

IN THE SUPREME COURT OF MISSOURI

SC89960

MITCHELL MILLER
Claimant/Appellant,

vs.

MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION
Self-Insured Employer/Respondent.

**SUBSTITUTE RESPONDENT'S BRIEF OF MISSOURI HIGHWAY
AND TRANSPORTATION COMMISSION**

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JURISDICTIONAL STATEMENT

The instant action requires the Court to decide what injuries fall within the scope of the Workers' Compensation Act, as amended in 2005. Mitchell Miller sought benefits for an incident taking place on 9-25-05. While employee and his crew were repairing a section of road, employee experienced a pop behind his right knee, followed by pain, as he was walking briskly to his truck. On 6-26-07, ALJ Ronald Harris held a hearing on the Claim. Thereafter, on 8-22-07, ALJ Harris issued his Award, holding that employee failed to meet his burden of proving that he suffered a compensable injury as a result of a work-related accident arising out of and in the course of employment.

Employee filed an Application For Review with the Industrial Commission. On July 25, 2008, the Industrial Commission issued its Final Award Denying Compensation, affirming the Award of ALJ Harris.

On 8-1-08, Mitchell Miller filed his Notice Of Appeal with the Industrial Commission. Thereafter, on February 17, 2009, the Missouri Court of Appeals, Eastern District, issued its Opinion. Therein, the Eastern District affirmed the Industrial Commission's Award. It found that the instant case was not distinguishable from *Bennett v. Columbia Healthcare & Rehabilitation*, 80 S.W.3d 524 (Mo.App.W.D.2002); *Kasl v. Bristol Care*, 984 S.W.2d 852 (Mo.banc.1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc.1999), which the Missouri Legislature sought to abrogate through the 2005 amendments to the Workers' Compensation Act. The Court held that employee failed to satisfy the requirement of proving that his injury arose out of and in the course of his employment, because he did not prove that brisk walking was a hazard or risk related to

his employment, to which he was not equally exposed outside of work. It agreed with the Industrial Commission's finding that, under the instant facts, employee's injuries resulted from a hazard or risk unrelated to his employment to which he would have been equally exposed outside of his employment, in normal non-employment life. Thus, Section 287.020.3(2)(b) precluded an award of compensation. Pursuant to Rule 83.02, and because of the general interest and importance of the issue presented, Presiding Judge Robert Dowd requested transfer to the Missouri Supreme Court.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals, pursuant to Article V, Section 3, and Article V, Section 10, of the Missouri Constitution (1945)(as amended 1982). Therefore, the jurisdiction of this Court is invoked pursuant to Article V, Section 3, and Article V, Section 10, of the Missouri Constitution (1945)(as amended 1982).

STATEMENT OF FACTS

Introduction

The instant case presents a question of first impression involving the interpretation and application of the 2005 amendments to the Workers' Compensation Act, which changed the statutory definitions of “**accident,**” “**injury,**” “**arising out of,**” and “**in the course of employment.**” The factual circumstances regarding the knee injury sustained by Mitchell Miller are substantially identical to those before the Western District in *Bennett v. Columbia Healthcare & Rehabilitation*, 80 S.W.3d 524 (Mo.App.W.D.2002), which the legislature specifically sought to abrogate through the 2005 amendments. **RSMo** §287.020.10. Thus, the Industrial Commission did not err in ruling that employee failed to satisfy the requirement of proving that his injury arose out of and in the course of his employment, because employee's injury resulted from a hazard or risk – brisk walking – unrelated to his employment, to which he would have been equally exposed outside of his employment in normal non-employment life. The injury employee sustained is precisely the type of injury that the 2005 amendments sought to render non-compensable. Consequently, the Industrial Commission's Award, denying workers' compensation benefits, must be affirmed.

Procedural History

On 2-23-06, Mitchell Miller filed a Claim for Compensation, seeking to recover workers' compensation benefits for an injury to his right knee. Therein, employee alleged that on 9-29-05, he was working with his crew on Route N, in Pike County, Missouri, laying hot mix patches of asphalt. While walking quickly to his truck from the

area where the asphalt was being applied, some 200-300 feet away, employee's right knee popped, and he felt pain. Claimant sought temporary total disability, permanent partial disability, and future medical treatment for his right knee injury. (L.F.2-3).¹ In its Answer, employer asserted that it was without sufficient facts or information upon which to base any conclusions pertaining to the Claim, and, therefore, denied all allegations contained in the Claim. (L.F.4).

On 6-26-07, ALJ Ronald Harris held a hearing on the Claim. (Tr.1-206). At hearing, the parties stipulated, *inter alia*, that employer had not paid any temporary total disability benefits or provided any medical treatment to employee. (Tr.3-4). The issues for ALJ Harris' resolution were: whether employee sustained a compensable injury by accident arising out of and in the course of his employment on 9-29-05; whether employee was entitled to future medical treatment; and whether employee was entitled to temporary total disability. (Tr.3-4).

ALJ's Award

On 8-22-07, ALJ Harris issued his Award. (L.F.5-13). Therein, the ALJ held that employee failed to meet his burden of proving that he suffered a compensable injury as the result of a work-related accident arising out of and in the course of his employment. He denied employee's Claim. (L.F.10-13).

¹ Matters referred to herein that are contained in the Legal File shall be designated as (L.F.____). Matters referred to herein that are contained in the Transcript Of Hearing shall be designated as (Tr.____).

As the ALJ noted, a number of changes were enacted to the Workers' Compensation Act, effective 8-28-05. Those changes included new definitions for the terms "accident" and "injury". As amended, Section 287.020.3 provided that an injury was deemed to arise out of and in the course of the employment only if it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and the injury does not come from a hazard or risk unrelated to the employment, to which workers would have been equally exposed outside of and unrelated to the employment, in normal non-employment life. (L.F.10-11).

ALJ Harris acknowledged that, during the 2005 legislative session, the legislature expressed its displeasure with what it perceived to be the expansion of the Workers' Compensation Act to such an extent that the focus in determining whether a case was compensable seemed to be whether the act was "incidental" to the employment, a doctrine that some referred to as "positional risk," rather than whether the employee was actually engaged in performing the duties of employment at the time he was injured. Section 287.020.10 clearly stated that displeasure:

"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 Healthcare & Rehabilitation...Kasl v. Bristol Care, Inc...* and *Drewes v. TWA...* and all cases citing, interpreting, applying, or following those cases." **RSMo** §287.020.10. (L.F.11).

The ALJ found that by abrogating *Bennett, Kasl* and *Drewes*, the legislature indicated that, in order for an injury to be compensable, required something more than simply being at the workplace at the time of the accident. This was consistent with the concept that workers' compensation was not designed to operate as accident insurance. (L.F.10-11).

Significantly, the Act did not provide a list of activities that were automatically prohibited from compensability. Since so many of the physical activities associated with employment are also associated with workers' non-employment lives, such as bending, lifting, carrying, pushing, pulling, turning, twisting, etc., an extensive list of automatically prohibited activities would essentially render the Act meaningless. (L.F.11-12). Thus, the ALJ reasoned, rather than focusing solely on the activity itself, one must carefully and properly examine the facts of each individual case in the context of how that activity interacted with the employment. A logical, common-sense approach would be to examine if the incident occurred while the individual was engaged in performing necessary and required duties of the job, in furtherance of the employer's business. (L.F.11-12).

While Mitchell Miller certainly would have to get his truck, whether by walking or some other means, before being able to move the truck, under the facts of the instant case, the activity of "walking" appeared to be incidental to the employment. The evidence showed that employee was walking at a "brisk" pace to his truck, although no one had instructed him to hurry. Claimant admitted that he liked to walk outside work, did so on a regular basis, and often walked at a brisk pace, even on surfaces similar to

those of the asphalt road. By his own admission, employee did not slip, trip, or stumble. He did not step into a hole, and was not aware of anything on the soles of his shoes that would have caused a problem. (L.F.12). Nor was claimant aware of anything about the surface of the road that would have caused the problem. There was nothing different about the steps immediately preceding the pop in claimant's right knee, when compared to the other steps he had taken. No specific event happened. Indeed, claimant had no idea what caused the problem. (L.F.12).

Thus, the ALJ found, there was nothing in the evidence that would lead to a conclusion that the activity of walking would expose the employee to any greater risk than walking outside of the employment. Nor did the evidence reveal a cause or explanation for claimant's right knee to pop. (L.F.12). ALJ Harris concluded that "this incident is an example of what the legislature specifically intended to exclude from compensability under the Act." (L.F.12). Applying strict construction, as required by Section 287.800, the ALJ held that employee did not suffer a compensable injury by way of an accident arising out of and in the course of the employment. He denied employee's Claim. (L.F.12-13).

On 9-7-07, employee filed an Application For Review with the Industrial Commission, appealing ALJ Harris' Award. (L.F.14-17).

Industrial Commission Award

Thereafter, on 7-25-08, the Industrial Commission issued its Final Award Denying Compensation, affirming the Award of ALJ Harris. (L.F.18-36). Having reviewed the evidence and considered the whole record, the Industrial Commission found that the

ALJ's Award was supported by competent and substantial evidence, and was made in accordance with the Workers' Compensation Act. The Industrial Commission affirmed the Award of ALJ Harris and granted no compensation on employee's Claim. (L.F.18-36). On 8-1-08, employee appealed to the Missouri Court of Appeals, Eastern District. (L.F.37-38).

Court of Appeals' Opinion

On 2-17-09, the Missouri Court of Appeals, Eastern District, issued its Opinion. Therein, the Court of Appeals affirmed the Industrial Commission's Award. (Opinion,10).

As the Eastern District noted, the action before it was a case of first impression involving the interpretation of the 2005 amendments to the Workers' Compensation Act, redefining "**arising out of**" and "**in the course of**" employment. (Opinion,1). In determining whether employee's injury arose out of or in the course of his employment, the Court focused on the second prong of Section 287.020.3(2), which provides that, for an injury to be deemed to arise out of and in the course of employment, it must come from a hazard or risk related to the job, that the worker would have not have been equally exposed to outside of the employment. (Opinion,6).

As the Court noted, Section 287.020.10 abrogated the holdings in *Bennett*, *Kasl*, and *Drewes*. In order to understand what had been abrogated by the legislature, it was necessary to examine the cases mentioned in Section 287.020.10. (Opinion,6-7). In *Bennett*, the employee was a hospital nurses' aide who was walking around the front of a patient's bed when she felt a pop in her right knee, in which she had a prior history of

problems. Later that day, while walking up a flight of stairs, Bennett felt another pop in her knee. While the Industrial Commission denied Bennett's claim, the Court of Appeals reversed. It held that the Industrial Commission erred in concluding that an injury caused or aggravated by walking could not be considered as arising out of the worker's employment. Specifically, the Court found that while walking was an activity done routinely outside of employment life, it nonetheless could constitute an injury arising out of and in the course of employment because walking, both on level floors and traversing stairs, was an integral part of Bennett's job activities, and she was engaged in activities incidental to her duties at the time she experienced each "pop" or "giving way" of her knee. (Opinion,7).

In *Kasl*, the employee, a manager at a residential care facility, fell and broke her ankle when she arose from a chair, unaware that her foot had fallen asleep. The Industrial Commission awarded temporary benefits, finding that the conditions of claimant's required work – waiting for the appointed time for a resident's medication – caused her foot to fall asleep, which, when coupled with the job requirement of getting medication, caused an accident. (Opinion,7-8). On appeal, the Supreme Court affirmed the Commission's Award, concluding that Kasl's injury arose out of and in the course of her employment. The Supreme Court found that claimant's foot falling asleep was a common condition, clearly related to her work. It reasoned that without having to wait for the appointed time to dispense medicine, Kasl's foot would not have fallen asleep. Only in conjunction with and exacerbated by her work did Kasl's common condition subject her to injury. (Opinion,8).

