

IN THE MISSOURI SUPREME COURT

ST. JOHN’S MERCY HEALTHCARE)
)
 Appellant/Employer,)
)
 vs.)
)
 SANDY JOHME,)
)
 Respondent/Employee)

SC92113

By Transfer from Missouri Court of Appeals, Eastern District

**AMICUS BRIEF OF THE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS
IN SUPPORT OF RESPONDENT/EMPLOYEE**

Respectfully Submitted By:

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JURISDICTIONAL STATEMENT

MATA hereby adopts the Jurisdictional Statement of the Respondent/Employee.

STATEMENT OF FACTS

MATA hereby adopts the factual background set forth in the Respondent/Employee's brief.

POINTS RELIED ON

- I. THE COURT OF APPEALS ERRED IN REVERSING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DECISION AWARDING COMPENSATION ON THE GROUNDS THAT EMPLOYEE JOHME’S INJURY FROM A FALL WHILE MAKING COFFEE DID NOT OCCUR IN THE COURSE AND SCOPE OF EMPLOYMENT UNDER REV. MO. STAT. SEC. 287.020.3(2) (2005) BECAUSE MAKING COFFEE WAS RELATED TO JOHME’S EMPLOYMENT IN THAT IT WAS DONE IN ORDER TO FOSTER GOODWILL WITH CO-EMPLOYEES, PROMOTE PRODUCTIVITY AND EFFICIENTLY UTILIZE THE EMPLOYER’S TIME AND RESOURCES, THEREBY PROVIDING MUTUAL BENEFIT TO BOTH THE EMPLOYER AND THE EMPLOYEE.**

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

Pile v. Lake Regional Health Systems, 321 S.W.3d 463 (Mo. App S.D. 2010)

Whiteley v. City of Poplar Bluff (Mo. App. S.D. 10-11-2011)

Rev. Mo. Stat. Sec. 287.020.3 (2005)

II. THE COURT OF APPEALS ERRED IN REVERSING THE AWARD OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ON THE BASIS THAT THE INJURY DID NOT ARISE OUT OF AND IN THE COURSE AND SCOPE OF EMPLOYMENT BECAUSE UNDER REV. MO. STAT. SEC. 287.020.3(2) (2005) THE ACCIDENT WAS THE PREVAILING FACTOR IN CAUSING THE INJURY AND THE INJURY CAME FROM A HAZARD OR RISK RELATED TO EMPLOYMENT UNDER THE PERSONAL CONVENIENCE DOCTRINE IN THAT JOHME WAS COMPLETING THE ACT OF RETRIEVING A CUP OF COFFEE WHEN SHE FELL.

Board v. Eurostyle, Inc., 998 S.W.2d 810, 814 (Mo. App. S.D. 1999)

Meyering v. Miller, 51 S.W.2d 65 (Mo. 1932)

Moore v. St. Joe Lead Co., 817 S.W.2d 542 (Mo. App. E.D. 1991)

Rev. Mo. Stat. Sec. 287.020.3(2) (1993)

ARGUMENT

- I. THE COURT OF APPEALS ERRED IN REVERSING THE LABOR AND INDUSTRIAL RELATIONS COMMISSION DECISION AWARDING COMPENSATION ON THE GROUNDS THAT EMPLOYEE JOHME'S INJURY FROM A FALL WHILE MAKING COFFEE DID NOT OCCUR IN THE COURSE AND SCOPE OF EMPLOYMENT UNDER REV. MO. STAT. SEC. 287.020.3(2) (2005) BECAUSE MAKING COFFEE WAS RELATED TO JOHME'S EMPLOYMENT IN THAT IT WAS DONE IN ORDER TO FOSTER GOODWILL WITH CO-EMPLOYEES, PROMOTE PRODUCTIVITY AND EFFICIENTLY UTILIZE THE EMPLOYER'S TIME AND RESOURCES, THEREBY PROVIDING MUTUAL BENEFIT TO BOTH THE EMPLOYER AND THE EMPLOYEE.**

Under *Hampton v. Big Boy Steel Erection*, 131 S.W.3d 220, 222 (Mo. 2003), on review of an award from the Labor and Industrial Relations Commission (hereinafter referred to as "Commission") "A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence. Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record." The Commission's award will be affirmed unless (1) it acted outside the scope of its powers; (2) the award was procured by fraud; (3) the facts

found by the Commission do not support the award; or (4) the record lacks sufficient, competent evidence to support the award. Rev. Mo. Stat. Sec. 287.495.1 (1998). When the issue on appeal is one of fact or the credibility of a witness, the Commission's decision will be affirmed unless against the overwhelming weight of the evidence, i.e. not supported by competent and sufficient evidence. *Cardwell v. Treasurer*, 249 S.W.3d 906 (Mo. App. 2008). However, on a question of law the appellate court examines issues and makes holdings as if it were the court of origin. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 726 (Mo. App. 2000). Herein, the Eastern District court of appeals reversed the Commission's decision to award benefits on the grounds that *Johme's* fall while making coffee for her coworkers did not arise out of and in the course and scope of employment under Rev. Mo. Stat. Sec. 287.020.3 (2005).

