

**TABLE OF CONTENTS**

Table of Contents.....2

Table of Authorities.....3

Jurisdictional Statement.....4

Statement of Facts.....5

Point Relied On.....7

Argument.....9

Conclusion.....16

Proof of Service.....17

Certificate of Compliance.....18

## TABLE OF AUTHORITIES

<u>DeVille v. Hiland Dairy, Co.</u> , 157 S.W.3d 284, 287 (Mo. App. S.D. 2005).....	7, 12
<u>Hall v. Fru Con Construction Corporation</u> , 46 S.W.3d 30 (Mo. App. E.D. 2001).....	7, 9
<u>Hampton v. Big Boy Steel Erection</u> , 121 S.W.3d 220 (Mo. banc 2003).....	7, 9, 14
<u>James T. Johnson v. Hertz Corporation</u> , Injury No.: 05-140664 (LIRC, 2007).....	7, 13 - 14
<u>Kent v. Goodyear Tire and Rubber Co.</u> , 147 S.W.3d 865 (Mo. App. W.D. 2004).....	7, 14
<u>Kristen Norman v. Phelps County Regional Medical Care</u> , Injury No.: 06-001823 (LIRC, 2007).....	7, 11 - 12, 13
<u>Lawson v. Ford Motor Company</u> , 217 S.W.3d 345 (Mo. App. E.D. 2007).....	7, 14, 15
<u>Miles v. Lear Corporation</u> , – S.W.3d —, WL 1862317 (Mo. App. E.D. 2008).....	7, 12
<u>Patterson v. Engineering Evaluation Inspections, Inc.</u> , 913 S.W.2d 344 (Mo. App. E.D. 1995).....	8, 15
<u>Simmons v. Bob Mears Wholesale Florist</u> , 167 S.W.3d 222 (Mo. App. S.D. 2005).....	8, 10, 11

## STATUTES

Missouri State Constitution, Article V, Section 3.....	4
Section 287.020.2 Revised Statutes of Missouri.....	7, 9
Section 287.020.3 Revised Statutes of Missouri.....	6, 7, 14
Section 287.020.3(3) Revised Statutes of Missouri.....	7, 10
Section 287.110 Revised Statutes of Missouri.....	4
Section 287.495 Revised Statutes of Missouri.....	4
Section 477.050 Revised Statutes of Missouri.....	4

## JURISDICTIONAL STATEMENT

Appellant sought workers' compensation benefits from the Missouri Highway and Transportation Commission for injuries resulting from work on September 29, 2005, in Pike County, Missouri. After a hearing, the Administrative Law Judge declined to award benefits to Appellant. That decision was appealed to the Missouri Labor and Industrial Relations Commission. On July 25, 2008, the Commission issued its Final Award Denying Compensation. A Notice of Appeal was filed on August 1, 2008.

This appeal is being undertaken pursuant to Section 287.495 of the Revised Statutes of Missouri. Since the incidence of Appellant's injury took place in Pike County, Missouri, this case falls within the territorial jurisdiction of the Eastern District, pursuant to Sections 477.050 and 287.110 of the Revised Statutes of Missouri. This appeal does not involve any issue that would confer exclusive jurisdiction on the Missouri Supreme Court, pursuant to Article V, Section 3 of the Constitution of the State of Missouri. Therefore, this appeal falls within the general appellate jurisdiction of the Court of Appeals under Section 287.495 of the Revised Statutes of Missouri, and Article V, Section 3 of the Constitution of the State of Missouri. This appeal follows.