As the Eastern District observed, the employee in *Drewes* was an airline reservation agent, whose work day included a regularly-scheduled 30-minute unpaid lunch break. While claimant was carrying her lunch to a break room, she fell and injured her ankle. (Opinion,8). The Supreme Court affirmed the Industrial Commission's award of benefits, finding that the injury arose out of and in the course of Drewes' employment. In so ruling, the Supreme Court reasoned that there was no evidence that the injury came from a hazard or risk that was unrelated to eating lunch and that Drewes was not equally exposed outside of her employment to the risk of falling during her lunch break. Finding that Drewes' injury occurred in the course of her employment, the Supreme Court held that accidents in or about the premises, during a scheduled unpaid lunch break, occurred in the course of the employment. (Opinion,8).

After reviewing *Bennett*, *Kasl*, and *Drewes*, the Eastern District assumed that the legislature intended to exclude cases from workers' compensation coverage where the injury arose from a hazard or risk unrelated to the worker's employment, to which the worker was equally exposed outside of the employment. (Opinion,9). The Eastern District did not believe that the instant case was distinguishable from *Bennett*, *Kasl*, and *Drewes*. It found that Mitchell Miller failed to satisfy the requirement of proving that the injury arose out of and in the course of his employment, because he did not prove that brisk walking was a hazard or risk related to his employment, to which he was not equally exposed outside of work. (Opinion,9).

The evidence demonstrated that Mitchell Miller had no idea what caused the pop in his knee and that he did not slip, trip, or fall, and he put his foot down no differently

than in his other steps at the time his knee popped. There was no distinctive condition of claimant's employment that caused or contributed to his injury. (Opinion,9). Claimant was equally exposed to the risk of injury from walking briskly at home as he was at work. The medical expert, Dr. Haupt, admitted that there was no greater risk of injury from walking at home or walking at work. There was equal exposure in both claimant's employment and non-employment life. (Opinion,9). Although walking was incidental to get to his truck, there was no testimony showing that walking briskly was required as part of Mitchell Miller's employment. The Eastern District ruled that claimant's injury resulted from a hazard or risk unrelated to his employment, to which he would have been equally exposed outside of his employment, in normal non-employment life. Thus, Section 287.020.3(2)(b) precluded an award of compensation. (Opinion,9-10).

The Eastern District affirmed the Industrial Commission's Award. However, because of the general interest and importance of the issues presented, the case was transferred to the Missouri Supreme Court, pursuant to Rule 83.02. (Opinion,10).

Relevant Facts

Mitchell Miller has been employed by Missouri Highway & Transportation Commission (hereinafter "Missouri Highway") for 17 years. On 9-29-05, he worked as an assistant maintenance supervisor. (Tr.5-6,142). In this capacity, claimant was responsible for performing paperwork, lining out work crews in the morning, and working with the crews on highway projects. (Tr.142).

On 9-29-05, claimant was working for Missouri Highway on Route N in Pike County, Missouri. That morning, claimant and other members of his crew were laying

hot mix patches on the roadway. Hot mix is an asphalt base material, composed of rock aggregate, with an oil base. It is used for paving. The hot mix is obtained at the plant, by using multiple dump trucks. When the hot mix is picked up at the plant, it is between 225° and 275°. The mix has to be at least 150° or 175° or more to be used for paving. (Tr.78,145-147).

Upon securing the hot mix at the plant, employee and other members of his crew drive the dump trucks to the job site. Upon arriving at the job site, claimant and his crew members park the dump trucks within the work zone or off the road. A pull paver is hooked on to a dump truck. The hot mix is dumped into it, and the paver pulls the hot mix through and lays it on the road. Crew members work at the back of the pull paver machine. They are responsible for smoothing out the hot mix with a rake, or shoveling the mix to patch the road. When the truck carrying the hot mix is close to being empty, another dump truck containing hot mix is driven up, and the pull paver is hooked on to that truck, so as to continue the paving process. (Tr.6-9,145-148).

On 9-29-05, claimant and his crew started on the job site at approximately 7 a.m. Between 7 a.m. and 10:30 a.m. that morning, claimant had engaged in the process of getting hot mix from the Troy plant, hauling it to the job site in a dump truck, dumping the hot mix, assisting at the pull-paver machine, and driving the truck back to the plant to secure more hot mix, multiple times. (Tr.7-8,145-147).

At approximately 10:30 a.m. on 9-29-05, Mitchell Miller was working at the pull-paver machine, shoveling asphalt to fill voids on the roadway. (Tr.13). Claimant thought that the hot mix was getting low in the truck, and that he needed to secure the dump truck

he had driven earlier that morning, which contained a load of hot mix. Employee began walking, at a “brisk” or “fast” pace, back to his truck, which was parked approximately 200 feet away from the pull-paver machine. After walking approximately 150 feet, claimant felt a pop in the back and left inside of his right knee. He immediately experienced right knee pain, and his knee began to stiffen. Claimant paused for a few minutes, and continued on to his truck. (Tr.13-17,24,148-152).

At the time just before employee felt the pop in his right knee, nothing specific happened, either to his knee or his body. Employee had been walking on asphalt pavement blacktop, i.e., regular highway pavement. Claimant described his walking pace as “brisk”, “fairly fast”, and as “a trot”. (Tr.15-17,34,152-153). Using an example, on a 1/10 scale, where a run was a 10 and a walk was a 1, claimant described a brisk walk as being between 3-4 on the scale. This was faster than claimant’s regular or normal walking pace. (Tr.154-155).

There was nothing wrong with claimant’s shoes on the day of the popping incident. Nor was there anything sticking on the soles of his shoes. The boots claimant was wearing when his knee popped had no relation to the pop, or his knee pain. Claimant was just walking along, and suddenly, his knee popped. (Tr.193-194).

Claimant experienced no pain, discomfort, or problem in his right knee while he was shoveling asphalt on the morning of 9-29-05. Rather, the popping incident occurred while employee was walking toward his work truck. Employee did not know whether there was anything about the surface of the roadway that caused the popping in his right knee. He did not slip, or step in a hole. Nor did one or both of claimant’s feet come out

from under him. (Tr.24-25). The popping incident occurred as claimant was placing his right foot down. Claimant's foot did not stick on the asphalt. (Tr.27-28). At the time claimant felt the pop in his right knee, he did not slip, trip or tumble over anything, or lose his balance. (Tr.156).

Claimant was walking briskly to his truck because he did not want the hot mix to cool, and he wanted to keep the crew's work flowing. He did not know how full the pull paver was at the time he started walking to his truck or how long it would be before the crew ran out of hot mix. (Tr.36,156-157,179). When claimant got to his truck, he was not planning to drive the truck any faster than he normally would. (Tr.36,40-41,167-168). The only thing claimant hurried on was walking the 200 feet from the pull paver machine to his truck. If claimant was not in a hurry, and was walking at his normal pace, he could walk 200 feet in less than a minute. By walking briskly to his truck, the most time claimant would have saved, in terms of the hot mix cooling and keeping the work going, would be between 30 and 45 seconds. In 30 to 45 seconds, the hot mix was not going to cool so much that it could not be used. (Tr.41-43,52-54,157-159,171-172). No one on the crew was demanding or urging that claimant hurry and get back as quickly as possible, so the crew could continue working. At the time claimant began to walk to his truck, the crew continued to work. They kept on working while claimant was getting his truck. (Tr.44-46,52-54,158-160,167-168).

Claimant has walked briskly, outside of work. He walks with his daughter and family for exercise. (Tr.64). During 2004 and 2005, claimant walked for exercise once or twice a week, for a half a mile to a mile. On these walks, claimant often walked

briskly. Claimant walks to keep himself in shape. When walking for exercise, claimant walks on all kinds of surfaces, including surfaces of the nature he walked on on 9-29-05. Employee walks uphill, downhill, and on steps. Walking is a part of claimant's lifestyle. (Tr.64-66,187-191).

The pain did not subside after the popping incident, but rather, grew worse. Claimant initially treated at Quincy Ambulatory Clinic. He then underwent an MRI of his right knee. Following the MRI, claimant underwent arthroscopic surgery, which was performed by Dr. Crickard, and physical therapy. Thereafter, employee was released to return to work. (Tr.17-20,194-195).

At present, claimant experiences right knee pain and stiffness. His knee complaints fluctuate in accordance with his activity level. Employee is currently working full duty. (Tr.19-20,22,197-199).

Testimony of Dr. Herbert Haupt

Dr. Haupt examined employee on 10-30-06 for complaints regarding his right knee. (Tr.82,131). Employee related that on 9-29-05, he was working for the Highway Department, laying hot mix patches. Claimant took a brisk walk several hundred feet back to his truck, to catch up with the patchwork being done. As employee was walking briskly, he felt a popping sensation with medial joint line discomfort. Employee experienced persistent stiffness, which continued. (Tr.82-83,131).

X-ray studies of the right knee demonstrated no acute pathology. A 10-3-05 MRI demonstrated areas of signal change in the inferior margin of the medial meniscus, consistent with an undersurface tear in the meniscus. Surgical findings were those of an

intact medial meniscus, with no tearing noted, but evidence of an impinging medial shelf plica, which was excised. (Tr.82-84,131-132). In Dr. Haupt's opinion, claimant's clinical presentation suggested residual symptomatology along the medial joint line, most consistent with a retained tear of the medial meniscus, despite surgical findings. (Tr.84,132).

In Dr. Haupt's opinion, and lacking information to the contrary, the work incident of 9-29-05 was the prevailing factor in the development of employee's symptomatic medial shelf plica, causing treatment to be required. (Tr.84-85,132-133). Alternatively, Dr. Haupt speculated that the popping sensation employee felt in his knee while walking was consistent with a tear of the medial meniscus. It was possible that claimant had sustained a tear of the medical meniscus that was not visualized during the initial arthroscopy, but had propagated and became more symptomatic over time. Under this alternative theory, and lacking information to the contrary, Dr. Haupt found that the 9-29-05 work incident was the prevailing factor² in causing a tear of the medical meniscus. (Tr.84-85,132-133).

Claimant had multiple treatment options. He could undergo a repeat MRI, or simply undergo an additional arthroscopic evaluation to assess the integrity of the medial meniscus. These treatment options were necessary in order for employee to reach

² Dr. Haupt interpreted the term "**prevailing factor**", as contained in the amended Workers' Compensation Act, as the major cause of the process or injury in question. (Tr.106-108).

maximum medical improvement. (Tr.85-86,133). In Dr. Haupt's opinion, claimant's need for additional medical treatment, including possible surgical intervention, was the result of the 9-29-05 incident. Claimant could continue working full duty, until further treatment was offered. (Tr.86,133).

As Dr. Haupt conceded, claimant's activity in walking briskly to his truck was not the cause of the development of medial shelf plica and/or a tear of the medial meniscus. Dr. Haupt admitted that he did not know, and could not say, what it was about employee's activity in walking briskly, or what occurred during that activity, that would cause claimant's right knee injury. It was significant to Dr. Haupt that there was no history of claimant having any complaint prior to that injury pattern. (Tr.87-88). Employee's pain complaints were well-defined as occurring during his brisk walk. Thus, Dr. Haupt assumed, lacking any information to the contrary, that the employee's activity of walking briskly was the prevailing factor in causing his knee condition. (Tr.87-88,110-112,123-124).

Claimant's activity in walking briskly was the only mechanism that had been documented that could relate to a tear in the medical meniscus, or an injury to the knee. (Tr.88). As Dr. Haupt conceded, he had only the history claimant provided to him. The history claimant related was of walking in a "fast" or "brisk" manner. However, Dr. Haupt failed to secure any definition from employee as to what the terms "brisk" or "fast" meant to him. (Tr.89-90). Nor did Dr. Haupt question claimant as to whether walking briskly or quickly at work was routine for him. By claimant's description of his

activity, it sounded as though his walking on 9-25-05 was more rapid than his normal walking pace. (Tr.107-108).

Moreover, Dr. Haupt did not determine the type of surface claimant was walking on when he experienced knee complaints. Claimant did not state how far he went before his knee popped, only indicating that he had walked several hundred feet. (Tr.109-110).