A. Arising out of and in the Course and Scope of Employment: 2005 Amendments Raise the Standard for Proving the Accident Caused the Medical Condition and Disability, but Lower the Bar for Proving Work Relatedness and Leave Risk Analysis Unchanged

Under Rev. Mo. Stat. Sec. 287.020.3(1) (2005), an accident must be the “prevailing factor in causing both the resulting medical condition and disability” in order to arise out of and in the course and scope of employment. The “prevailing factor” is defined to be “the primary factor, in relation to any other factor, causing both the

resulting medical condition and disability.” There is no dispute herein that *Johme’s* fall was the prevailing factor in causing her medical condition and disability.

Additionally, Rev. Mo. Stat. Sec. 287.020.3 (2)(a)&(b) (2005) provides that an injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonable apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Succinctly put, the 2005 amendments did not make any changes to the requirement for arising out of and in the course and scope of employment other than to raise the *causation* standard for proving the medical condition and disability from the “*substantial factor*” to “the *prevailing factor*” and remove both the “natural incident of the work” and “proximate cause” requirements in Rev. Mo. Stat. Sec. 287.020.3(2)(b&c) (1993). Language dealing with Rev. Mo. Stat. Sec. 287.020.3(2)(b), “risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life” remains absolutely identical to the previous version of Rev. Mo. Stat. Sec. 287.020.3(2)(d)(1993). As such, it is clear that the legislature did not intend to change the definition of arising out of and in the course and scope of employment other than to raise the standard for proving the “medical

condition and disability” from *substantial* factor to *prevailing* factor. Removing the “course and scope of employment” requirements that the accident be a *natural incident of work* and that work be the *proximate cause* of the injury did not make the statute *more* exclusive.

The effect of the statutes is two-fold. First, the Legislature obviously intended to raise the bar of compensability for proving medical/disability causation by replacing the “substantial” factor test for proving “medical condition” and “disability” with the “prevailing” factor test. Undoubtably, the legislature desired to further restrict the coverage of “medical conditions” where the medical proof of causation for a “medical condition” and “disability” was not comparatively important. However, in terms of defining which types of *activities* would give rise to compensable accidents, the Legislature did nothing to further *restrict* the compensability of claims. In fact, by removing the requirements that the accident be a *natural incident of work* and that employment be the *proximate cause* of the injury it actually made the proof for arising out of and in the course and scope of employment much *less* stringent, not more so. This not only is consistent with the 2005 amendments, but is good policy, as it protects both employees and employers. The more claims that fail the test of arising out of and in the course and scope of employment, the less useful the Missouri Workers’ Compensation Law will be in protecting both injured workers and employers who have purchased insurance in order to protect themselves and their employees, which is the fundamental purpose of the law. To restrict the coverage of claims too much would be to open the

floodgates for employees to sue their employers for personal injuries while at the same time deny injured workers economic security that the legislature bargained for them.

Clearly then, the court of appeals declaration in *Johme* that “the Legislature specifically sought to make it more difficult to obtain worker’s compensation, and such doctrine is not consistent with this purpose” is at best an inaccurate political assessment and in any event provides a poor legal framework for interpreting statutory law. The policy “to make it more difficult to obtain workers’ compensation” simply does not translate into a useful legal doctrine, nor is it based in any statute. Statutory construction requires a presumption “that the legislature intended that every word, clause, sentence, and provision of statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.” *Landman v. Ice Cream Specialities, Inc.*, 107 S.W.3d. 240, 252 (Mo. banc 2003). Indeed, we must interpret the law strictly, as required by Rev. Mo. Stat. Sec. 287.80.1 (2005).

B. Post 2005 Case Law

Only a few other cases have addressed the 2005 amendments to Rev. Mo. Stat. Sec. 287.020.3 (2005), interpreting the changes to the requirement that the injury “arise out of and in the course of the employment;” *Miller v. Mo. Highway & Transp. Comm’n*, 287 S.W.3d 671 (Mo. 2009); *Bivins v. St. John’s Regional Health Center*, 272 S.W.3d 446, [2, 3] (Mo. App. 2008); *Pile v. Lake Regional Health Systems*, 321 S.W.3d 463 (Mo. App S.D. 2010); *Whiteley v. City of Poplar Bluff* (Mo. App. S.D. 10-11-2011), *Stricker v.*

Children's Mercy Hospital, 304 S.W.3d 189 (Mo. App. W.E. 2010); and *Beine v. County of St. Charles & Treasurer of Missouri as Custodian of Second Injury Fund*, (Mo. App. E.D. 12-6-11).

