann Asphalt, Inc., and was working under the provisions of the Missouri Workers' Compensation Law;
3. All parties stipulated to venue in Kansas City, Missouri for purposes of a final hearing to be held;
4. All parties stipulated that claimant's average weekly wage was \$444.38 and the appropriate compensation rate for weekly benefits is \$296.25 for temporary total and \$296.25 for permanent partial disability benefits;
5. All parties stipulated the employee suffered an injury arising out of the fall;
6. All parties stipulated that the employer had notice of the alleged injury and the claim for compensation was filed within the time prescribed by law;
7. All parties stipulated that Employee's claim for compensation was filed within the time allowed by law; and

8. All parties stipulated that if the claim is found compensable, Employer is liable for temporary total disability benefits from September 14, 2005, through May 30, 2006, and November 13, 2008, through January 27, 2009, which represents 47 5/7 weeks.

ISSUES

The issues to be determined by the hearing are as follows:

1. Whether on or about September 14, 2005, Employee sustained an accident arising out of and in the course and scope of his employment;
2. Whether claimant is entitled to past medical benefits of \$71,462.67;
3. Whether claimant is entitled to future medical care and treatment as a result of the alleged injury;
4. Whether Employer is liable for nature and extent of employee's disability;
5. Whether Employer is liable for disfigurement; and
6. Liberty Hospital's Application for Direct Payment

FINDINGS OF FACT AND RULINGS OF LAW

The Claimant testified on his own behalf and offered the following exhibits into evidence, all of which were admitted:

Claimant's Exhibits

- A. Medical Records of Liberty Orthopedics
- B. Medical report of Dr. Michael Poppa
- C. Medical Records of Liberty Hospital
- D. Medical Records of Apria
- E. Medical Records of North Kansas City Hospital
- F. Summary of Medical Bills
- G. Not offered
- H. Not offered
- I. Not offered
- J. Photograph

The Employer/Insurer offered the following exhibits into evidence, all of which were admitted:

Employer/Insurer's Exhibits

1. Photograph of motorcycle
2. Photograph of motorcycle
3. Photograph of motorcycle

4. Photograph of parking lot looking to the east
5. Photograph of parking lot looking to the west
6. 2005 Google Aerial View
7. 2012 Google Aerial View
8. Medical Report of Dr. James Stuckmeyer
9. Medical Records Reviewed by Dr. James Stuckmeyer
10. Deposition of Phillip Wood dated January 30, 2006
11. Deposition of Jim Eaton

Claimant did not object to exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9. The Court admitted both exhibits into evidence. Claimant generally requested court ruling on any objections contained in Exhibits 10 and 11. The Court admitted Exhibits 10 and 11 subject to any objections contained in the transcript. After reviewing the testimony in Exhibits 10 and 11, all objections therein are deemed overruled.

Claimant testified live. He testified that he completed his sophomore year in high school and obtained his GED. He was born on November 14, 1981. He currently works at Nor-Man as a warehouse supervisor.

Claimant testified that he started at Gann Asphalt, Inc., on September 2, 2005. He hired on as a laborer and did what he was told to do. Gann Asphalt, Inc., essentially resurfaces roads, driveways and other items with asphalt. His job included sweeping and blowing dirt off of the work area.

Using Employer and Insurer's Exhibit 6, Claimant described the location of Gann Asphalt. He described the building as on the very end of the building on the right hand side of the photograph. He described other companies sharing the building.

Using Employer and Insurer's Exhibit 7, he described the location of Gann Asphalt and further testified to the location of its equipment. The equipment included dump trucks, trailers and other equipment he did not recall or did not know about. He testified that he normally arrived at his employer's place in the morning, leaving the lot in company trucks. He testified that Gann Asphalt stored the asphalt elsewhere.

He started that morning at 8:00 a.m. The owners, Brian and Joe Gann, were not present when Claimant arrived. Claimant testified the owners were elsewhere. Claimant testified that the company was not ready to go that day, but that they were waiting on Brian and Joe.

One of the employees was working on a truck. Other employees started washing the equipment using a power washer. He arrived at work on his motorcycle, the first day he drove it to work. He parked the motorcycle near a boat at Gann Asphalt, but it blocked a garage door, and they told him to move it. He moved it to the other side of the garage. He had to move the motorcycle again because it was in the way. It was when he was moving the motorcycle that the accident occurred. He testified that he was told to park his motorcycle in a different lot before they left for the job.