Claimant's plica condition was not an injury. But a meniscal tear was an injury. Walking was not a mechanism that commonly resulted in a meniscus tear or internal derangement of the knee. This was true whether the walking occurred at home, or on the job. Mechanisms such as bending, stooping, twisting, or kneeling were more commonly associated with a meniscus tear. But claimant did not describe any of these mechanisms to Dr. Haupt. (Tr.90,110-112,123). Specifically, Dr. Haupt had no information available to him, by medical records or history, to suggest that there was any prior activity causing the injury. (Tr.110-112,123-124).

It was also possible, however, that employee could have torn his meniscus or developed a degenerative tear of the meniscus at an earlier time, and the tear simply became symptomatic during his brisk walk at work. (Tr.112-113,120). A patient can have a degenerative tear and not be aware of it because of the lack of physical complaints. However, Dr. Haupt did not know whether employee, in fact, had a meniscus tear. All that Dr. Haupt had in determining causation was information provided to him by the medical records, and by claimant, through his history. (Tr.92-93,95-96,99-102,104).

What Dr. Haupt had was a situation in which there was no prior admission of any discomfort to the knee, and no diagnostic test or finding by a physician to suggest that employee's injury pre-existed the time when employee first experienced discomfort – when he was walking briskly at work. (Tr.118-119). Lacking information to the contrary, Dr. Haupt assumed that when employee first noticed discomfort during his brisk walk, that walk was the factor that resulted in the discomfort, which required medical treatment. Dr. Haupt had no information to suggest another cause for employee's complaints on 9-25-05, other than walking briskly at work. (Tr.121-122).

During his evaluation, Dr. Haupt did not ask employee if he did any walking, whether brisk or otherwise, other than at work. Claimant did not provide Dr. Haupt with a history that, during 2004 and 2005, he often walked for exercise, some 2-3 times a week, and that during these walks, claimant walked at a hurried or brisk pace. (Tr.113-115). Assuming that employee was walking at home and experienced popping of the right knee with pain, then lacking evidence to the contrary, Dr. Haupt would consider the activity of walking at home to be the prevailing factor in causing claimant's knee condition. (Tr.116).

Assuming all other variables were the same, walking itself, whether at work or at home, carried the same risk of injury. (Tr.125). As Dr. Haupt acknowledged, everything else being equal, walking was walking. The injury risk in walking would be the same at home or in the workplace. (Tr.127-128).

POINTS RELIED ON

I.

THE INDUSTRIAL COMMISSION’S AWARD MUST BE AFFIRMED. THE INDUSTRIAL COMMISSION DID NOT ERR IN DENYING THE EMPLOYEE’S CLAIM FOR COMPENSATION AND IN FINDING THAT THE EMPLOYEE FAILED TO DEMONSTRATE THAT HIS RIGHT KNEE INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT FOR MISSOURI HIGHWAY, FOR THE REASONS THAT THE 2005 AMENDMENTS TO THE WORKERS’ COMPENSATION ACT REJECTED PRIOR EXPANSIVE JUDICIAL INTERPRETATIONS OF THE DEFINITIONS OF “ACCIDENT”, “INJURY”, “ARISING OUT OF”, AND “IN THE COURSE OF EMPLOYMENT”, AS EXEMPLIFIED BY THE DECISIONS IN *DREWES*, *KASL* AND *BENNETT*; TO RECOVER UNDER THE 2005 AMENDMENTS, THE EMPLOYEE WAS REQUIRED TO SHOW THAT HIS RIGHT KNEE INJURY AND CONDITION DID NOT COME FROM A HAZARD OR RISK UNRELATED TO HIS EMPLOYMENT TO WHICH HE WOULD HAVE BEEN EQUALLY EXPOSED TO OUTSIDE OF AND UNRELATED TO THE EMPLOYMENT IN HIS NORMAL NON-EMPLOYMENT LIFE; AND THE UNDISPUTED EVIDENCE DEMONSTRATES THAT THE EMPLOYEE WAS EQUALLY EXPOSED TO THE HAZARD OF POPPING HIS RIGHT KNEE, WHETHER HE WAS WALKING BRISKLY AT WORK OR OUTSIDE OF WORK; AND THE EMPLOYEE FAILED TO SHOW THAT ANY CONDITION

**UNIQUE TO HIS EMPLOYMENT CAUSED OR CONTRIBUTED TO CAUSE
THE POPPING INCIDENT AND HIS RIGHT KNEE INJURY.**

Bivins v. St. John's Regional Health Center, 272 S.W.3d 446 (Mo.App.S.D.2008);

Bennett v. Columbia Healthcare & Rehabilitation, 80 S.W.3d 524 (Mo.App.W.D.2002);

Missouri Alliance for Retired Persons v. Department of Labor & Industrial Relations,

2009 WL 454282 (Mo.banc.2009);

Drewes v. TWA, 984 S.W.2d 512 (Mo.banc.1999).

STANDARD OF REVIEW

The Missouri Constitution, Article V, Section 18, provides for judicial review of the Industrial Commission's Award, to determine whether it is authorized by law and supported by competent and substantial evidence upon the whole record. *Richard v. Missouri Department of Corrections*, 162 S.W.3d 35,37 (Mo.App.W.D.2005). On appeal from an award in a workers' compensation case, the Supreme Court reviews the Award of the Industrial Commission, pursuant to Section 287.495. Under that statutory provision, the Court may modify, reverse, remand for hearing, or set aside the Award only upon the following grounds: 1) that the Industrial Commission acted without or in excess of its power; 2) that the Award was procured by fraud; 3) that the facts found by the Industrial Commission do not support the Award; or 4) that there was not sufficient, competent evidence in the record to warrant the making of the Award. **RSMo** §287.495.1; *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220,222 (Mo.banc.2003).

The Court examines the record as a whole to determine if it contains sufficient, competent and substantial evidence to support the Award. *Hampton*, 121 S.W.3d at 223; *Heiskell v. Golden City Foundry*, 260 S.W.3d 443,449 (Mo.App.S.D.2008). Whether the Award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. *Hampton*, 121 S.W.3d at 223. *Id.*;

On appeal, questions of law are given *de novo* review. *Dubose v. City of St. Louis*, 210 S.W.3d 391,394 (Mo.App.E.D.2006); *Adamson v. DTC Calhoun Trucking*, 212 S.W.3d 207,213 (Mo.App.S.D.2007). This Court is not bound by the Industrial Commission's interpretation and application of the law, and no deference is afforded to

the Industrial Commission's interpretation of the law. *Schoemehl v. Treasurer*, 217 S.W.3d 900,901 (Mo.banc.2007); *Pierson v. Treasurer*, 126 S.W.3d 386,387 (Mo.banc.2004). The primary issue for the Court's resolution, the interpretation of the 2005 amendments to the Workers' Compensation Act, in particular, those amendments changing the definitions of "**accident**", "**injury**", "**arising out of**" and "**in the course of employment**", and whether employee sustained a compensable accident and injury under those definitions, requires the interpretation of a statute, and therefore, the Court's review of that question is *de novo*. *Richard*, 162 S.W.3d at 37.

ARGUMENT

I.

THE INDUSTRIAL COMMISSION'S AWARD MUST BE AFFIRMED. THE INDUSTRIAL COMMISSION DID NOT ERR IN DENYING THE EMPLOYEE'S CLAIM FOR COMPENSATION AND IN FINDING THAT THE EMPLOYEE FAILED TO DEMONSTRATE THAT HIS RIGHT KNEE INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT FOR MISSOURI HIGHWAY, FOR THE REASONS THAT THE 2005 AMENDMENTS TO THE WORKERS' COMPENSATION ACT REJECTED PRIOR EXPANSIVE JUDICIAL INTERPRETATIONS OF THE DEFINITIONS OF "ACCIDENT", "INJURY", "ARISING OUT OF", AND "IN THE COURSE OF EMPLOYMENT", AS EXEMPLIFIED BY THE DECISIONS IN *DREWES*, *KASL* AND *BENNETT*; TO RECOVER UNDER THE 2005 AMENDMENTS, THE EMPLOYEE WAS REQUIRED TO SHOW THAT HIS RIGHT KNEE INJURY AND CONDITION DID NOT COME FROM A HAZARD OR RISK UNRELATED TO HIS EMPLOYMENT TO WHICH HE WOULD HAVE BEEN EQUALLY EXPOSED TO OUTSIDE OF AND UNRELATED TO THE EMPLOYMENT IN HIS NORMAL NON-EMPLOYMENT LIFE; AND THE UNDISPUTED EVIDENCE DEMONSTRATES THAT THE EMPLOYEE WAS EQUALLY EXPOSED TO THE HAZARD OF POPPING HIS RIGHT KNEE, WHETHER HE WAS WALKING BRISKLY AT WORK, OR OUTSIDE OF WORK; AND THE EMPLOYEE FAILED TO SHOW THAT ANY CONDITION

UNIQUE TO HIS EMPLOYMENT CAUSED OR CONTRIBUTED TO CAUSE THE POPPING INCIDENT AND HIS RIGHT KNEE INJURY.

The instant case provides the Court with its first opportunity to construe and apply the 2005 amendments to the Workers' Compensation Act, redefining the terms "accident" and "injury". In applying the Act as amended, and determining whether Mitchell Miller's right knee injury arose out of and in the course of his employment, the Court should take into consideration both the history of the Workers' Compensation Act, and the nature of the remedy provided to injured employees under its provisions.

Purpose of the Workers' Compensation Act

The Workers' Compensation Act was first enacted in 1926. *Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations* (hereinafter "Missouri Alliance"), 2009 WL 454282 (Mo.banc.2009). As enacted, the purpose of the Missouri Workers' Compensation law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. *Schoemehl v. Treasurer*, 217 S.W.3d 900,901 (Mo.banc.2007); *Anderson by Anderson v. Kauffman & Sons Excavating*, 248 S.W.3d 101,108 (Mo.App.W.D.2008). Workers' Compensation laws, such as those of the state of Missouri, provide a no-fault system of compensation for injured employees. *Gunnnett v. Girardier Building & Realty*, 70 S.W.3d 632,636 (Mo.App.E.D.2002); *Akers v. Warson Garden Apartments*, 961 S.W.2d 50,56 (Mo.banc.1998).

Under the Workers' Compensation Act, an employee who sustains an injury by accident arising out of and in the course of the employment is provided certain

compensation, without the necessity of having to prove fault on the part of the employer and without being subject to common law defenses. *Gunnnett*, 70 S.W.3d at 636; *Anderson*, 248 S.W.3d at 108; *Missouri Alliance*, 2009 WL 454282. In exchange for expeditious and definite compensation for work-related injuries, the employee foregoes his right to sue the employer for negligence and obtain the common law measure of damages in cases where fault could be shown. *Id.* Under this compromise, the employer assumes a broader range of liability than it might have had at common law, under a fault based system of liability. *Gunnnett*, 70 S.W.3d at 636; *Akers*, 961 S.W.2d at 56. In exchange, the employer is protected, since the compensation paid under the Act is the injured employee's exclusive remedy against the employer. Thus, the employer is shielded from the possibility of having to pay out the full measure of common law damages. *Gunnnett*, 70 S.W.3d at 636.