In *Miller*, the Missouri Supreme Court denied compensability for a walking injury because there was no proof that “walking” was the prevailing factor in causing the knee injury, nor was there evidence that the employee was exposed to a greater risk of injury from walking as opposed to outside of work. *Miller* was walking a flat surface, he did not fall or stumble. He produced simply no evidence that he was performing any specific job duty when the knee “happened to pop.” *Miller* at 674. The mere fact that he was at work when he was hurt while walking to his truck, without any proof of what employment task he was performing while he was walking, was not enough:

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

employment, but did not arise out of employment. Under sections 287.020.2, .3 and .10 as currently in force, that is insufficient.

Miller at [3] (italics provided).

Miller clearly decided “upon consideration of all the circumstances” that the work accident was *not* “the *prevailing* factor in causing the injury.” Rev. Mo. Stat Sec. 287.020.3(2)(a) (2005). The fact that his knee popped while he was walking, without evidence regarding the risks (frequency, briskness, whether he was carrying something) of walking by the employee in his working and nonworking life, and without evidence of an unusual trauma such as a fall or stumble, made denial statutorily mandated based upon “consideration of all the circumstances.” The *facts* in *Miller* fail the prevailing factor test of Rev. Mo. Stat. Sec. 287.020.3(2)(a) (2005), pursuant to the 2005 amendments. The *absence of facts* in *Miller* also fail both the “related to” and “risk” prongs of Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005), both before and after the 2005 amendments. There simply was no proof the accident occurred while performing a task related to work or that it resulted from a risk not faced equally outside of employment. In the end, *Miller* essentially came down to a lack of proof based upon “consideration of all the circumstances” that the act of merely walking without a stumble or fall was in itself the prevailing factor in causing injury. Herein, there are factual findings by the Commission that *Johme* was carrying out the task of making coffee for others at work that provided a

benefit to her employer and that she had a trauma (a fall) that was the prevailing factor in causing her medical condition and disability under all the circumstances.

In *Bivins* the court of appeals determined that an “unexplained fall” that occurred as the employee was walking down a hall to clock in for the day did not arise “out of and in the course and scope of employment.” *Bivins* at 451. Since *Bivins* had not clocked in yet, she could not have been performing an activity related to employment. Therefore, the only way the “unexplained fall” could have been compensable is if it came from an activity unrelated to employment that posed a greater risk to her than what she faced in her nonemployment life, i.e. a slippery floor or another dangerous condition. However, because the employee couldn’t even explain why she fell, she therefore couldn’t prove how “she was exposed to an unusual risk of injury that was not shared by the general public”:

Here, like the employee in *Drewes*, claimant 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. The current statute concisely states, “An injury is not compensable merely because work was a triggering or precipitating factor,” § 287.020.2; that in order for an injury to be deemed to arise out of and in the course of employment, it cannot 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

nonemployment life,” § 287.020.3(2)(d). The commission found that there was no rational connection between claimant's work and the injury that was sustained. Giving deference to the commission's determination of the credibility of witnesses and its determination of the weight to be given conflicting evidence, and having examined the whole record, this court concludes the commission's award denying compensation is supported by competent and substantial evidence. The commission could have reasonably made its findings and reached its result upon consideration of all the evidence that was before it.

Bivins at 451-452.

Bivins essentially boils down to a case where it was undisputed that the accident was not the result of performing a work activity and there was no proof of increased risk. It is not illuminating herein since it was determined on the basis that the fall happened before the employee started her work day and there was no evidence or argument that the risk of falling was increased by her employment, either quantitatively or qualitatively. It was simply the result of an “unexplained fall” that occurred before the employee clocked in and could perform a work related task, which was undisputed. In contrast, *Johme* was in the middle of a paid work shift and the Commission found that she was performing a task that benefitted her employer. Therefore, her fall relates to her employment without making a risk analysis under the second prong of Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005).