## STATEMENT OF FACTS

Mitchell Miller (hereinafter "Employee") worked for Missouri Highway and Transportation Commission (hereinafter "Employer"), for nearly 20 years, eventually attaining the title of Assistant Maintenance Supervisor. TR. 6, 141, 142, 170. Employee's responsibilities consisted of, but were not limited to, paperwork, organizing crew work, working with crews, and usually acting as crew chief. TR. 142. On September 29, 2005, Employee and his crew were repairing section of road in Pike County, Missouri, during regular work hours. TR. 6, 7, 13, 14, 134, 141 - 145, 147, 170, 171. This entailed transporting an asphalt amalgam from a plant in Troy, Missouri to the job site and applying it to the roadway. TR. 7 - 9, 14, 23, 24, 32, 33, 134, 136, 142 - 149, 157, 158. On that day, Employee parked his truck within the work zone, approximately 200 feet from where the crew was working, and joined the crew in working. TR. 13, 23, 146 - 149. After being informed that the crew was running out of the asphalt amalgam, Employee began walking back to his truck. TR. 13, 14, 24, 134, 145, 147. His gait was brisk. TR. 14, 34, 146, 152, 156. About three-quarters of the way back to his truck, Employee felt a pop behind his right knee, followed by pain. TR. 14 - 16, 24, 25, 27, 135, 150, 151, 153, 164. Employee stated that he was not sure what triggered the pop. TR. 25, 152. Employee did not slip, trip, or stumble. TR. 25, 28, 156. There was not a hole or other impediment on the asphalt to the employee's knowledge, nor were there any obstructions on Employee's shoes. TR. 25, 27, 28, 193. Prior to this

experience, Employee was a recreational walker. TR. 65, 67, 187 - 191.

The injury was reported to Employer, who subsequently denied the case. Award 5. Employee sought treatment on his own. Award 5. An MRI was performed, followed by surgery. TR. 82, 83, 131. After a brief period of improvement, pain returned to Employee's right knee. TR. 82, 83, 131. Employee was sent by Employer to Dr. Herbert Haupt for an independent medical examination. TR. 80 - 82, 130, 131. Dr. Haupt recommended another MRI or surgery, to discover the source of the continued pain. TR. 86, 133. Dr. Haupt admitted that walking was not the normal mechanism for such an injury. TR. 90, 95, 96, 111, 112, 120, 123. Yet, he went on to state that, absent information to the contrary, the work event of September 29, 2005, was the prevailing factor in the development of the injury. TR. 85, 88, 90, 93, 95, 96, 111, 112, 122, 132, 133. Dr. Haupt also voiced his displeasure at the legislature's revision to the language of Section 287.020.3 Revised Statutes of Missouri, and adoption of the term "prevailing factor" to replace the term "substantial factor." TR. 104, 106, 107.

A hearing was then held, at Employer's request, and the Administrative Law Judge declined to award workers compensation benefits to Employee. TR. 1, Award 2, 4, 10. However, the Administrative Law Judge found both Employee and Dr. Haupt to be very credible witnesses. Award 6. Appeal to the Missouri Labor and Industrial Relations Commission followed, with the Commission declining to award benefits. Final Award 1, 9. This appeal follows.

POINT RELIED ON

THE ADMINISTRATIVE LAW JUDGE, AND THE LABOR AND INDUSTRIAL RELATIONS COMMISSION, ERRED AS A MATTER OF LAW IN FINDING THAT THE INJURY OF SEPTEMBER 29, 2005, DID NOT ARISE OUT OF, AND IN THE COURSE OF, EMPLOYEE'S EMPLOYMENT BECAUSE THE TESTIMONY OF EMPLOYEE, THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERT, AND CASE LAW, PROVE THAT THE ACCIDENT AROSE OUT OF THE COURSE OF EMPLOYMENT, AND IS THEREFORE COMPENSABLE.

Section 287.020.2 Revised Statutes of Missouri

Section 287.020.3 Revised Statutes of Missouri

Section 287.020.3(3) Revised Statutes of Missouri

DeVile v. Hiland Dairy, Co., 157 S.W.3d 284 (Mo. App. S.D. 2005).

Hall v. Fru Con Construction Corporation, 46 S.W.3d 330 (Mo. App. E.D. 2001).

Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003).

James T. Johnson v. Hertz Corporation, Injury No.: 05-140664 (LIRC, 2007).

Kent v. Goodyear Tire and Rubber Co., 147 S.W.3d 865 (Mo. App. W.D. 2004).