Prior Judicial Interpretations of the Act

Since the passage of the Workers' Compensation Act in 1926, there have been several substantive amendments to the Act and its provisions. *Wolfgeher v. Wagner Cartage Service*, 646 S.W.2d 781 (Mo.banc.1983), provides an exhaustive lesson regarding amendments to the Workers' Compensation Act, since its initial enactment, and the construction given to the provisions of the Act by the Missouri appellate courts. *Wolfgeher*, 646 S.W.2d at 783-785; *Wynn v. Navajo Freight Lines*, 654 S.W.2d 87,88 (Mo.banc.1983). As *Wolfgeher* recognized, the fact of an injury having occurred does not, taken alone, constitute an accident within the meaning of the Act. *Wolfgeher*, 646

S.W.2d at 83. To establish a right to compensation, an employee is required to prove both an accident and an injury, i.e., the unexpected event and the resultant trauma. *Id.*

As *Wolfgeher* observed, while the statutory definition of “**accident**”³ had remained constant since the inception of the Act, judicial construction of that term had not followed suit. *Wolfgeher*, 646 S.W.2d at 781; *Wynn*, 654 S.W.2d at 89. Prior to *State ex rel Hussman-Ligonier v. Hughes*, 153 S.W.2d 40 (Mo.1941), Missouri appellate courts allowed compensation for injuries sustained in the usual course of a workers’ duties, without evidence of any unusual strain. *Wolfgeher*, 646 S.W.2d at 783-784. In rejecting an employer’s contention that the statutory language “unexpected or unforeseen event” required some unusual act or movement, the Supreme Court in *Carr v. Murch Brothers Construction*, 21 S.W.2d 897,899 (Mo.App.1929), found that this construction was out of accord with both the language of the Act and its purpose. *Carr* held that the unexpected or unforeseen event, as referred to in the statute, included an unexpected or unforeseen event (result) ensuing from a usual and intentional act or movement of the worker done in the ordinary course of his employment. *Carr*, 21 S.W.2d at 899; as quoted in *Wolfgeher*, 646 S.W.2d at 784.

The Supreme Court repudiated this concept of “accident” in *Hussman*. Therein, an employee suffered a coronary occlusion while carrying a bucket of water in the

³ An “**accident**” was defined as “an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.” **RSMo** §3691 (1939).

performance of his usual duties. *Hussman*, 153 S.W.2d at 41. The Supreme Court reversed an award of compensation, ruling that the injury itself could not constitute the “event” or “accident”. *Hussman*, 153 S.W.2d at 42; *Wolfgeher*, 646 S.W.2d at 784. It reasoned that the prior construction of “**accident**” adhered to by Missouri courts had made the employer something less than an unlimited insurer. Even though proof of fault or negligence had been dispensed with, proof of accident was still necessary. *Hussman*, 153 S.W.2d at 42; *Wolfgeher*, 646 S.W.2d at 781. To hold that the injury itself constituted the “event” or “accident” would make the Act provide for insurance against disease or injury, rather than against accident. *Id.*

The aftermath of *Hussman* was the narrow rule, holding that where the only unexpected or unforeseen event was the injury, there was no “accident” for which workers’ compensation benefits could be awarded. *Wolfgeher*, 646 S.W.2d at 784; *Sciortino v. E. Salia*, 157 S.W.2d 535 (Mo.App.1942). Only where the strain was accompanied by a slip or a fall, or where the strain was unexpected or abnormal, was the injured worker deemed to have sustained a compensable accident. *Wolfgeher*, 646 S.W.2d at 784; *William v. Anderson Air Activities*, 319 S.W.2d 61,65 (Mo.App.1958).

In *Crow v. Missouri Implement Tractor Company*, 307 S.W.2d 401 (Mo.banc.1957), the Supreme Court ruled that an unusual or abnormal strain could be classified as an accident, even though not preceded by a slip or fall. *Crow*, 307 S.W.2d at 405; *Wolfgeher*, 646 S.W.2d at 783. The unexpected or abnormal strain usually resulted from the performance of the work in an abnormal manner or in a manner that was not routine, but this was not necessarily so. *Davies v. Carter Carburetor*, 429 S.W.2d

738,746 (Mo.1968); *Wolfgeher*, 646 S.W.2d at 783. An abnormal strain could also result from the lifting of heavy objects while in an awkward or unbalanced posture, where the worker was subjected to stress of unforeseen force or duration. *Merriman v. Gutman Trust Service*, 392 S.W.2d 292,297 (Mo.1965); *Wolfgeher*, 646 S.W.2d at 783.

Wolfgeher

Wolfgeher found that the Missouri rule was in contrast to the overwhelming majority of states which held that a strain was compensable, even though the work being performed at the time of the injury was routine, and the strain was not unusual or abnormal. *Wolfgeher*, 646 S.W.2d at 784. The majority rule was that where the performance of the usual and customary duties of an employee led to a physical breakdown or a change in pathology, the injury was compensable. *Wolfgeher*, 646 S.W.2d at 784-785. *Wolfgeher* concluded that the narrow construction of “**accident**” adhered to by Missouri courts was inconsistent with the broad purposes of workers’ compensation and the principles upon which the Act was to be applied. *Wolfgeher*, 646 S.W.2d at 785. The Act was to be liberally construed and was intended to extend benefits to the largest possible class in order that its fundamental purpose of placing upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment might be achieved. *Wolfgeher*, 646 S.W.2d at 785.

Further, *Wolfgeher* concluded that the narrow definition of “**accident**” prevented compensation for gradual and progressive injuries that resulted from repeated or constant exposure to on-the-job hazards, even though the injuries were clearly work-related. *Wolfgeher*, 646 S.W.2d at 785. The Supreme Court abandoned the narrow construction

of the term “**accident**”, thus aligning Missouri with the overwhelming majority of states, which had eliminated the abnormal or unusual strain requirement. *Wolfgeher*, 646 S.W.2d at 784-785; *Wynn*, 654 S.W.2d at 89.

Beginning with *Wolfgeher*, Missouri courts construed the term “**accident**” as including not only those injuries which resulted from an unforeseen and unusual event, but also encompassing those cases where the result, the injury itself, was unforeseen or unexpected. *Rector v. City of Springfield*, 820 S.W.2d 639,642 (Mo.App.S.D.en banc. 1991). Following *Wolfgeher*, the cause of the injury did not need to be a single traumatic event. *Id.* Rather, an employee was compensated for gradual and progressive injuries, which resulted from repeated or constant exposure to on-the-job hazards. *Id.* Cases following the rule established in *Wolfgeher* held that an employee’s work need only be a contributing factor to the injury. *Id.* It was not necessary that the employee’s work be the sole cause, or even the primary cause, of the injury, and the right to compensation existed if the actual triggering causes were found, on the basis of substantial evidence, to met the “job-related” or “work-related” test of *Wolfgeher*. *Id.*

1993 Amendments

The 1993 amendments to the Workers’ Compensation Act, and the subsequent construction and application of the amended provisions by the Missouri courts is crucial to understanding the intent of the legislature in redefining “**accident**” and “**injury**” in 2005. In 1993, the Missouri legislature amended the Workers’ Compensation Act. Specifically, the legislature amended the definitions of the terms “**accident**” and “**injury**” contained therein.

Pursuant to the 1993 amendments, an “**accident**” was:

“an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work-related. An injury is clearly work-related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.” **RSMo** §287.020.2 (1994).

Relatedly, the 1993 amendments altered the definition of the term “**injury**”.

Under those amendments, an “**injury**” was defined to be:

“an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.” **RSMo** §287.020.3(1) (1994).

The 1993 amendments provided that an injury was 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 non-employment life.” **RSMo** §287.020.3(2) (1994).

The 1993 amendments to the Workers’ Compensation Act required that the working conditions be a substantial factor in the cause of the injury, in order for the injury to be considered compensable. The statutory changes focused attention on the question of whether or not there was a compensable injury, as opposed to whether an accident had occurred. Craig Billmeyer, “Workers’ Compensation Law In Missouri After Senate Bill 251,” 51 JMOB 77 (1995). While the 1993 amendments to the Workers’ Compensation Act changed the definitions of “**accident**” and “**injury**” and disposed of the requirement that an employee demonstrate that his injury arose out of an unusual strain, the amendments did not dispose of the requirement that a condition of the worker’s employment cause his or her injury. To recover benefits under the 1993 amendments, an employee was required to show that the injury was not caused by a hazard or risk to which the employee would have been equally exposed outside of and unrelated to the employment in normal non-employment life.⁴ *Kasl*, 984 S.W.2d at 855 (Limbaugh, J., dissenting).

⁴ See, for example, *Able v. Mike Russell’s Standard Service*, 924 S.W.2d 502, 504 (Mo.banc.1996)(holding that an employee who suffered an idiopathic fall while standing

Despite this fact, Missouri courts interpreted the 1993 amendments in such a broad manner as to permit an employee to recover workers' compensation benefits by showing merely that they suffered an injury while working. *Kasl*, 984 S.W.2d at 856 (Limbaugh, J., dissenting). Missouri decisions interpreting the 1993 amendments shifted from an increased risk analysis⁵ to a positional risk analysis.⁶ *Bennett*, 80 S.W.3d at 531. This

on paved, level ground while working was not entitled to workers' compensation. The condition of the workplace bore no causal relationship to the employee's injury.

⁵ In his treatise on workers' compensation law, Arthur Larson identifies 5 historical positions with regard to determining whether a risk or hazard causing injury to an employee arose out of and in the course of the workers' employment. *Bennett v. Columbia Healthcare*, 80 S.W.3d 524,531 (Mo.App.W.D.2002); 1 Arthur Larson, *Larson's Workers' Compensation Law*, §§3.02-3.05 (2002)(hereinafter "Larson's"). The increased risk analysis holds that if the particulars of the worker's employment led to an increase in the risk or hazard which resulted in the injury, then the injury is compensable, even if the risk or hazard is shared by others outside of the employment. *Id.*

⁶ Under the positional risk analysis, an injury is compensable if it would not have occurred if the worker had not been subjected to the risk of injury due to the employment. Essentially, the positional risk analysis is a "but for" test. *Id.*

shift in judicial construction is exemplified by three cases: *Drewes v. Trans World Airlines*, 984 S.W.2d 512; *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852; and *Bennett v. Columbia Healthcare*, 80 S.W.3d 524.

Drewes v. TWA

At issue in *Drewes* was whether an employee who was injured when she fell while carrying her lunch in a break room could recover workers' compensation benefits. *Drewes*, 984 S.W.2d at 514. Veronica Drewes worked as a TWA reservation agent. Her work day included a regularly-scheduled 30-minute unpaid lunch break. There was not enough time to leave the building for lunch because no food was available nearby, and moreover, the surrounding area was unsafe at the time of Drewes' lunch break. *Drewes*, 984 S.W.2d at 513-514. During her lunch break on the day of the accident, Drewes purchased food from vending machines in the TWA-leased break room on the second floor. This break room was for the exclusive use of TWA employees. *Drewes*, 984 S.W.2d at 514. Due to a line at the microwaves, Drewes went downstairs to use the break room on the first floor, intending to eat in the adjacent cafeteria, smoke a cigarette, and return to work on time. *Id.* While Drewes was carrying her lunch in the first floor break room toward the cafeteria door, she fell, and injured her ankle. *Id.* TWA leased space on the first and second floors of the building, but did not lease the first floor break room, which was open to all tenants of the building. TWA management permitted employees to use the common first-floor break room, and TWA staff told Drewes that employees were free to use both break rooms, as they regularly did. *Id.*

The ALJ awarded workers' compensation benefits, and the Industrial Commission affirmed. TWA appealed. On appeal, the Supreme Court affirmed. *Drewes*, 984 S.W.2d at 513-514.

As the Supreme Court observed, to arise out of the employment, the injury must be incidental to, and not independent of, the relation of employer and employee. It found that tending to one's personal comfort was "incidental to employment." *Drewes*, 984 S.W.2d at 514. Drewes was tending to her personal comfort by carrying her lunch, when she fell. Her activity, eating lunch, was incidental to her employment. *Id.*

The 1993 amendments also required that Drewes' activity (an incident of her work) be a substantial factor in causing her resulting medical condition or disability; and that Drewes' injury 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 non-employment life. *Drewes*, 984 S.W.2d at 514. The Supreme Court found that Drewes' act of carrying her lunch to the table to eat her meal was a substantial factor in causing her injury. It reasoned that there was no evidence of an idiopathic condition that was innate or peculiar to Drewes. Nor was there any evidence that the injury came from a hazard or risk that was unrelated to Drewes eating lunch. It found, necessarily, that Drewes was not 'equally exposed' outside of her employment to the risk of falling during her lunch break. Thus, Drewes' accident arose out of her employment. *Drewes*, 984 S.W.2d at 514.