Beginning with *Pile*¹ and later *Stricker*, *Whiteley* and most recently *Beine*, the courts of appeals have variously examined the examined the 2nd prong of Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005) dealing with the heightened exposure to risk of injuries for activities *unrelated* to employment. In each *Pile* and *Stricker* the courts found compensable claims for injuries while walking due to an increased employment related risk. In *Pile*, the nurse employee was quantitatively exposed to much more walking at work than at home, when she suffered a “pedestrian” stumble (but not fall) *without* known cause. *Pile* at 468. In *Stricker*, the employee nurse fell and broke her ankle because of the Danskø clogs she was required to wear at work and did not wear at home created a heightened qualitative risk. *Stricker* at 193. Both *Pile* and *Stricker* arose out of and in the course and scope of employment because of increased risk caused by the employment.

In contrast, *Whiteley* dealt with a case where an officer injured his neck when he was reaching to clean the inside of his patrol car, an “integral part of the job of PBPD officers.” *Whiteley* at 13. As such, since the activity met the first prong of relatedness in Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005), there was no need to undertake a risk analysis as in *Pile* and *Stricker*, the claim was compensable. On the other hand, *Beine* dealt with

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A concurring opinion found that the act of nurse Pile walking to get medicine was itself related to employment and therefore compensable without making a determination as to the exposure to risk outside of employment.

an instance where a sheriff's deputy was injured in a voluntary golf tournament, an activity clearly not related to his employment under the first prong of Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005). There was no contention in *Beine* that he faced a greater risk of injury from the voluntary golf tournament than that which he was exposed to in his everyday nonworking life. Therefore, the claim did not arise out of and in the course and scope of employment.

All of the cases since 2005 interpreting the arising out of and in the course and scope of employment under Rev. Mo. Stat. Sec. 287.020.3(2) (2005), except the court of appeals decision in *Johme*, consistently apply strict construction to interpret the statute. Under strict construction, we give the statute its plain meaning and refrain from enlarging the law beyond that meaning. *Stricker* at 192 citing *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo. App. S.D. 2009).

Presently in *Johme*, the Commission's finding of facts that must be accepted by the court as true; "as Employee finished making the new pot of coffee, she turned and twisted her right ankle, which caused her right foot to slip off of her sandal, and she fell onto her right side and then her back." *Johme* at 3. Likewise, the court is required to accept as true additional findings of fact made by the Commission in the award, including:

Based upon employee's testimony, making coffee was not something that was required of employee as part of her job as a patient billing representative. But neither was making coffee prohibited or discouraged. In fact, employer provided

coffee pot and supplies for its workers' use. In this particular situation, claimant was making coffee as a gesture of courtesy to the other workers in the office, as she had just poured herself the last cup from the pot. *We find that the employee's act of making coffee inured to employer's benefit in that the coffee was available to all employees for their comfort (and probably energy and focus).* Employee did not depart long from her assigned duties and the method whereby she made the coffee was not unusual or unreasonable. We find employee's activity of making coffee was incidental to and related to her employment. We need not proceed to the second step of the analysis.

Essentially, the Commission factually found that the employee made a reasonable employment related decision to make coffee for her co-workers. The practice of making coffee for others at work is common because it is courteous and promotes employee alertness, happiness, efficiency and cooperation. There is no intellectual strain in concluding that making coffee (with supplies provided by the employer) fosters greater overall employee productivity. One can easily imagine the counterproductive work atmosphere that would develop if certain employees refused to make coffee themselves, but only consumed coffee made by others. Or if tired employees could not avail themselves of coffee. Office efficiency, moral and productivity are enhanced by the making of coffee, especially when more than one cup of coffee is made at a time. Expenses are saved the employer when the coffee maker is not run repeatedly and over again throughout the work day. Workers do not waste time waiting for their one cup of

coffee to brew, electricity is not wasted by multiple single brews and fewer coffee filters are consumed. The employer paid for the coffee and supplies because coffee enhances alertness and function. The Commission's factual conclusions that the making of coffee inured a benefit to the employer are based upon common sense.

It is common practice in most any office for the employer to provide coffee because the act of making coffee provides a *mutual benefit* for both the employee and the employer. When an act provides benefit to both the employee and employer, then the mutual benefit derived to the employer makes the activity related to employment. See *Brenneisen v. Leach's Standard Serv. Station*, 806 S.W.2d 443, 448 (Mo. App. E.D. 1991):

This principle is known as the "Mutual Benefit Doctrine" and although the "dual purpose" doctrine is often used interchangeably (citation omitted), there is a slight distinction. The dual purpose doctrine is normally applied only to a situation involving travel, whereas the mutual benefit doctrine is not so restricted. The doctrine simply states that an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee, is compensable when some advantage to the employer results from the employee's conduct.