Kristen Norman v. Phelps County Regional Medical Care, Injury No.: 06-001823 (LIRC, 2007)

Patterson v. Engineering Evaluation Inspections, Inc., 913 S.W.2d 344 (Mo.  
App. E.D. 1995)

Simmons v. Bob Mears Wholesale Florist, 167 S.W.3d 222 (Mo. App. S.D.  
2005)

## ARGUMENT

THE ADMINISTRATIVE LAW JUDGE, AND THE LABOR AND INDUSTRIAL RELATIONS COMMISSION, ERRED AS A MATTER OF LAW IN FINDING THAT THE INJURY OF SEPTEMBER 29, 2005, DID NOT ARISE OUT OF, AND IN THE COURSE OF, EMPLOYEE'S EMPLOYMENT BECAUSE THE TESTIMONY OF EMPLOYEE, THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERT, AND CASE LAW, PROVE THAT THE ACCIDENT AROSE OUT OF THE COURSE OF EMPLOYMENT, AND IS THEREFORE COMPENSABLE.

Reviewing courts must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, or whether the award is contrary to the overwhelming weight of the evidence. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222 - 223 (Mo. banc 2003). Nothing requires a reviewing court to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award. Id. The purpose of the Missouri Workers' Compensation Act is to place the losses sustained by employees as a result of their employment on industry. Hall v. Fru Con Construction Corporation, 46 S.W.3d 30, 34 (Mo. App. E.D. 2001). Courts will liberally construe the act to effectuate that purpose. Id.

An accident is defined in Section 287.020.2 of the Revised Statutes of Missouri as "...an unexpected traumatic event or unusual strain identifiable by time and place of

occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.” Work must be the prevailing factor for compensation to be awarded. Employee’s incident would be within the purview of this definition. It occurred on September 29, 2005, in the morning. TR. 6, 7, 134, 142, 143, 144. It caused a pop in Employee’s right knee, followed by pain. TR. 14 - 16, 24, 25, 27, 135, 150, 151, 153, 164. Accordingly, it was an accident, with work being the prevailing factor, as determined by Employer’s expert, Dr. Haupt. 85, 88, 90, 93, 95, 96, 111, 112, 122, 132.

An injury is defined in Section 287.020.3(3) of the Revised Statutes of Missouri as “..violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body...” The aforementioned accident produced an injury. Employee’s knee suffered a pop, followed by pain. TR. 14 - 16, 24, 25, 27, 135, 150, 151, 153, 164. An injury was sustained by Employee as a result of work for Employer.

For an injury to arise out of an employment relationship, the injury must be a natural and reasonable incident of the employment and there must be a causal connection between the conditions under which the work is required to be performed and the resulting injuries. Simmons v. Bob Mears Wholesale Florist, 167 S.W.3d 222, 225 (Mo. App. S.D. 2005). A claimant bears the burden of proving an accident arose

out of and in the course of employment. Id. Here, the injury and accident occurred while Employee was at a work site, performing work functions, during regular work hours. TR. 6, 141, 142, 170, 171. He was preparing to move a truck. TR. 13, 14, 24, 134, 145, 147. To move the truck, he first had to walk to it. As Dr. Haupt testified, absent information to the contrary, the work event of September 29, 2005, was the prevailing factor in the development of the injury. TR. 85, 88, 90, 93, 95, 96, 111, 112, 122, 132, 133. Walking was a natural and reasonable incident of employment. It was an efficient mode of transport for Employee. But for the requisite walking, Employee would be uninjured.

“In the course of employment” refers to the time, place and circumstances of the employee’s injury. Id. Here, Employee’s walking was a natural and reasonable incident of his employment. It was a necessary component of Employee’s work, allowing him to traverse job sites and supervise other employees. As Dr. Haupt testified, the work event of September 29, 2005, was the prevailing factor in the development of the injury. TR. 85, 88, 90, 93, 95, 96, 111, 112, 122, 132, 133. Moreover, Employee was “in the course of employment.” The injury was sustained during working hours, at a job site, while performing a task incident to work. Employer did not impeach or contradict the testimony of employee. “[In the absence of] evidence proffered to impeach or contradict...testimony...the Commission finds [employee’s] description of the accident and injury sustained to be credible and worthy of belief.” Kristen Norman v. Phelps

County Regional Medical Center, Injury No.: 06-001823, (LIRC, 2007)(Commission awarded benefits to Employee, overturning Administrative Law Judge's decision).