Additionally, to recover benefits, Drewes' accident must have occurred in the course of her employment. Workers were not in the course of their employment, except

while engaged in or about the premises where their duties were being performed, or where their services required their presence as part of such service. *Drewes*, 984 S.W.2d at 514-515. Injuries to a fixed hour, fixed place employee, on an unpaid lunch break away from the employer's premises, were not compensable. *Drewes*, 984 S.W.2d at 515. "Premises" included property owned or controlled by the employer. Section 287.020.5 covered accidents both "in" the premises and "about" the premises. *Id.* Accidents in or about the premises, during a scheduled unpaid lunch break, occurred in the course of employment. *Drewes*, 984 S.W.2d at 515. While *Drewes*, a fixed hour, fixed place worker, was injured on an unpaid lunch break in a room that was not owned, rented or controlled by TWA, the first-floor break room was common and open to all tenants of the building, and adjoined TWA's premises on the first floor. The common break room was in or about TWA's premises. Therefore, *Drewes*' accident occurred "in the course of" her employment. *Drewes*, 984 S.W.2d at 515.

Judge Ann Covington dissented. As she observed, to obtain an award of workers' compensation, *Drewes* had to show that her injury arose out of and in the course of her employment. *Drewes*, 984 S.W.2d at 515. In 1993, the legislature explicitly defined the term "**injury**" and more fully described when an injury should be deemed to arise out of and in the course of the employment. *Id.* As Justice Covington noted, under the 1993 amendments, an injury was one which has arisen out of and in the course of the employment. An injury was deemed to arise out of and in the course of employment only if it is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; it can be seen to have followed

as a natural incident of the work; it can be fairly traced to the employment as a proximate cause; and 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 non-employment life. *Drewes*, 984 S.W.2d at 515-516. The legislature’s use of the conjunction “and” reflected its intent that an employee meet all the requirements of Section 287.020.3(2) to prove that their injury arose out of and in the course of employment. *Drewes*, 984 S.W.2d at 516.

Judge Covington found that Section 287.020.3(2)(d) was dispositive of Drewes’ claim. That claim failed because Drewes’ injury resulted from a hazard or risk unrelated to her employment, to which she would have been equally exposed outside of and unrelated to her employment, in normal non-employment life. *Id.* There was no evidence that Drewes’ fall in the first floor break room resulted from a hazard or risk to which Drewes would not have been equally exposed outside of her employment. Drewes was not injured while performing her work duties. She fell as she was carrying her lunch during a lunch break. At the time of her fall, Drewes was in the building’s common break room, which was open to all inhabitants of the building. The risk to Drewes was no greater than the risk to any inhabitant of the building, or any member of the general public who might have ventured into the break room. *Id.*

Even assuming, *arguendo*, that the break room was part of TWA’s premises, and thus arguably related to Drewes’ employment, there was no evidence that her fall was caused by any characteristic or condition of the break room. Drewes inexplicably fell. *Id.* She was no more likely to fall in the break room during her lunch break than in her

“normal non-employment life.” *Id.* Because Drewes’ injury resulted from a hazard or risk unrelated to her employment, it could not be deemed to have arisen out of and in the course of the employment. Thus, Drewes’ injury was not compensable. *Drewes*, 984 S.W.2d at 516.

Judge Covington found that the majority decision departed from *Abel*, which was not distinguishable. Abel was a gas station attendant who fainted while checking credit card receipts at a gas pump. He sustained a head injury when he fell to the pavement. The Supreme Court affirmed the Industrial Commission’s award denying compensation. It found that there were no conditions at Abel’s workplace that made his workplace any different from or any more dangerous than those a member of the general public could expect to confront in a non-work setting. *Id.* The connection between Drewes’ injury and her employment was even more attenuated than the connection in *Abel*. Unlike Abel, who was injured while carrying out his work, Drewes was taking an unpaid lunch break in the common area of the building where her office was located. As in *Abel*, Drewes failed to show that any condition of the work caused her injury. She simply fell. *Id.* Judge Covington read both Section 287.020 and *Abel* to require a holding that Drewes’ injury could not be deemed to have arisen out of and in the course of her employment. *Id.*

Kasl v. Bristol Care

In *Kasl v. Bristol Care*, 984 S.W.2d at 853, an employee sought workers’ compensation benefits for injuries she sustained when she arose from her chair to dispense medicine to a resident and, unaware that her foot had fallen asleep, fell and

broke her ankle. Marcia Kasl managed and resided at a residential care facility. One evening, she arose from her chair to dispense medication to a resident. Unaware that her left foot had fallen asleep, Kasl fell and broke her ankle. *Kasl*, 984 S.W.2d at 852-853.

The Industrial Commission issued a temporary award of benefits, finding Kasl's injuries to be compensable. The employer appealed, asserting that the injury did not arise out of and in the course of Kasl's employment. *Kasl*, 984 S.W.2d at 853.

The Supreme court affirmed. It observed that in amending the Workers' Compensation Act in 1993, the legislature did not change the fundamental principle of workers' compensation. Namely, that employers were liable, irrespective of negligence, to furnish compensation to employees for personal injuries from accidents arising out of and in the course of the employment. *Kasl*, 984 S.W.2d at 853. However, the 1993 amendments did change the definition of "accident". Adopting the test in *Wolfgeher*, the 1993 amendments required that, to be compensable, accidents must be clearly work-related. *Id.* This meant that the accident must be unique to the work. *Id.* Further, the 1993 amendments required that work be a substantial factor, and not merely a triggering or precipitating factor, in causing the resulting medical condition or disability. *Id.* However, the Supreme Court found that awards for injuries triggered or precipitated by work were nonetheless proper *if* the employee showed that the work was a substantial factor in the cause of the injury. *Id.*

As the Supreme Court recognized, the 1993 amendments also changed the definition of the term "injury". *Kasl*, 984 S.W.2d at 854. The parties disputed the meaning of Section 287.020.3(2)(d), which stated that to be compensable, the injury

could not come from a hazard or risk “unrelated to” the employment. *Id.* Among such hazards or risks were idiopathic conditions, those peculiar to the individual or innate. *Id.* Common conditions exacerbated by employment requirements were not idiopathic. But injuries on the job, resulting from an idiopathic condition peculiar to the employee, were not covered under the Act. *Id.*

After waiting for the appointed time, Kasl arose from her chair to dispense medicine to a resident, which was a requirement of her job. *Id.* In terms of Section 287.020.3(2)(d), Kasl’s condition was not idiopathic. Having a foot “fall asleep” was neither innate nor peculiar to Kasl. Rather, the Court found that Kasl’s foot falling asleep was a common condition clearly related to her work. Without having to wait for the appointed time to dispense medicine, Kasl’s foot would not have fallen asleep. *Id.* And, without having to arise to dispense medicine (a job requirement), with a foot that had fallen asleep, Kasl would not have fallen, breaking her ankle. *Id.* By itself, having a foot fall asleep was neither a hazard nor a risk to Kasl. Only in conjunction with and exacerbated by her work did Kasl’s common condition subject her to injury. *Id.* The work-related requirements were a substantial factor – more than a mere triggering or precipitating factor – in the fall that caused Kasl’s injury. *Id.* Below, the Commission had found that the conditions of Kasl’s required work – waiting for the appointed time for the patient’s medication – caused her foot to fall asleep, which, when coupled with the job requirement of getting the medication, caused an accident. *Id.* Kasl’s work was thus a substantial factor in causing her fall and resulting injury, which was clearly work-related. *Id.*

Judge Limbaugh issued a dissenting opinion. *Kasl*, 984 S.W.2d at 855-856. He found that the majority misapplied the 1993 amendments to the facts of the case, “in such an excessively liberal manner that one is hard-pressed to imagine any injury from an accident at work that is not compensable.” *Kasl*, 984 S.W.2d at 855. Judge Limbaugh strongly disagreed that any requirement of Kasl’s job was a substantial factor in the fall that caused her injury. The requirement that Kasl arise from her chair to dispense medicine to residents at the care facility was, instead, nothing more than a triggering or precipitating factor, which in and of itself, was not a sufficient connection to the accident and the injury. *Kasl*, 984 S.W.2d at 855-856. While the job requirement was clearly related to the accident and injury, it was not the kind of substantial factor that should result in compensability. It was not enough to merely show that claimant suffered an injury while working. *Kasl*, 984 S.W.2d at 856.

Judge Limbaugh disagreed with the majority’s tacit conclusion that the hazard or risk of injury from a foot falling asleep after sitting in a chair was something to which Kasl would not have been equally exposed out of her employment. *Id.* As the Supreme Court stated in *Abel*,⁷ recovery under Section 287.120.1 followed only where a condition unique to or exacerbated by the workplace exists and contributes to cause the injury. *Kasl*, 984 S.W.2d at 856. The majority failed to point to any condition unique to or exacerbated by Kasl’s work that existed and contributed to cause her injury. *Id.* The

⁷ *Abel*, 924 S.W.2d at 504.

reason for this failure was obvious: Kasl's foot could have fallen asleep wherever she had been seated, whether at work, or at home, or elsewhere. *Id.*

As Justice Limbaugh noted, the majority could not distinguish *Abel*. Therein, the Supreme Court affirmed the Industrial Commission's award denying compensation to Abel, who suffered an intracerebral hematoma from a fall on the pavement of a gasoline station. The fall occurred when Abel fainted while checking credit card receipts at one of the gas pumps as part of his duties as a gas attendant. *Id.* Although Abel was fulfilling the requirements of his job at the time of his accident, and the accident and injury was in that sense related to the employment, there was no causal connection to Abel's injury. Although Abel's injuries occurred in the course of his employment, nothing about the condition of Abel's workplace enhanced the effects of gravity or made the conditions of his workplace any different from or any more dangerous than those a member of the general public could expect to confront in a non-work setting. *Id.*

Justice Limbaugh found that the case before the Court was no different. No facts showed that the hazard or risk of employment was something different from that which Kasl would have encountered in everyday life. *Id.* Further, Kasl's duty to dispense medicine was no more a substantial factor in causing her injury than Abel's duty to check credit card receipts at the gas pumps was a substantial factor in causing his injury. *Id.*

As Justice Limbaugh observed, the majority's decision referred to the Industrial Commission's findings of fact. The Commission acknowledged that there really were no material facts in dispute. *Id.* Rather, the "facts" were that Kasl was sitting in a chair at the care center, and when the time came for her to dispense medications to the resident,

she arose from her chair and fell because her foot had fallen asleep. *Id.* The Industrial Commission’s “finding” – that the conditions of Kasl’s required work caused the accident – was simply an application of the law to the uncontested facts. *Id.* In other words, it was a conclusion of law to which the Supreme Court owed no deference. *Id.* Moreover, Justice Limbaugh noted that the Industrial Commission’s “finding” was based exclusively on the now-suspect holding in *Kloppenburg v. Queen-Size Shoes*.⁸ *Id.* Kloppenburg had nearly identical facts. Therein, an employee fell when she arose from her chair because her foot had fallen asleep. *Id.* In Judge Limbaugh’s view, the 1993 amendments redefining “**accident**” and “**injury**”, coupled with the *Abel* decision, effectively overruled *Kloppenburg*. *Id.*

Bennett v. Columbia Healthcare

Bennett v. Columbia Healthcare & Rehabilitation, 80 S.W.3d at 526-527, ruled that an employee’s injury did not have to be immediately preceded by a sudden fall or an unusual strain to be compensable, and that an injury occurring while Bennett was walking and climbing stairs arose out of her employment. Marianne Bennett was a nurses’ aide at Columbia Healthcare. Before the date of her injury, Bennett had a prior history of right knee problems, including medical treatment on several occasions. In fact, Bennett had undergone surgery for torn cartilage in 1979. At issue were two incidents. The first occurred as Bennett was making a patient’s bed. While she was walking around the bed, Bennett felt a pop in her right knee. *Bennett*, 80 S.W.3d at 526. Later that day, Bennett