As the court indicated in *Graham v. La-Z-Boy Chair Co.*, 117 S.W.3d 182, 185 (Mo. App. S.D. 2003), "courts have looked to the particular facts of each case to determine whether the activity that caused the injury was purely recreational or whether it

offered some benefit to the employer as well as the employee. This analysis, referred to as the 'mutual benefit doctrine,' ultimately permits a worker to receive benefits if he was 'injured while engaging in an act that benefits both the employer and the employee and 'some advantage to the employer results from the employee's conduct.'" *Otte v. Langley's Lawn Care, Inc.*, 66 S.W.3d 64, 70 (Mo. App. E.D.2001) (quoting *Stockman v. J.C. Indus., Inc.*, 854 S.W.2d 24, 27 (Mo.App. W.D.1993); see also *Blatter v. Missouri Dep't of Social Servs.*, 655 S.W.2d 819, 823 (Mo.App. S.D.1983)) (establishing the "mutual benefit doctrine" as a part of Missouri law). The 2005 amendments the law did nothing to abrogate the mutual benefit doctrine, which comes through the application of Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005)² and previous incarnations of the exact same statutory language.

Clearly, the *Johme* court is not empowered to disregard the factual findings made by the Commission regarding the mutual benefits inured to the employer, but must accept them as true. *Hampton* at 222. When those facts are consistent with showing a nexus between the work activity being performed and the injury to the employee, and when there is no question that the accident was the prevailing factor in causing the resulting medical condition and disability, then the injury arises out of and in the course and scope of employment. To deny the claim as arising out of and in the course and scope of

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The *Beine* court is the only court to examine the mutual benefit doctrine since the 2005 amendments, but declined to decide whether the doctrine was still good law.

employment simply because the accident was mundane or pedestrian in nature is not statutorily justified under strict construction. The Missouri Workers' Compensation Law does not require proof of negligence or even an explanation as to why the accident occurred.

C. Abrogation of Prior Cases and Strict Construction

Johme's erroneous decision to deny the claim failed to apply strict construction it acknowledged was required under Rev. Mo. Stat. Sec. 287.800.1 (2005) when interpreting Rev. Mo. Stat. Sec. 287.020.3(2) (2005). Instead, by invoking the vague doctrine that the new law must "make it more difficult to obtain workers' compensation," because that is what the *Johme* court inferred was the general intent of the 2005 amendments, the *Johme* court disregarded specific statutory language. The *Johme* court specifically rejects the weighing of the risks done in *Pile* on the premise that it was based upon "common law" that does not exist in workers' compensation. While certain case law was specifically abrogated by the 2005 amendments to Rev. Mo. Stat. Sec. 287.020.10 (2005), it simply is inaccurate to assert that the *Pile* case was based upon abrogated case law or that all case law preceding the 2005 amendments to the Workers' Compensation Law have been abrogated. The weighing of risks done in *Pile* is a direct judicial interpretation of Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005) consistent with *Miller* and many previous decisions. *Pile* is not based on common law, although it is consistent with prior case law interpreting the exact same statutory language.

Certainly, the legislature did intend 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 limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo. App. W.D. 2002); *Kasl v. Bristo Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo. banc 1999) and all cases citing, interpreting, applying, or following those case.” Rev. Mo. Stat. Sec. 287.020.10 (2005). However, the statute does not purport to reject *all* previous case law, which would be inconsistent with the very limited and specific changes made in the 2005 amendments as discussed above dealing principally dealing with the “prevailing” factor test for medical/disability causation and the *removal* of the requirements that the injury “followed as a natural incident of the work” and “can be fairly traced to the employment as proximate cause.” Rev. Mo. Stat. Sec. 287.020.3(2)(b&c) (1993). Rather, only the specifically cited cases and their progeny are abrogated, and only then to the extent that they are inconsistent with the new “prevailing” factor standard (instead of “substantial” factor) inserted in Rev. Mo. Stat. Sec. 287.020.3(1&2) (2005) when defining “arising out of” and “in the course of the employment.”³ Rev. Mo. Stat. Sec. 287.020.10 (2005).

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Also abrogated is the case law dealing with “accident” and “occupational” disease to the extent those sections changed and are inconsistent with the 2005 amendments, but those changes do not impact the *Johme* case. In any event, the only change to the definition of