At the time of the accident, he was on the clock. He went to put his motorcycle behind the line of vehicles in order to power wash the motorcycle. As he turned his motorcycle to the

left, the handlebars turned to the left trapping his left forearm between the handlebar and the gas tank. However, the vehicle fell onto its right side as the wheel skidded out from under him. At most, his vehicle moved a foot or two from where the turn began.

Claimant testified that the Employer and Insurer's photographs do not show the area where his arm got caught. After he fell, he got up and then went to the side of the parking lot and sat down. He did not move the motorcycle. He testified that the accident occurred even with the dumpster depicted in the photographs. He described the scrape marks as approximately 20 feet in length but were not caused by the motorcycle. He denied any slide of the motorcycle. Later, he testified that the accident occurred past the dumpster a little bit, but not too far.

Claimant testified that the dumpster did not appear in Employer and Insurer's Exhibit 7. He was traveling from right to left in the photograph. He testified that Gann Asphalt had equipment lined up further than the dumpster.

Claimant testified that someone told him his wrist was broken. No one from Gann Asphalt offered to take into the hospital, so he called his mom. Employer did not provide an ambulance or assistance. He waited 30 minutes for his mother to arrive and take him to the hospital.

In the office, Joe was already there, with Brian just arriving. Brian did not offer treatment. His mother took him to North Kansas City Hospital. They referred Claimant to Dr. Santosh George, an orthopedic surgeon. Brian Gann came to the emergency room but did not offer treatment and did not discuss work. He claimed that Brian asked if Claimant planned to file a workers' compensation claim and that Claimant needed to do right.

Claimant testified that Exhibit J was a picture of his arm with the fixator attached. He developed infection at the wound, with "stuff" leaking out of the pins. He also described pain associated with this condition. The doctors treated his wrist for infection. Were this case found compensable, I would have assessed 8 weeks disfigurement.

He developed osteomyelitis in 2008, requiring another surgery. He has not used antibiotics since his release from Dr. George in 2009. He testified to his wrist, mid-forearm and elbow scar. Claimant's left wrist appeared swollen between the thumb and the forefinger with scarring at the wrist. Approximately mid-forearm, there appeared to be a slight depression with scarring. Claimant testified that he developed left elbow scarring following surgery for the osteomyelitis.

Since his release from care, he described his arm sensation is different. He is left-hand dominant, and cannot write for a long time. He has difficulty typing for any length of time and has difficulty picking up a bowling ball. His hand cramps if he uses it for a long time. He no longer bowls. He bowled a little before the accident. He cannot describe anything that he can no longer do but claims that he cannot do things as well or as long as before.

On cross-examination, Claimant admitted that his employer provided an advance on his salary in order to get his motorcycle from the mechanic. Approximately one month before working for Gann Asphalt, he took his motorcycle to the mechanic because it would stop after a

short time. He told his employer that he asked for the advance in order to get it is motorcycle for transportation to work. Before that, his girlfriend took him to work.

The Employer and Insurer referenced the deposition of Claimant taken on January 30, 2006. According to Claimant, the accident occurred:

“We were – – we were all waiting for, you know, our guys to get back so we could go do something. My foreman was fixing our trucks, and so I didn’t have nothing left to do, so I went to wash my bike. Well, in the process of moving it, it slid out from under me.”

(Deposition of Philip R. Wood, page 10, lines 13-18). At the time, his task involved getting the trucks ready and washing them. (Deposition of Philip R. Wood, page 12, lines 20-25, page 13, lines 1-3).

Contrary to his testimony, Claimant testified that he moved his bike earlier, because it was in the wrong spot. However, when he parked his bike in the new spot, he did not move it until he moved the bike to wash it. (Deposition of Philip R. Wood, page 20, lines 1-14). Claimant cannot specifically recall if he asked permission to wash the bike.

He admitted that while waiting for Brian and Joe, his job duties involved getting the trucks ready for work that day. He thinks that he asked Chad if he could wash his bike, but cannot specifically recall. He never asked Joe or Brian for permission to wash his personal vehicle on company time. He admitted that an employee told him he did not think it would be a problem, but just do not let them catch you. He testified that he was referencing Joe and Brian. However, he denied that he considered that statement as a prohibition from the employer.

He testified that he never used his personal vehicle to go directly to or from a job site; rather, he would simply show up for work and travel to a site in company trucks.