⁸ 704 S.W.2d 234 (Mo.banc.1986).

felt another pop in her right knee, while she was carrying linens up a flight of stairs. Despite these incidents, Bennett worked the rest of her shift. That evening, Bennett received treatment at the emergency room. Notes from the emergency room physician stated that Bennett was not carrying anything while she was walking up the stairs. However, an incident report stated that Bennett was carrying clothing protectors at the time her knee popped on the stairs. *Id.* When the incidents occurred, Bennett believed, and remarked to her supervisor, that her knee hurt because her arthritis was acting up. *Id.*

Thereafter, on 1-31-97, Bennett's knee locked up while she was pushing a wheelchair. Another incident occurred on 5-13-97 when, according to Bennett, her knee again "locked up" at work. *Id.*

After hearing, the ALJ issued an award. Finding that there was no evidence that Bennett was suffering from an occupational disease, the ALJ confined his analysis to the question of whether Bennett's injury was compensable as caused by an "accident" arising out of her employment. The ALJ took the position that Bennett did not suffer any accident, because she did not sustain a fall, loss of balance, slip, or unusual twisting or straining immediately prior to the times when her knee "popped" or gave way. *Id.* Moreover, the ALJ concluded that the activity in which Bennett was engaged, walking around the hospital premises (including ascending and descending stairs), was an activity to which she was equally exposed outside of her employment. He held that Bennett's injury was not work-related. *Bennett*, 80 S.W.3d at 526-527. Specifically, the ALJ found that Bennett did not sustain an accident arising out of and in the course of her employment on any of the instances in question. *Bennett*, 80 S.W.3d at 527. The ALJ

reasoned that walking and going upstairs were normal activities of daily life, to which claimant was equally exposed outside of her employment, and that there was no fall, twisting, jerking, or loss of balance. *Id.* After the Industrial Commission affirmed the ALJ's award, Bennett appealed. *Id.*

On appeal, Bennett asserted that the Industrial Commission erred in denying her claim because her injury did not arise from any twisting, fall, jerking, or loss of balance while she was performing her job duties. Claimant argued that under its analysis, the Commission essentially added an improper element to her claim. *Id.* Additionally, Bennett contended that the Industrial Commission erred in finding that she was equally exposed to the same hazards outside of work as she encountered as a result of her job duties. She argued that the Industrial Commission misapplied the law by holding that her injury was not compensable because she engaged in similar activities in her non-employment life. *Id.* Bennett posited that the Industrial Commission could not have found that she was equally exposed to similar activities outside of the work environment, since making patients' beds, carrying linen upstairs, and pushing wheelchairs were not normal activities she engaged in outside of work, but rather, were activities inherently and exclusively related to her employment. *Id.*

On appeal, the Western District noted that the issue of compensability turned upon the interpretation of the word "**accident**" in the Workers' Compensation Act. It observed that prior to *Wolfgeher*, the legal concept of "**accident**" was generally restricted to sudden traumatic events. *Bennett*, 80 S.W.3d at 528. *Wolfgeher* broadened the definition of "**accident**", shifting the focus to whether a work-related injury had occurred,

and away from whether the employee had been exposed to some sudden, unexpected trauma that precipitated the injury. *Id.*

Cases following the 1993 amendments to the Act treated those amendments as codifying the principles in *Wolfgeher*. *Id.* For example, in *Smith v. Climate Engineering*,⁹ the Eastern District opined that the emphasis had shifted away from the requirement that the employee had suffered from a sudden “accident”, to an examination of the injury itself and whether it arose out of and in the course of the employment. As such, although not immediately preceded or accompanied by an unforeseen and unusual event, an injury was compensable if it was an unexpected result of the performance of the usual and customary duties of an employee, which led to a physical breakdown or change in pathology. *Bennett*, 80 S.W.3d at 528-529. The rationale underlying the ruling in *Smith* was mirrored by the subsequent decision in *Winsor v. Lee Johnson Construction*.¹⁰ *Winsor* ruled that an employee need not necessarily show that his injury resulted from the occurrence of an unusual event. Rather, an employee was only required to show that his injury was “job-related”. *Bennett*, 80 S.W.3d at 529. It was sufficient to show only that the performance of the usual and customary duties led to a breakdown or change in pathology. Thus, *Winsor* held that the worsening of a pre-existing condition was a change in pathology. *Id.*

⁹ 939 S.W.2d 429,434 (Mo.App.E.D.1996).

¹⁰ 950 S.W.2d 504,509 (Mo.App.W.D.1997).

The Western District found that the ALJ took the position that in order for Bennett's injury to be compensable, it had to be immediately preceded by either a sudden fall (precipitated by slipping or tripping) or by some unusual strain upon her knee caused by bending, twisting or kneeling. *Bennett*, 80 S.W.3d at 529. This was an erroneous application of the law under *Wolfgeher* and the 1993 amendments. *Id.* By adopting the ALJ's opinion, the Commission compounded that error. *Id.*

The Western District then turned to Bennett's second point on appeal. She argued that the Commission erred in finding that she was equally exposed to the same hazards and risks outside of her employment. Specifically, Bennett asserted that the ALJ's opinion, adopted by the Industrial Commission, incorrectly concluded that walking could not be a hazard arising out of her employment. *Bennett*, 80 S.W.3d at 529-530.

As the Court observed, Bennett bore the burden of establishing that the hazard or risk that led to her injury was not one that she was equally exposed to outside of her employment. *Bennett*, 80 S.W.3d at 530. Claimant suggested that this test was not applicable when the activity causing the injury was required as part of the employee's duties. *Id.* In making this assertion, Bennett relied on a series of cases in which employees were compensated for injuries suffered while walking, including *Kasl* and *Drewes*. *Bennett*, 80 S.W.3d at 530. In *Wells* and *Willeford*, cited by claimant,¹¹ the employees faced icy conditions that made walking treacherous. *Bennett*, 80 S.W.3d at

¹¹ *Wells v. Brown*, 33 S.W.3d 190 (Mo.banc.2000); *Willeford v. Lester E. Cox Medical Center*, 3 S.W.3d 872 (Mo.App.S.D.1999).

530. The Western District observed that the respective claimants in these cases faced hazards, *in addition to* the risk inherent to the activity of walking. These employees were also required to face those hazards as a result of their employment. Implicit in that observation seemed to be a view that the employees could have avoided these additional hazards outside of their respective employments. For this reason, the courts in *Wells*, *Willeford* and *Kasl* concluded that the employees' injuries resulted from dangers to which the workers were not equally exposed in their non-employment activities. *Bennett*, 80 S.W.3d at 530.

However, the Western District found *Drewes* more difficult to resolve. *Id.* As it observed, the *Drewes* opinion did not note any particular hazard faced by the employee. *Id.* In evaluating the issue of compensability, the Supreme Court relied on four factors. First, *Drewes*' act of carrying her lunch to the table to eat her meal was a substantial factor in causing her injury. *Id.* Second, there was no evidence of an idiopathic condition innate or peculiar to *Drewes*. Nor was there any evidence that the injury came from a hazard or risk that was unrelated to *Drewes* eating lunch. Necessarily, *Drewes* was not equally exposed outside of her employment to the risk of falling during her lunch break. *Bennett*, 80 S.W.3d at 530.

As the Western District noted, *Wells*, *Willeford*, *Kasl* and *Drewes* were each factually distinguishable, as those cases involved a fall, whereas the case before it did not. However, the Western District found that this distinction was not dispositive as to the underlying issue, i.e., the application of the requirement in Section 287.020.3 that an

injury arise from a hazard that the employee is not equally exposed to in her non-employment activities. *Bennett*, 80 S.W.3d at 530-531.

The Western District took note of the five positions with regard to determining whether a risk or hazard causing injury to a claimant arose out of the claimant's employment, as summarized by Arthur Larson in his treatise on workers' compensation law. The court observed that prior to *Drewes*, the reported cases appeared to fall within the increased risk analysis, the majority rule according to Larson. The language of Section 287.020.3(2)(d) also appeared to fit within that category. *Bennett*, 80 S.W.3d at 531. However, the Western District found that *Drewes* likely signaled a shift away from that position, toward either an actual risk or a positional risk analysis. It appeared that the injury *Drewes* suffered was found to be compensable merely because it occurred while she was engaging in activities incidental to her employment. *Id.*

In light of *Drewes*, the Western District found that the Industrial Commission erred in concluding that an injury caused or aggravated by walking could not be considered as arising out of employment. Clearly, walking, both on level floors and traversing stairs, was an integral part of *Bennett's* job activities. *Id.* *Bennett* was engaged in activities incidental to her duties at the time she experienced each "pop" or "giving way" of her knee. *Id.*

2005 Amendments

As *Kasl*, *Drewes* and *Bennett* demonstrate, judicial interpretations of the 1993 amendments to the Workers' Compensation Act served to expand the scope of workers' compensation coverage. In an effort to realign the Workers' Compensation Act, and the

scope of coverage provided thereunder, back to its original intent, the legislature, through Senate Bills 1 and 130 made significant changes to the Missouri workers' compensation system. *Missouri Alliance*, 2009 WL 454282. Senate Bills 1 and 130 amended 39 sections of Chapter 287, RSMo. *Id.* The amendments contained within Senate Bills 1 and 130 redefined key terms in the Act, including the terms “**accident**”, “**injury**”, “**arising out of**”, and “**in the course of employment**”. (SB.Nos.1,130).

When enacting legislation, the legislature is presumed to be aware of the state of the law, including the judicial interpretation of statutes. *Nunn v. C.C.Midwest*, 151 S.W.3d 388,397 (Mo.App.W.D.2004). In construing statutes to ascertain legislative intent, it is presumed that the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts, and that in amending a statute, it is ordinarily the intent of the legislature to effect some change in the existing law. *State ex rel Kemp v. Hodge*, 629 S.W.2d 353,358 (Mo.banc.1982).

That the Missouri legislature was aware of prior judicial constructions of the terms “**accident**” and “**injury**” which served to expand workers' compensation coverage, and intended to abrogate those prior decisions, is evidenced by the clear and unambiguous language in Section 287.020.10. Therein, the legislature expressly stated its intent to abrogate *Kasl*, *Drewes*, *Bennett*, and similar cases interpreting the 1993 amendments to the Act. **RSMo** §287.020.10. That provision 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 the employment” to include, but not be limited to, holdings in: *Bennett v. Columbia Healthcare & Rehabilitation...Kasl v. Bristol Care...* and *Drewes v. TWA...* and all cases citing, interpreting, applying, or following those case.” **RSMo §287.020.10.**

When enacting the 2005 amendments, the legislature was free to reject prior judicial interpretations of the Workers’ Compensation Act, and the definitions of **“accident”** and **“injury”** contained therein, that the legislature believed to be unduly expansive or to reject specific judicial rulings, such as those in *Kasl, Drewes,* and *Bennett.* See *Lawson v. Ford Motor Company*, 217 S.W.3d 345,349 (Mo.App.E.D.2007), finding that the language contained in Section 287.020.10 merely served as a clarification of the fact that any construction of the previous definitions of **“accident”, “injury”, “occupational disease”, “arising out of”,** and **“in the course of the employment”** by the Missouri courts was rejected by the amended definitions contained in Section 287.020. ¹²

¹² Workers’ compensation law is entirely a creature of statute. *Hayes v. Show Me Believers*, 192 S.W.3d 706,707 (Mo.banc.2006); *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273,276 (Mo.banc.2002). When interpreting the Workers’ Compensation Act, the Court is to ascertain the intent of the legislature from the language used, and to give effect to that intent by giving the words used their plain and ordinary meaning. *Id.*; *Nunn*, 151 S.W.3d at 396.

Senate Bills 1 and 130 significantly changed the definitions of both “**accident**” and “**injury**”. The definition of “**accident**” under the Act as amended is:

“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.”

RSMo §287.020.2.