Of the cases specifically abrogated by Rev. Mo. Stat. Sec. 287.020.10 (2005) and the new definitions of “arising out of” and “in the course of the employment,” none would impact the case at hand since the wording of the statute pertaining to the injury’s relatedness to employment under Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005) has not changed from language in Rev. Mo. Stat. Sec. 287.020.3(2)(d) (1993). For example, *Bennett* dealt with an instance where a nurse aid’s knee simply “popped” as she was walking around a bed and again when she was carrying linens up stairs, without her falling. *Bennett* at 526. *Bennet* would not longer be compensable, as the Supreme Court alluded to in *Miller*, because neither *Bennett* or *Miller* could prove the work accident was the “prevailing” factor in causing the injury “upon consideration of all the circumstances” and furthermore *Bennett*’s several dates of accident would not meet the new definition for “accident,” i.e. that it occur during a single work shift. Rev. Mo. Stat. Secs. 287.020.2 & 287.020.3(2) (2005). Simply “popping” your knee while walking at work on multiple dates, without a stumble or fall (*Bennett*) is now insufficient under *Miller* to prove that work was the “prevailing” factor in causing injury based “upon consideration of all the circumstances” as required by Rev. Mo. Stat. Sec. 287.020.3(2)(a) (2005). With no change by the amendments to Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005) dealing with the relatedness of the work activity or the weighing of risks, the abrogation of *Bennett* has

“accident” contained in the 2005 amendment was to completely *remove* the “substantial” factor test (without inserting the “prevailing” factor test) and add the requirement that the event occur “during a single work shift.” Rev. Mo. Stat. Sec. 287.020.2 (2005).

nothing to do with the case herein since the standard of work relatedness remains unchanged by the 2005 amendments. In *Miller*, there simply was no proof as to the reason the employee was walking, how it related to his employment, and the mere fact that he was walking, without evidence of a fall or other “circumstances” was not sufficient to prove the accident was “prevailing” factor in causing the medical condition and disability as required in order to prove arising out of and in the course and scope of employment. *Miller* did not address the risk analysis prong that the *Pile* court considered and there little or no evidence in *Johme* of enhanced risk for the court to consider.

Kasl is also inapposite, since it was expressly decided on the basis that “Kasl’s work was thus a *substantial* factor in causing her fall and resulting injury, which was thus clearly work related” under the old Rev. Mo. Stat. Sec. 287.020.3(2)(a) (1993), and dealt with the allegation of an idiopathic injury. *Kasl* at 844. Obviously, simply standing and falling because your leg fell asleep as in *Kasl* would not be compensable today under the present statute because of Rev. Mo. Stat. Sec. 287.020.10. Neither idiopathic injuries or injuries where the accident was merely the “*substantial*” factor in causing injury arise out of or in the course and scope of employment under the new statute.

Finally, the Legislature also specifically abrogated the *Drewes* case, which dealt with the personal convenience doctrine as it applied to the now repealed Rev. Mo. Stat. Sec. 287.020.5(1993):

5. Without otherwise affecting either the meaning or interpretation of the abridged clause, “personal injuries arising out of and in the course of such employment”, it is hereby declared not to cover workers except while engaged in or about the premises where their duties are bine performed, or where their services required their presence as part of such service.

Drewes was injured when she slipped and fell while carrying her lunch during an unpaid lunch break, in a break room on the ground floor of a building that was not owned or controlled by the employer and was open to use by all inhabitants of the building. *Drewes* at 516. The *Drewes* court specifically found that the fall took place “in and about” TWA’s premises and therefor the claim was compensable under Rev. Mo. Stat. Sec. 287.020.5(1993). Since the 2005 amendments did away with Rev. Mo. Stat. Sec. 287.020.5(1993), *Drewes* would no longer apply.⁴

Essentially, the 2005 amendments *did not* redefine the meaning of “unrelated to employment,” and only made it easier to prove that an activity is related to employment by removing the language requiring “proximate cause” and “incident of employment” that was contained in the old law. The 2005 amendments generally did make it more difficult to prove a compensable claim, but this was done by modifying the definition for

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The personal convenience doctrine referenced in *Drewes* was not abrogated, since subsection Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005) from which it derives has not been altered in any way. This issue is addressed by separate point.

“arising out of” and “in the course and scope of employment” to require that the accident be the “prevailing” factor in causing the medical condition and disability, rather than only a “substantial” factor. The mutual benefit doctrine is good law and has not been abrogated directly or indirectly. Had it been the intention of the 2005 Legislature to change the requirement for relatedness to work, then it would have modified the language contained in Rev. Mo. Stat. Sec. 287.020.3(2)(b)(2005) or it would have specifically rejected the doctrine. It did not, and therefore the meaning of “unrelated to work” remains the same as before the 2005 amendments were enacted. *Johme*’s injury arose out of and in the course and scope of employment because it benefitted her employer.

II. THE COURT OF APPEALS ERRED IN REVERSING THE AWARD OF THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ON THE BASIS THAT THE INJURY DID NOT ARISE OUT OF AND IN THE COURSE AND SCOPE OF EMPLOYMENT BECAUSE UNDER REV. MO. STAT. SEC. 287.020.3(2) (2005) THE ACCIDENT WAS THE PREVAILING FACTOR IN CAUSING THE INJURY AND THE INJURY CAME FROM A HAZARD OR RISK RELATED TO EMPLOYMENT UNDER THE PERSONAL CONVENIENCE DOCTRINE IN THAT JOHME WAS COMPLETING THE ACT OF RETRIEVING A CUP OF COFFEE WHEN SHE FELL.