He claims that he ran out of work, and therefore went to stage his motorcycle. He denied speeding or showing off, but admitted the motorcycle had scrapes on the side.

Brian Gann testified for the employer and insurer. Mr. Gann denied any use of personal vehicles to and from work sites. He described the normal start time at 7:00 a.m., trying to get on the road by 7:15 a.m. On this particular day, they were waiting on another subcontractor to finish the work before arriving. Joe and Brian went to the jobsite to check on the status.

Brian loaned Claimant money to get his motorcycle out of the mechanic’s shop. He told Brian that he needed the vehicle as a second vehicle. His girlfriend had just given birth, and that she had to wake and dress the baby to take him to work.

Before Joe and Brian left, Brian gave specific orders to his employees to white and clean out trucks and prepare them for the job that day. He specifically told Claimant to wiping clean out the trucks. He anticipated that they would have work to do while Joe and Brian were away.

He received a call about 10 minutes away from returning to the lot about the accident. When he pulled into the lot, the trucks were still staged. They did not extend beyond Gann

Asphalt's boundaries. Using Exhibit 7, Mr. Gann testified to the extent of the parking lot used by Gann Asphalt, and denied any equipment beyond the area. He testified that he went to where the motorcycle was laying and picked up the motorcycle and walked it into the garage. He testified that the gouges shown on Exhibit 5 lead right up to the motorcycle and that the gouges appeared to have been made by the motorcycle, based upon their location and the location of the motorcycle. He measured the gouges, testifying that they were approximately 60-75 feet in length. He testified that the workers were still working on the company trucks when he returned.

When he returned, Claimant was in the office talking to the office manager. Brian offered to take Claimant to the hospital, but Claimant refused saying that he was waiting on his mother. Brian went to the emergency room that evening to check on Claimant's well-being.

On cross-examination, Mr. Gann estimated the length of the building at 300 feet, but he never measured the building and simply guessed at the length. He admitted he did not take photographs of the motorcycle laying on the ground in relationship to the gouges, and admitted he did not take photographs showing measurement of the gouges.

Mr. Gann finally testified that his opinion as to the relationship between the gouges and the accident were based on the relationship of the motorcycle and gouges when he found them.

Medical Evidence

Mr. Wood was seen in the emergency room of the North Kansas City Hospital following the accident on September 14, 2005. The emergency room records reflect Mr. Wood had an on-the-job injury when a motorcycle he was riding fell, injuring his arm, knee and left elbow and wrist. The emergency room records indicated Mr. Wood was in moderate pain and had suffered multiple abrasions as well. X-rays were ordered and revealed a comminuted, displaced fracture of the distal radius with articular involvement. Mr. Wood was seen by Dr. Santosh George for an orthopedic consultation in the emergency room. Mr. Wood was subsequently transferred to Liberty Hospital for medical care. Dr. George noted Mr. Wood presented to the emergency room with a deformity of the left wrist and abrasions to his bilateral upper extremities. Dr. George reviewed the X-rays and recommended a closed reduction with possible percutaneous pinning and application of an external fixator for stabilization.

Mr. Wood underwent surgery on September 15, 2005 at Liberty Hospital, consisting of a closed reduction, percutaneous pinning of the left radial styloid fracture and application of an external fixation device. He received follow-up care with Dr. George at Liberty Orthopedics on September 29 and October 4, 2005. On October 17, 2005, Dr. George noted Mr. Wood was having difficulty keeping the pin sites cleaned, but on examination, the pin sites were clean and there was minimum build-up of necrosis. Dr. George recommended continuing the fixator for an additional ten days as long as the pin sites remained clean. On October 27, 2005, Dr. George recommend removal of the external fixator; however, he noted the pin sites showed signs of erythema and peripheral purulence, particularly the pin sites over the metacarpal. Dr. George scheduled the pin removal in the operating room in order to clean out the pin sites. The records reflect on October 31, 2005, Mr. Wood was having purulente drainage from the external fixator proximal pins. On November 1, 2005, Mr. Wood underwent removal of the external fixator pins and irrigation and debridement of the pin sites.

Mr. Wood saw Dr. George on November 10, 2005, and Dr. George noted the pin sites were clean, dry and intact, except for the proximal sites where pins for the mid-shaft of the radius went in. There were two areas of erythema at those sites. Dr. George recommended Mr. Wood take the antibiotics previously prescribed.