An injury is deemed to be in the course of employment if it occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment or something incidental thereto. DeVille v. Hiland Dairy, Co., 157 S.W.3d 284, 287 (Mo. App. S.D. 2005)(internal citations omitted). The work being done was normal and typical of Employee's work for Employer, namely: walking to move a vehicle so that work may continue. The accident and injury were a natural incident of the work, as walking was required for Employee to progress from one point to another during his employment. Driving, biking, skipping, hopping, swimming, crawling and other modes of transport were not viable options for Employee under these circumstances. Moreover, for the work to be completed, walking was required and Employee (by walking rather than opting for another mode of transport) was performing a duty of employment.

A compensable injury is one, arising out of and in the course of employment, where the Employee's acts were reasonably incidental to commencement of employee's work and were also for the benefit of the employer. Miles v. Lear Corporation, — S.W.3d —, WL 1862317 (Mo. App. E.D. 2008). Here, Employee suffered an injury arising out of and in the course of employment. Employee was, as he had for twenty years, working for Employer. TR. 6, 141, 142, 170. Walking was a reasonably

incidental action Employee had to take so that work could progress. By walking, Employee was performing a task reasonably incidental to the commencement of work, which was for the benefit of Employer. As such, the injury Employee suffered is compensable.

When Employee suffered his injury, he was in the process of procuring more asphalt amalgam. TR. 13, 14, 24, 134, 145, 147. To procure the amalgam, Employee had to move his vehicle. TR. 13, 14, 24, 134, 145, 147. To move his vehicle, Employee had to walk to it, from his work station. TR. 13, 14, 24, 134, 145, 147. Consequently, walking was incidental to Employee's duties for Employer. "[A]t the time the injury and accident occurred, employee was within her period of employment where she might reasonably be and where she was fulfilling the duties of her employment or she was engaged in the performance of some task incidental thereto...Accordingly, employee was in the course of her employment." Kristen Norman v. Phelps County Regional Medical Center, Injury No.: 06-001823, (LIRC, 2007)(Commission awarded benefits to Employee, overturning Administrative Law Judge's decision). As a result of the walk, whether it was an explicit or incidental duty, Employee was acting within the course of employment when he sustained the injury. Put another way, his injury was a direct result of his work. "I find that since Mr. Johnson's [injury] was the 'direct result' of his work, his work necessarily was 'the prevailing factor' in causing his resulting medical condition." James T. Johnson v. Hertz Corporation, Injury No.: 05-140664,

(LIRC, 2007)(award of the Administrative Law Judge affirmed).

Employee testified that, though he was a recreational walker, he had never had problems with this knee. TR. 65, 67, 187 - 191. "A claimant's credible testimony as to work-related functioning can constitute competent and substantial evidence." Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. banc 2003). The Administrative Law Judge found that Employee was a very credible witness. Award 6. Consequently, his testimony should be treated as competent and substantial evidence. Also, Employer's own expert, Dr. Haupt, testified that, absent information to the contrary, the work event of September 29, 2005, was the prevailing factor in the development of the injury. TR. 85, 88, 90, 93, 95, 96, 111, 112, 122, 132. Prevailing factor is defined as the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Lawson v. Ford Motor Company, 217 S.W.3d 345, 349 (Mo. App. E.D. 2007). A single expert opinion may be competent and substantial evidence in support of an award of benefits, even where the causes of the occupational disease in question are of an indeterminate nature. Kent v. Goodyear Tire and Rubber Co., 147 S.W.3d 865, 868 (Mo. App. W.D. 2004). As the Administrative Law Judge stated in his opinion, both Employee and Dr. Haupt were very credible witnesses. Award 6. Moreover, the testimony of Dr. Haupt was the only expert testimony in the record.