The court of appeals reversed the Labor and Industrial Relations Commission's award granting compensation because the *Johme* court found that the personal convenience doctrine had been abrogated by the 2005 amendments to the Missouri Workers' Compensation Law with the application of strict construction and therefore the fall while making coffee did not arise out of and in the course and scope of employment. The standard of review utilized by the court of appeals and this court involves a question of law and therefore the appellate court examines issues and makes holdings as if it were the court of origin, without deference. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 726 (Mo. App. 2000).

A. The Personal Convenience Doctrine Is Established Missouri Law

As early as 1931, injuries that occurred while the employee was engaging in employer approved activities for personal comfort or convenience were considered related to employment for purposes of the workers' compensation system. *Conklin v. Public Service Co.*, 41 S.W.2d 608 (Mo. App. 1931). In *Conklin*, an injury during a baseball game was found to be causally related to employment when the employer knew and encouraged the games at the employer's place of business during the midday break. *Id.*

The doctrine continued to be used to cover employees who were injured while engaging in activities that are part of a normal work day but are not necessarily included in the employees job description. *See, e.g. Goetz v. J.D. Carson Co.*, 357 Mo. 125, 206 S.W.2d 530, 534 (1947) ("A pause by an employee within reasonable limits of time and place to satisfy the needs of the body for food or drink, or even for refreshment, may well be considered as reasonably incidental to his work."); *Ford v. Bi-state Development Agency*, 677 S.W.2d 899, 901-902 (Mo. App 1984) ("Employees who, within the time and space limits of their employment engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment."); *Moore v. St. Joe Lead Co.*, 817 S.W.2d 542, 543 (Mo. App. E.D., 1991) ("Incidental activities include the inevitable acts of human beings in ministering to their personal comfort while at work...").

B. The Personal Convenience Doctrine Survives Strict Construction

In 2005 the Missouri Legislature changed the Missouri Workers' Compensation Law to require that the statutes be strictly construed. Rev. Mo. Stat. §287.800.1(2005). Strict construction is not necessarily the opposite of liberal construction. *Meyering v. Miller*, 51 S.W.2d 65, 68 (Mo. 1932). Rather, strict construction merely requires the court give the statute "its plain meaning and refrain from enlarging the law beyond that meaning." *Stricker v. Children's Mercy Hosp.*, 304 S.W.3d 189, 192 (Mo. App. W.D. 2010). Strict construction does not require the courts to construe the language of the terms so narrowly as to become unreasonable. *Board v. Eurostyle, Inc.*, 998 S.W.2d 810, 814 (Mo. App. S.D. 1999). Liberal construction, in contrast, allows for an interpretation of the statute that is at odds with the letter of the statute, but accomplishes the purpose of the legislature. *Board of Educ. of Community Consolidated Sch. Dist. No. 59 v. IL Board of Education*, 740 N.E.2d 428, 433 (Ill. App. 2000). In the workers' compensation context, liberal construction meant "a claimant will be considered within its scope if reasonably possible." *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 620 (Mo. 2005).

Strict construction, therefore, does not mean that no common law exists outside of the statute, only that any pre-existing common law cannot be in conflict with the text or spirit of the statute. Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* §58:2, (7th Ed. 2009) "Courts also note that strict construction of statutory language is more of an aid than an end, and does not eliminate from consideration other

guides to interpretation.” *Id.* The question should be, is doctrine of personal convenience, long established through a case history of interpreting The Missouri Workers’ Compensation Law, consistent with and grounded in the current statutes? The answer is yes.

C. The Personal Convenience Doctrine Was Not Abrogated by Changes to “Arising out Of” and “In the Course and Scope of Employment”

The legislature abrogated specific interpretations of workers’ compensation common law in the 2005 changes dealing with the definition of “accident”, “occupational disease”, “arising out of”, and “in the course of employment.” Rev. Mo. Stat. §287.020.10 (2005). The abrogation of specific case law means that 1)the legislature knew workers’ compensation common law existed, 2) they found certain interpretations of the statute objectionable, and 3)they recognized their ability to abrogate any provision of case law they found objectionable. The legislature could have abrogated the common law doctrine of personal comfort and convenience, but conspicuously chose not to do so by citing a specific case or changing the appropriate section of law. The legislature made no change to the language from which the personal convenience doctrine arises, contained in Rev. Mo. Stat. §287.020.3(2)(b) (2005), which deals with the requirement that the injury not come from a hazard or risk *unrelated to employment* to which the employee is equally exposed outside of employment.