Relatedly, the term “**injury**” is an:

“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.” **RSMo** §287.020.3(1).

Pursuant to the 2005 amendments, an injury shall be deemed to arise out of and 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 non-employment life.” **RSMo** §287.020.3(2).

An injury resulting directly or indirectly from idiopathic causes is not compensable. **RSMo** §287.020.3(3).

Significantly, the 2005 amendments altered the requirement that the Act and evidence be liberally construed. As amended, Section 287.800 states:

“1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers’ compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers’ compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence in resolving factual conflicts.” **RSMo** §287.800.

The requirement for strict construction, contained in amended Section 287.800, is a significant departure from the prior law, which called for the provisions of Chapter 287 to be liberally construed. *Allcorn v. Tap Enterprises*, 2009 WL 482355 (Mo.App.S.D.2009). Strict construction of a statute presumes nothing that is not expressed. *Id*; *3 Sutherland Statutory Construction*, §58:2 (6th Ed.2008). The rule of strict construction does not mean that the statute is to be construed in a narrow manner, but that everything shall be excluded from its operation which does not clearly come within the scope of the language used. *Id*. Relatedly, strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases

which fall fairly within its letter. *Id.* The clear, plain, and obvious import of the language should be used, and the statute should not be applied to situations or parties not fairly or clearly falling within its provisions. *Id.* Where strict construction is required, the Court is not to enlarge or extend the law. *Id.*

Moreover, Section 287.800 requires that the evidence is to be weighed impartially, without giving the benefit of the doubt to any party. **RSMo** §287.800. By this language, the legislature made it abundantly clear that previous cases which had applied a liberal construction of the law to resolve questions in favor of coverage for the employee were no longer to be followed. *Allcorn*, 2009 WL 482355.

Judicial interpretation of the 1993 amendments, as evidenced by *Kasl, Drewes* and *Bennett*, allowed an employee to recover workers' compensation, even where the causal connection between the conditions of the employment and the injury was minimal or extremely attenuated. The 2005 amendments sought to return the Workers' Compensation Act and judicial interpretation of the Act to the state it was in under *State ex rel Hussman* and similar authorities. These prior judicial precedents required the showing of both an accident and an injury, and that the work accident be the primary or main factor in bringing about the employee's injury. *Hussman*, 153 S.W.2d at 42.

The amendments to the statutory definitions of “**accident**” and “**injury**” served to modify the burden of proof on the issue of causation in workers' compensation matters. *Lawson*, 217 S.W.3d at 350; *Missouri Alliance*, 2009 WL 454282. The prevailing factor standard of compensability was intended to narrow the category of work-related injuries by accident for which an employee was eligible to receive workers' compensation

benefits. *Lawson*, 217 S.W.3d at 350. Clearly, the prevailing factor standard is a more rigorous standard for compensability than the prior substantial factor test. *Id.*

Since the passage of Senate Bills 1 and 130 amending the Act, there have been few published appellate court opinions applying the 2005 amendments. Two decisions, however, *Bivins v. St. John's Regional Health Center*, 272 S.W.3d 446 (Mo.App.S.D.2008); and *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo.App.E.D.2008), provide guidance for the Court.

Bivins v. St. John's

At issue in *Bivins* was whether an employee could recover workers' compensation benefits for a fall occurring while she was walking down a common hallway to clock in for work. Joyce Bivins was employed by St. John's. On 8-27-06, she arrived at the hospital to begin work. Bivins was walking down a hallway toward a time clock, where she planned to clock in, when she fell. *Bivins*, 272 S.W.3d at 448.

The parties disputed exactly how Bivins' fall occurred. Claimant contended that her foot stuck to the floor and that this caused her to fall. *Id.* However, employer presented evidence that there was nothing on the floor that would have caused claimant's foot to slip or that would have caused her to slip or trip. Bivins admitted that there were no warning signs indicating the floor was wet, and that she saw no debris, no liquid, or a sticky substance on the floor. *Bivins*, 272 S.W.3d at 448. The floor was composed of the same type of tile that was present throughout the hospital. Photographs taken immediately after the incident showed nothing on the floor. There was no credible evidence in the record that the condition of the floor caused Bivins to slip, trip, or caused

her foot to stick, thus causing her to fall. *Id.* An emergency nursing record and a patient medical record stated that the employee tripped and/or slipped. Those records did not indicate that Bivins' foot stuck to the floor. *Id.* Witnesses at hearing testified that claimant informed them that she "just fell," and that claimant did not state that she fell because her foot stuck to the floor. *Bivins*, 272 S.W.3d at 448-449.

The Industrial Commission concluded that Bivins was walking in a hallway on the premises of the employer when she "just fell", meaning that she simply or merely fell, without explanation. It rejected as not credible employee's trial testimony that her foot stuck to the floor immediately prior to falling. Due to the fact that Bivins' injury was the result of an unexplained fall, the Industrial Commission was unable to determine or conclude that there was any unique condition of the employment which contributed to her injury. *Bivins*, 272 S.W.3d at 449.

As the Commission observed, the burden rested on Bivins to show some direct causal connection between her injury and her employment. An award of compensation could only be issued if the injury was a rational consequence of some hazard connected with the employment. *Id.* The employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. *Id.*

Due to the fact that claimant's injury was sustained as a result of an unexplained fall, the Industrial Commission could not establish a causal connection between the conditions under which Bivins was performing her work and her resultant injury. Given the facts of the case, an award of compensation could only be justified by accepting the "but for" reasoning of the positional risk doctrine. *Id.* However, the 2005 amendments

specifically abrogated earlier case law interpretations involving the positional risk doctrine, and required proof greater than the fact that the conditions and obligations of the employment placed the employee in the position where she was injured. *Id.*

An employee had to satisfy the concept of causation, i.e., to establish some rational connection between her work and the injury sustained. Since Bivins' fall was not able to be explained, since she "just fell", the element of proof needed to establish that the injury arose out of her employment was lacking. *Bivins*, 272 S.W.3d at 450. Denying Bivins' claim, the Commission found that she failed to sustain her burden of proving that her injury was due to an accident arising out of and in the course of employment. *Id.*

On appeal, the Southern District affirmed. *Bivins*, 272 S.W.3d at 451-452. As the Court of Appeals observed, Section 287.020.10 precluded recovery under the Act for certain types of injuries. It did so by restricting the definitions of certain terms in the Act, including "accident", "arising out of", and "in the course of employment". Moreover, Section 287.020.10 provided that the previous definitions of those terms, such as those used in *Bennett*, *Kasl*, *Drewes* and similar cases, were no longer applicable for purposes of determining liability under the Act. *Bivins*, 272 S.W.3d at 451.

Section 287.020.10, in particular, the abrogation of the decision in *Drewes* therein, was applicable to the facts before the Court. The employee in *Drewes* was on her lunch break when she fell in the break room she was crossing in order to enter an adjacent cafeteria, where she intended to eat lunch. *Id.* Like the employee in *Drewes*, Bivins was not performing assigned duties at the time of her unexplained fall. Rather, she was

walking down a common hallway, intending to clock in for purposes of commencing work. *Id.* Had the law remained as it existed at the time of *Drewes*, arguably Bivins' injury could have been declared as having been incidental to her employment. However, present law did not allow recovery on that basis. *Id.*

Under the statute as amended, in order for an injury to be deemed to arise out of and in the course of the employment, it could not be the product of 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 non-employment life. *Id.* There was no rational connection between Bivins' work and the injury she sustained. The Southern District concluded that the Industrial Commission's award denying compensation was supported by competent and substantial evidence. *Bivins*, 272 S.W.3d 454-452.

Gordon v. City of Ellisville

Gordon v. City of Ellisville, 268 S.W.3d 459-460, is also instructive. Gerald Gordon was employed as a maintenance worker for the city of Ellisville. On 10-21-05, Gordon was in the process of climbing out of a tub grinder at work when he slipped and fell on his right arm, with his arm extended. *Gordon*, 268 S.W.3d at 456. After undergoing conservative care, Gordon underwent an MRI, that revealed a massive rotator cuff tear. *Id.* Subsequently, Gordon underwent shoulder surgery, completed physical therapy, and was returned to work without restriction. *Id.*

Gordon filed a compensation claim. At hearing, the issues were medical causation with regard to Gordon's need for surgery, entitlement to temporary total disability, and permanent partial disability. *Id.* During hearing, Gordon testified that in 1993, he

sustained a shoulder injury for which he underwent an open right rotator cuff repair. According to the employee, following the 1993 surgery he was 99.5% back to normal, and had no difficulties performing the labor required for his job. *Gordon*, 268 S.W.3d 456-457. Additionally, Gordon could play softball, bowl and golf with his right arm without problem. Gordon testified that since the 2005 injury, he could no longer play sports and needed assistance to compensate for pain in his arm when performing his work duties. *Gordon*, 268 S.W.3d at 457.

Dr. Poetz diagnosed Gordon's medical condition from the 1993 injury as a right rotator cuff tear. He diagnosed the 2005 injury as a massive irreparable right rotator cuff tear. Dr. Poetz found that the surgical procedure employee underwent in November 2005 was necessary because of the October 2005 injury. *Gordon*, 268 S.W.3d at 457.

Dr. Lehman, who performed the November 2005 surgery on Gordon's shoulder, testified that prior to performing surgery he believed that employee's rotator cuff tear was a result of the October 2005 accident. But Dr. Lehman came to a different conclusion after observing claimant's shoulder during surgery. *Gordon*, 268 S.W.3d at 457. When he operated on employee's shoulder, Dr. Lehman expected to see a re-tear of the employee's previous rotator cuff repair. Instead, he found no evidence of any good rotator cuff tissue. Additionally, Dr. Lehman found chronic changes in employee's joint that appeared to be long term in nature. Given these findings, Dr. Lehman concluded that Gordon's October 2005 work accident was not the prevailing factor in causing his need for surgery. Dr. Lehman diagnosed employee's 2005 injury as a strain of the right shoulder, and found that the strain had no effect on the employee's rotator cuff.

Relatedly, Dr. Lehman concluded that Gordon did not have a disability as a result of the October 2005 accident. *Id.*

Finding Dr. Lehman's testimony to be more persuasive than that of Dr. Poetz, the Industrial Commission ruled that Gordon was not entitled to benefits. Based on Dr. Lehman's testimony, the ALJ held that the injury Gordon suffered from the 2005 work accident was not the prevailing factor in causing his rotator cuff tear. *Gordon*, 268 S.W.3d at 457-458. The Industrial Commission affirmed the denial of benefits. *Gordon*, 268 S.W.3d at 458.

On appeal, the Eastern District affirmed. Before the Court of Appeals, Gordon argued that because the Industrial Commission found that he suffered some trauma to his right shoulder when his work accident occurred, the Commission was required to award compensation. Gordon contended that the 2005 accident aggravated his previous shoulder condition, rendering the injury compensable. *Gordon*, 268 S.W.3d at 459.

As the Court observed, caselaw preceding the 2005 amendments permitted an employee to recover benefits by establishing a direct causal link between their job duties and an aggravated condition. However, when the legislature amended Section 287.020, it changed the criteria for determining when an injury was compensable. *Gordon*, 268 S.W.3d at 459. Specifically, the legislature struck out language stating that an injury was deemed to arise out of and in the course of the employment where it was reasonably apparent that the employment was a substantial factor in causing the injury, the injury can be seen to have followed as a natural incident of the work, and can be fairly traced to the employment as a proximate cause. *Id.* Under the Act as amended, a work injury was

compensable *only if* the accident was the prevailing factor in causing both the resulting medical condition and disability. Moreover, Section 287.200 required the appellate court to strictly construe the provisions of the Act. *Gordon*, 268 S.W.3d at 459.

Thus, the issue before the court was whether Gordon established that his 2005 accident was the prevailing factor in causing his need for rotator cuff surgery and post-surgery treatment. Utilizing the standards contained in the Act, as amended, the Eastern District held that the Industrial Commission's finding, that employee's 2005 accident was not the prevailing factor in causing his need for rotator cuff surgery, was supported by competent and substantial evidence. *Gordon*, 268 S.W.3d at 460.