Dr. Haupt testified to his displeasure at the legislature's revision to the language of Section 287.020.3 of the Revised Statutes of Missouri, and adoption of the term

“prevailing factor” to replace the term “substantial factor.” TR. 104, 106, 107. In spite of his displeasure, his expert medical opinion was that the walk Employee took at work on September 29, 2005, was the prevailing factor in his subsequent injury. TR. 85, 88, 90, 93, 95, 96, 111, 112, 122, 132. Employer offered no contrary evidence. Where there are conflicting medical opinions, the decision of the Commission will be upheld unless it is against the overwhelming weight of the evidence. Lawson v. Ford Motor Company, 217 S.W.3d 345, 350 (Mo. App. E.D. 2007). The weight of the evidence here, in fact the sole medical evidence proffered, supports Employee’s contentions. Denying an award is against the overwhelming weight of the only medical evidence provided.

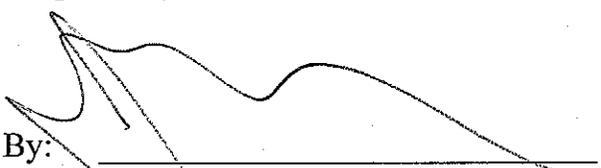
Both the Labor and Industrial Relations Commission and the Court of Appeals resolve any doubts in favor of the employee and the Court of Appeals will affirm an award so long as it is supported by substantial competent evidence. Patterson v. Engineering Evaluation Inspections, Inc., 913 S.W.2d 344, 345 (Mo. App. E.D. 1995). Here, the awards of the Administrative Law Judge and the Labor and Industrial Relations Commission are not supported by substantial competent evidence. Instead, the awards rely on indeterminate semantics approved by the legislature. The substantial competent evidence supports Employee’s claim that he suffered a compensable injury and is entitled to benefits.

**CONCLUSION**

WHEREFORE, Counsel for Employee/Petitioner respectfully prays that this Court: (1) reverse the decision of the Labor and Industrial Relations Commission and find that, as a matter of law, the injury was causally related to the accident in question; and (2) reverse the decision of the Labor and Industrial Relations Commission finding that Employee/Petitioner suffered a compensable injury; and (3) remand this cause to the Administrative Law Judge for a determination of the extent of disability benefits that Employee/Petitioner is entitled to receive for his work-related injury.

Respectfully Submitted,

By:

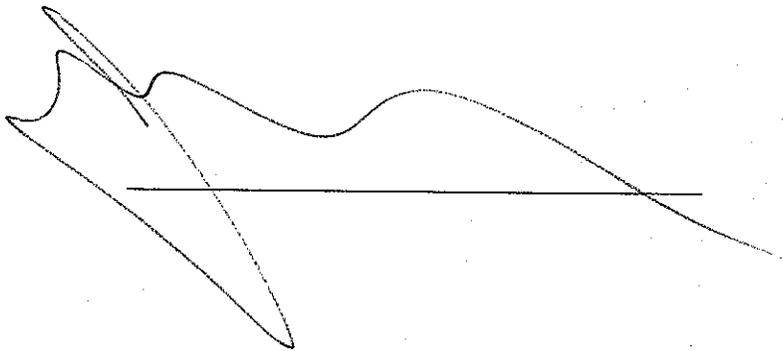


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**PROOF OF SERVICE**

The undersigned states that one (1) true and correct copies was mailed via US Mail, first class postage paid, on September 15, 2008, to: Robert Bidstrup, Attorney for Employer/Respondent, 1100 Millennium Executive Center, 515 Olive Street, St. Louis, Missouri 63101-1836.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be a name with a long, sweeping tail.

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(cc) and 84.06(g)**

In compliance with Rule 84.06(cc) and 84.06(g), the undersigned hereby certifies that this brief:

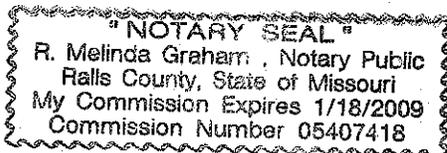
- a. Contains the information required by Rule 55.03;
- b. Complies with the limitation contained in Rule 84.06(b);
- c. Contains 1,818 words;
- d. Was prepared using Word Perfect 11; and
- e. Is also being submitted to the Court on a floppy disk, which was scanned for viruses and found to be virus-free.

Respectfully Submitted,

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Subscribed and sworn to before me this 15<sup>th</sup> day of September, 2008.



*R. Melinda Graham*  
Notary Public