Mr. Wood did relatively well until August, 2006. Mr. Wood returned to Dr. George on August 29, 2006 and reported a few days prior to the examination, Mr. Wood noticed erythema around the area of the external fixator incision. The area of erythema got slightly bigger and there was even an associated pimple that spontaneously resolved. Dr. George ordered x-rays which were apparently negative for any deep abscess or any osseous pathology. Dr. George prescribed Keflex and ordered him to return for follow up. Mr. Wood returned on September 5, 2006. Unfortunately, Mr. Wood had been unable to take the antibiotics, as his wife had misplaced the prescription. Upon examination, Dr. George noted peripheral cellulitis and a pustular head. Dr. George incised the area and prescribed Keflex for the infection. Mr. Wood returned on September 12, 2006, for a follow up examination. A culture taken a week prior did not grow any organisms. Dr. George released him to activities as tolerated and to follow up on a PRN basis. He also gave Mr. Wood "explicit" instructions to let him know if he has any areas of breakdown of the infection as he did before so they could be aggressive about treating it rather than waiting for the infection to become more involved.

Unfortunately, the infection returned and he also developed an area of concern around his elbow. Mr. Wood was seen by Dr. George on October 16, 2006. Dr. George noted the right forearm had a "very large" amount of swelling and what appeared to be a subcutaneous abscess. On the left elbow, Dr. George noted a subcutaneous abscess at the insertion of the tricep tendon. Mr. Wood had a long standing history of the wound not healing and Dr. George recommend formal irrigation and debridement of both the left elbow as well as the left forearm. He also felt it was reasonable to debride the area of the radius and even try to get a burn sample in order to send it for cultures. Dr. George felt it was possible that Mr. Wood had developed a subtle osteomyelitis. Dr. George was concerned of the subsequent wound development of the elbow as it raised suspicion that a resistant variety of bacteria may be harbored. Accordingly, Dr. George brought Mr. Wood to the hospital for chronic drainage and erythema of the elbow. Dr. George performed formal debridement and irrigation in the operating room. The records reflect there was purulence in the forearm wound deep to the bone.

Mr. Wood was seen by Dr. Raghavendra Adiga, an infectious disease doctor, while in the hospital. Dr. Adiga noted there was gram-positive cocci in the wound gram stain causing a rather high suspicion for a staphylococcal or streptococcal infection. Dr. Adiga recommended intravenous antibiotic therapy for four weeks. He also noted if Mr. Wood had an osteomyelitis or a deep infection close to that, oral antibiotic therapy may be suboptimal. He felt it was possible suboptimal antibiotic therapy may result in frequent ongoing drainage and eventual need for more aggressive surgery. Therefore, Dr. Adiga recommended outpatient intravenous antibiotic therapy. On follow up with Dr. George on October 26, 2006, he noted the incision was clean, dry and intact. Dr. George recommend Mr. Wood continue with the antibiotics. Mr. Wood did relatively well until November 4, 2008. He returned to Dr. George due to shooting pains in his forearm for the prior several weeks. X-rays were ordered which revealed the left forearm demonstrated subtle areas of lucency in the mid-shaft of the radius consistent with where the previous abscess was present. Dr. George was uncertain whether it represented a subtle osteomyelitis and recommended an MRI of the left arm to evaluate it further.

Mr. Wood saw Dr. Adiga on November 9, 2006, who noted the prior cultures grew out Methicillin-Sensitive Staphylococcus Aureus. He also noted Mr. Wood was discharged to his home on intravenous Cefazolin every eight hours and was tolerating that well until the present time. Dr. Adiga's impression was complicated deep seeded Staphylococcus Aureus infection of the left forearm with prior history of fracture fixation and evidence of debridement of bone fragments in the areas that were recently removed. He reported Mr. Wood had received outpatient IV antibiotic therapy through a catheter line. Mr. Wood had been on intravenous antibiotics for approximately three weeks which was long enough for a deep seeded infection. However, Dr. Adiga did not feel Mr. Wood could completely stop his antibiotic therapy and recommended three more weeks of oral Keflex.

Mr. Wood underwent an MRI on November 13, 2008, which revealed an abnormal appearance involving the distal two-thirds of the left marrow cavity suggestive of osteomyelitis with possible intraosseous abscess relation. There was also an impingement within the overlying soft tissues which the radiologist felt was possibly related to fibrosis from the previous surgery.