Johnson v. Town & Country Supermarkets

Finally, employer refers the Court to *Johnson v. Town & Country Supermarkets*, 2007 WL 4055936 (Mo.Lab.Ind.Com.2007).¹³ Randy Johnson was on the premises of employer's supermarket, during his normal work shift, fulfilling his duties on behalf of his employer. While performing his work duties, Johnson was requested by management to assist co-employees in retrieving grocery shopping carts from a retirement community located nearby. While walking through a grocery aisle toward the front of the store, Johnson injured his right lower extremity. *Id.* In describing how the injury occurred, Johnson stated that while walking down the grocery aisle, he "stepped wrong" and that

¹³ While not binding precedent, since it is an award of the Industrial Commission, the *Johnson* case is instructive as to how the Commission has interpreted and applied the 2005 amendments to a case involving similar facts.

his foot “rolled toward the ground”. As Johnson admitted, there was nothing on the floor that caused his right foot to roll. And, as Johnson conceded, he was not sure what caused the fall. It appeared that he rolled his ankle. There was no evidence that Johnson slipped, tripped, or stumbled. *Id.* A medical expert testified that the employee’s misstep was an inversion-type injury. To the doctor’s knowledge, there was no floor defect present and the event could have occurred anywhere. *Id.*

The Industrial Commission observed that, generally, all risks causing injury to an employee can be brought within three categories: 1) risks distinctly associated with the employment; 2) risks personal to the employee; and 3) neutral risks, i.e., risks having no particular employment or personal factor. *Id.* Harms arising from the first category were universally compensable, while harms arising from the second category were universally non-compensable. Harms arising from the third category resulted in controversy. *Id.*

Moreover, the Industrial Commission noted that various lines of interpretation of the phrase “**arising out of**” could be traced to application of the increased risk, actual risk, and positional risk doctrines. *Id.* The increased risk doctrine provided that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to the employment. Under the actual risk doctrine, whether the risk is also common to the public is of no concern, if it is a risk of the employment. *Id.* The employment subjects the employee to the actual risk that caused his injury. Under the positional risk doctrine, an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed the employee in the position where he was injured. *Id.*

Since risks distinctly associated with the employment fall readily within the increased risk doctrine, they are considered to arise out of the employment. As to risks that are personal to an employee, the origins of harm are personal, and cannot possibly be attributable to the employment. *Id.* Neutral risks are neither distinctly employment, nor distinctly personal, in nature. With neutral risks, the cause of the injury is unknown, unexplainable, or happenstance. Or, if the cause is known, it is not associated with the employment or the worker personally. With these types of risks, an award of workers' compensation benefits can only be justified by accepting the "but for" reasoning of the positional risk doctrine. *Id.*

The Industrial Commission observed that all three cases referred to in Section 287.020.10 – *Kasl, Drewes*, and *Bennett* – had one component in common. Namely, that it was difficult, or impossible, to ascertain whether or if the employment subjected the employee to some risk or hazard greater than that to which the employee regularly experienced in everyday life. In other words, there was no rational connection between the employment and the injury. *Id.*

The evidence showed that Johnson was walking down a grocery aisle, at a rapid pace. There was no evidence that the rapid pace at which Johnson was walking was remotely connected to the fact that he misstepped, causing his injury. *Id.* Moreover, as the medical expert testified, the event could have occurred anywhere. The Industrial Commission could not find any unique condition of Johnson's employment that contributed to his injury. Rather, the evidence led to the conclusion that Johnson's injury arose from a hazard or risk unrelated to his employment. *Id.*

The burden rested on Johnson to show some direct causal connection between the injury and his employment. *Id.* An award of compensation could only be issued if the injury was a rational consequence of some hazard connected with the employment. The employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The Industrial Commission could not establish a causal connection between the conditions under which Johnson was performing his work and his resultant injury. Given the facts, an award of compensation could only be justified by utilizing the positional risk doctrine. However, the legislature abrogated earlier caselaw interpretations adhering to that doctrine. Johnson had failed to satisfy the concept of causation, i.e., to establish a rational connection between his work at the supermarket and his injury. Finding that Johnson's injury arose from a hazard or risk unrelated to his employment, the Industrial Commission denied his claim. *Id.*

Claimant Has Failed To Show That His Knee Injury Arose Out Of

And In The Course Of His Employment For Missouri Highway

When the 2005 amendments to the Workers' Compensation Act are applied to the undisputed facts, it becomes apparent that the Industrial Commission's Award, denying compensation, must be affirmed. The employee has failed to demonstrate a rational connection between his work and his right knee injury. *Bivins*, 272 S.W.3d at 451-452. Claimant's employment did not expose him to any hazard or risk, greater than that which he was regularly exposed to in his normal non-employment life. *Id; Johnson*, 2007 WL 4055936. Thus, the Industrial Commission did not err in denying employee's claim.

As the undisputed facts show, there was no unique condition of claimant's employment that caused or contributed to cause the popping in his right knee and his subsequent right knee condition. *Bivins*, 272 S.W.3d at 451-452. It is undisputed that Mitchell Miller experienced a pop in his right knee while walking briskly to his truck, which was parked approximately 200 feet away from the pull paver machine. Claimant described his walking pace at the time of the popping incident as "brisk", "fairly fast", and as "a trot". This was faster than the employee's regular or normal walking pace. (Tr.13-17,24, 34,148-152,153-155). At the time when he felt his knee pop, Mitchell Miller was walking on a flat, paved asphalt surface. There was nothing about the surface of the roadway that caused the popping in the employee's right knee. Claimant did not slip, trip, fall, tumble over anything, lose his balance, or step in a hole. The employee's feet did not come out from under him. (Tr.24-25,27-28,156).

Moreover, there was nothing wrong with the employee's shoes on the day of the popping incident. Nothing was stuck on the soles of his shoes. The boots employee was wearing when his knee popped had no relation to the pop, or to claimant's knee pain. The employee's foot did not stick on the asphalt. (Tr.27-28,193-194). Claimant had no explanation for the popping incident. As the employee admitted, he was just walking along, and suddenly, his knee popped. (Tr.193-194).

Walking was part of Mitchell Miller's lifestyle. As the employee conceded, he walked briskly, outside of work in his normal non-employment life. During 2004 and 2005, employee walked for exercise once or twice a week, to keep himself in shape. During these walks, which were for distances from a half a mile to a mile, the employee

often walked briskly. When walking for exercise, claimant walked on all kinds of surfaces, including asphalt of the same nature as that he was walking on on 9-25-05. (Tr.64-66,187-191).

The medical expert, Dr. Haupt, testified that assuming all other variables were the same, walking itself, whether at work or at home, carried the same risk of injury. Essentially, walking was walking. The injury risk in walking would be the same to the employee at home, or in the workplace. (Tr.125,127-128).

The undisputed evidence shows that the employee's injury did not arise out of or in the course of his employment for Missouri Highway. Specifically, the undisputed facts demonstrate that the employee's injury arose from a hazard or risk – walking briskly – to which he was equally exposed outside of his employment, in his normal non-employment life. **RSMo** §287.020.3; *Bivins*, 272 S.W.3d at 451-452. Walking was a normal activity of daily life, to which claimant was equally exposed outside of his employment. *Bivins*, 272 S.W.3d at 451-452. While the employee was walking briskly to get to his truck, the medical evidence shows that he was equally exposed to the risk of injury, whether he was walking briskly at work, or at home. (Tr.125,127-128). Given the instant facts, compensation could only be awarded if the Court utilized the positional risk doctrine. As Section 287.020.10 shows, the Missouri legislature has abrogated decisions, such as *Kasl*, *Drewes* and *Bennett*, that adhered to that doctrine. **RSMo** §287.020.10; *Johnson*, 2007 WL 4055936.

Claimant has failed to show a direct causal connection between the conditions of his employment and his right knee injury. *Id.*; *Bivins*, 272 S.W.3d at 451-452. Absent in

the record is any evidence of a unique or distinctive condition of claimant's employment for Missouri Highway on 9-29-05 that caused or contributed to cause the popping incident or his knee injury. *Id.* Nor has claimant demonstrated that he faced hazards as a result of his employment, in addition to the risks inherent in the activity of walking. Mitchell Miller was equally exposed to the same hazard of popping his knee while walking outside of work, as he was while traversing the 200 feet between the pull paver machine and his truck at the job site on the morning of 9-29-05. **RSMo** §287.020.3(2); *Bivins*, 272 S.W.3d at 451-452; *Johnson*, 2007 WL 4055936. The popping incident could have occurred anywhere that the employee was walking, whether at work, at home, or elsewhere. *Id.*

As the Eastern District properly found, the instant case is indistinguishable from the factual circumstances in *Bennett*, *Kasl*, and *Drewes*. Those cases share a common element with the case at bar. Namely, that the employees therein did not face any hazard unique to their employment, in addition to the hazards or risks inherent in the activity of walking. *Kasl*, 984 S.W.2d at 854; *Drewes*, 984 S.W.2d at 514-515; *Bennett*, 80 S.W.3d at 531-532.

The facts before the Court are nearly identical to those before the Western District in *Bennett*. Here, the employee experienced a pop in his knee, associated with pain, while walking. *Bennett*, 80 S.W.3d at 526. As in *Bennett*, Mitchell Miller's activity in walking was a normal activity of daily life, to which he was equally exposed outside of his employment. And, as in *Bennett*, claimant experienced no fall, twist, slip, or loss of balance. *Bennett*, 80 S.W.3d at 526-527. Claimant's popping incident was unexplained.

It just happened. Given the clear and unambiguous terms of Section 287.020.10, abrogating *Bennett*, along with the decisions in *Drewes* and *Kasl*, the Industrial Commission did not err in concluding that the employee's popping incident did not result in a compensable injury. **RSMo** §§287.020.3(2); 287.020.10; *Johnson*, 2007 WL 4055936.

True, the activity of walking was incidental and for the employee to get to his truck. However, there is no evidence in the record that walking briskly was a requirement of claimant's employment for Missouri Highway. It was not necessary for the employee to walk briskly to his truck on 9-29-05. As employee conceded, none of the crew members were yelling at him to hurry up and come back as quickly as possible, so that the crew could continue working. The only time that employee was going to save, in terms of the hot mix cooling, would have been the 30-45 seconds he would have saved by walking briskly to his truck. In that brief interval, however, the hot mix was not going to cool so much that it could not be used. (Tr.36,40-43,44-46,52-54,157-160,167-168,171-172).

The Industrial Commission properly found that the employee failed to satisfy the requirement of proving that his injury arose out of and in the course of his employment. **RSMo** §287.020.3(2); *Bivins*, 272 S.W.3d at 451-452. As the Industrial Commission noted, the knee injury claimant sustained on 9-29-05 is precisely the type of injury that the 2005 amendments sought to render non-compensable. *Id.* Consequently, the Industrial Commission's Award, denying the employee's Claim, must be affirmed.

CONCLUSION

The Industrial Commission's Award, denying the employee's Claim for Compensation, must be affirmed. Mitchell Miller has failed to show that the popping incident on 9-29-05 and his right knee injury arose out of and in the course of his employment for Missouri Highway. In the context of the 2005 amendments to the Workers' Compensation Act, claimant has failed to demonstrate that his right knee injury arose from any hazard or risk related to his employment, to which he was not equally exposed outside of work in his normal non-employment life. There is no evidence in the record that any condition unique to claimant's employment caused or contributed to cause the employee's right knee condition. The injury sustained by the employee is precisely the type of injury that the 2005 amendments sought to render non-compensable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent this 27th day of March, 2009, to:
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CERTIFICATE OF COMPLIANCE

This Brief complied with Rule 84.06(b) and contains 17,937 words. To the best of
my knowledge and belief, the enclosed disc has been scanned and is virus-free.

Mary Anne Lindsey

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