Following the results of the MRI, Mr. Wood underwent surgery on December 9, 2008, by Dr. George consisting of debridement of the mid-shaft radius osteomyelitis with the creation of a cortical window. He was seen post-operatively on December 29, 2008. He was placed on IV antibiotics and given instructions to protect the area risk for a pathological fracture through the area of the cortical window. He was placed in a cock-up wrist brace and ordered to follow up in six weeks. Mr. Wood returned on January 27, 2009. Mr. Wood continued on IV antibiotics and follow up care with Dr. Adiga. In Dr. George's opinion, Mr. Wood had been noncompliant and missed three appointments with Dr. Adiga regarding the wound care. X-rays revealed a faint lucency in the areas of the fracture but the overall fracture appeared to be healing "not unreasonably." Dr. George noted Mr. Wood had a PICC line in place and he made calls to the home health services to facilitate removal of the PICC line. Dr. George released Mr. Wood to return on an as-needed basis.

Expert Report of Michael J. Poppa, D. O., M.B.A.

Dr. Poppa performed an independent medical evaluation. After performing a physical evaluation and reviewing all of the medical records, Dr. Poppa assessed traumatic contusion/comminuted displaced fracture of the distal radius with articular involvement, ulnar styloid fracture, post-op bacterial colonization-staph aureus, probable osteomyelitis secondary to complicated left forearm deep seated staphylococcus aureus infection, subcutaneous abscess at the insertion of the triceps tendon, impingement involving the soft tissue of his left forearm distal two-thirds and chronic pain. Dr. Poppa stated as a result of the accident, Mr. Wood had undergone four surgical procedures including: closed reduction with percutaneous pinning of his left radial styloid fracture and application of an external fixation device; surgical removal of the external fixator pins with irrigation and debridement of the pin sites; additional surgical debridement and irrigation involving his left elbow with purulence in the forearm wound deep to the bone; and debridement of the mid-shaft radius osteomyelitis with the creation of a cortical window.

Dr. Poppa felt all the medical treatment, including the subsequent infections, were a direct or natural consequence of his September 14, 2005, injury. Furthermore, all treatment Mr.

Wood received was reasonable and necessary as a direct result of his accident. Dr. Poppa reported Mr. Wood has limited functional capabilities involving his left elbow/forearm. He recommended he avoid working in cold environments or in high temperatures. He also recommended sunscreen and/or wear protective clothing over the residual soft tissue scarring. Based upon the severity of his injuries and significant post-operative residuals, Dr. Poppa felt Mr. Wood had suffered an overall 35% permanent partial disability of his right upper extremity between his elbow and shoulder at the 222 week level.

Expert Report of James A. Stuckmeyer, M.D.

Dr. Stuckmeyer also performed an independent medical evaluation in this case. His assessments of Mr. Wood's conditions were similar to Dr. Poppa's opinions. However, Dr. Stuckmeyer also added he believed there was a possibility that the deep seated Staph aureus infection could recur. He also noted Mr. Wood had limitations in his range of motion at both the level of the elbow and at the level of the wrist, all consistent with the initial fracture and subsequent extensive treatment provided. Dr. Stuckmeyer also felt Mr. Wood had a positive Tinel's sign over the median nerve, and may be developing post-traumatic, post-surgery carpal tunnel syndrome. He recommended electrodiagnostic studies to rule out carpal tunnel syndrome. As it relates to disability, Dr. Stuckmeyer felt Mr. Wood had suffered a 20% permanent partial disability at the level of the elbow.

FINDINGS

The accident occurred on September 15, 2005. The changes to the Missouri Worker's Compensation Act took effect on August 28, 2005. The new statute defines injury as an injury that arises out of and in the course of employment. MO. REV. STAT. §287.020.3. The statute specifically 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.

MO. REV. STAT. §287.020.3.

In Missouri, Claimant bears the burden of proof to show the injury is compensable. *Johme v. St. John's Mercy Health Care*, 366 S.W.3d 504, 509 (Mo. banc 2012). Furthermore, the legislative changes left no doubt that the provisions of MO. REV. STAT. §287.020.3 are strictly construed. *Johme v. St. John's Mercy Health Care*, 366 S.W.3d at 509. Finally, the

legislature intended 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 employment.” *Johme v. St. John’s Mercy Health Care*, 366 S.W.3d at 509. Therefore the 2005 statutory revisions including MO. REV. STAT. §287.020.3 must control any determination whether the injury arises out of and in the course of employment. *Johme v. St. John’s Mercy Health Care*, 366 S.W.3d at 509.

Employer and Insurer acknowledged that Claimant’s injury occurred at his workplace and represented the prevailing factor causing the injury. This Court does not have to evaluate this case in context of MO. REV. STAT. §287.020.3(2)(a). The issue for the court is whether the accident arose “out of” Claimant’s employment.

MO. REV. STAT. §287.020.3(2)(b) provides that to be compensable, the injury cannot 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. In this particular case, any movement of this particular motorcycle and the subsequent fall occurred due to some condition of his employment. The injury occurred while Claimant performed a personal task to move his motorcycle to wash the unit.

In *Miller v. Missouri Highway & Transp. Comm’n*, 287 S.W.3d 671 (Mo. 2009), the Claimant experienced a popping of his knee followed by pain, while walking briskly at work. In *Miller*, the parties did not dispute that anything about the work caused the injury. In finding against Claimant, the court stated:

The meaning of these provisions is unambiguous. An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. The injury here did not occur because Mr. Miller fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment. Under sections 287.020.2, .3 and .10 as currently in force, that is insufficient.

Miller v. Missouri Highway & Transp. Comm’n, 287 S.W.3d 671, 674 (Mo. 2009).

The Supreme Court also rejected compensability in *Johme*. In *Johme*, Claimant twisted and turned her ankle making coffee. The Court held that the issue involves whether the cause of her injury, turning and twisting her ankle and falling off her shoe, had a causal connection to her work activity other than the fact that occurred in the office’s kitchen wall making coffee. She did not produce evidence showing that she was not equally exposed to the cause of her injury, i.e. turning, twisting her ankle, or falling off her shoe while in her workplace making coffee, than she would have been while outside her workplace in her normal nonemployment life. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 511 (Mo. 2012). The Court held that Claimant failed to meet her burden to show the injury was caused by a risk related to her employment activity as opposed to a risk equally exposed to in normal nonemployment life. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 511 (Mo. 2012).

In *Pope v. Gateway to West Harley-Davidson*, 404 S.W.3d 315 (Mo.App. E.D. 2012), Claimant fell downstairs at his employer's business and dislocated and fractured his right ankle. The appellate court found that the evidence supported the accident occurred in the course and scope of his employment, when he fell down the stairs. His injury was causally connected to work since he was on the second floor of a showroom after moving a motorcycle from the sales lot into the upper show room, and then going down the stairs to check with his supervisor in the service department before clocking out in leaving. Claimant was required to descend the staircase connecting the upper and lower showrooms, while wearing work boots and carrying his work-required home. The *Pope* Court distinguished these facts from *Miller* and *Johme*. 404 S.W.3d at 320.

Unlike the *Pope* case, Claimant's movement of his motorcycle did not have any connection with his work at Gann Asphalt, Inc. Claimant worked as a laborer, resurfacing roads, driveways and other items with asphalt, including sweeping and blowing dirt off of a work area. His motorcycle did not have any connection with work.

The evidence supports this finding. I find that Claimant's testimony is not credible as to the facts leading up to the accident. This represented Claimant's first day with his motorcycle after having repairs. His testimony at trial that he had to move his motorcycle to park in a different lot contradicts his deposition testimony in 2006. In 2006, Claimant admitted he moved his motorcycle to wash it. At trial, Claimant testified that he moved the motorcycle to park it in the appropriate lot. In addition, Claimant discussed washing his motorcycle at trial. Claimant's change in the events leading up to the accident damaged his credibility.

Claimant also denied allegations of his speed causing the accident. Claimant denied any gouges in the asphalt leading to his motorcycle supporting his theory. However, Mr. Gann testified that these marks and gouges led to the location of the motorcycle. He testified that the marks and gouges measured approximately 75 feet, and photographs of the motorcycle show scrape marks consistent with the gouges.

Finally, Claimant admitted on cross-examination that a co-employee told him he did not think it would be a problem to wash his bike, but also told him not to let Joe or Brian catch him. Despite his denial that this represented prohibition from the employer, clearly Claimant knew or should have known his employer prohibited personal tasks while in the employment. It is irrelevant that there may be water on the parking lot that contributed to the slide.

Based upon my findings that Claimant's injuries did not "arise out of" employment, they are not compensable under Missouri Workers' Compensation Law. As a result of the above rulings, the Direct Medical Fee Dispute filed by Liberty Hospital is moot.

Made by: _____

Mark S. Siedlik

Administrative Law Judge
Division of Workers' Compensation