The language contained in the new statute regarding “unrelated to the employment” is the exact same phrase that was used pre 2005. The only pertinent changes actually *removed impediments* to finding relatedness by taking out provisions in Rev. Mo. Stat. Sec. 287.020.3(2)(b&c) (1993) requiring that the injury follow “as a natural incident of the work” and be “fairly traced to the employment as a proximate cause.”⁵ Therefore, under the current definition of arising out of and in the course and scope of employment, it is actually *simpler* to prove work relatedness. None of the 2005 amendments are inconsistent with the personal convenience doctrine.

The Legislature did abrogate three cases as they related to “case law interpretations on the meaning of or definition of ‘accident’, ‘occupational disease’, ‘arising out of’, and ‘in the course of the employment’”. The case law interpretations abrogated were each related to newly created definitions for those terms in the 2005 legislation. The language of SB 1 does not specifically address the personal comfort doctrine nor does it create new definitions for the relevant provisions of Rev. Mo. Stat. §287.020.3(2)(b) (2005) under which the doctrine applies

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The 1993 definition for arising out of and in the course and scope of employment required proof of each element; failure to prove any element would be insufficient. Therefore, by logic, proof of the convenience doctrine necessarily meant that work relatedness was proven. Rev. Mo. Stat. Sec. 287.020.3(2) (1993).

The cases specifically abrogated by Rev. Mo. Stat. Sec. 287.020.10 (2005) are not related to the question presented in the *Johme* case. *Bennett* and *Kasl* are not about personal comfort doctrine. The holdings in *Bennet* were confined to the definition of accident and whether or not walking as an activity could be considered to “arise out of” employment. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo. App. 2002). The court’s opinion in *Kasl* turned on whether or not having a foot fall asleep constituted a hazard related to employment. *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999)

Drewes does utilize the personal comfort doctrine, but turns on the application of a section of the statute that removed by the 2005 amendments, Rev. Mo. Stat. Sec. 287.020.5 dealing with the limitation of the definition of arising out of and in the course of such employment” to injuries actually occurring on the employers premises or where employees are required to be. *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 514 (Mo. 1999). The *Drewes* decision was abrogated by the removal of Rev. Mo. Stat. Sec. 287.020.5 (1993) and the specific insertion in Rev. Mo. Stat. Sec. 287.020.2 (2005) of language requiring the accident to occur “during” a single work shift, not on break. Unlike the accident in *Johme*, *Drewes* occurred on premises not owned or controlled by the employer and during an unpaid break. *Id.* at 515. There were no language changes in Rev. Mo. Stat. Sec. 287.020.3(2)(b) (2005) that would account for or even suggest the abrogation of the personal convenience doctrine.

Post 2005 cases have not directly addressed the personal comfort doctrine, but since the statutory language that prompted the incorporation of the personal comfort doctrine was unchanged, the personal comfort doctrine remains the law. The activity must still fall within the definition of “arise out of” and “in the course of employment” in Rev. Mo. Stat. §287.020.3(2) (2005). As long as the activity can be seen as a condition of, i.e. related to employment and there is a causal relationship between that activity and the accident that caused the injury, the requirements of the statute have been met. *Miller v. MO Hwy and Trasp.*, 287 S.W.3d 671 (Mo. 2009); *Stricker v. Children’s Mercy Hosp.*, 304 S.W.3d 189 (Mo. App. W.D. 2010).

Attending one’s personal convenience has always been widely accepted to relate to employment within the meaning of Rev. Mo. Stat. Sec. 287.020.3(2)(b), in its many incarnations, and therefore if *Johme* was attending to her personal needs when injured and work was the prevailing factor in causing the medical condition and disability, then the claim arose out of and in the course and scope of employment. While the *Johme* court was concerned that even smokers taking a break might be covered under the personal convenience doctrine, there is no precedent for such a case and in any event those facts are not before the court in *Johme*.

CONCLUSION

The court must only determine if the plain meaning of the words “unrelated to employment” still allow for compensation of injuries that occur while the employee is engaging in activities that either provide a benefit to the employer or a personal comfort/convenience to the employee. In doing so, strict construction applies to the interpretation of the words in the statute, but strict construction is not a tool for any particular political vantage point. Strict construction requires adherence to the meaning of the words in the statutes, not liberalism or conservatism. The relevant words defining “arising out of” and “in the course and scope of employment” have become in *some* ways more restrictive (the insertion of the “prevailing” factor test), and in *some* other ways less restrictive (the elimination of “a natural incident of work” and “employment as a proximate cause” of the injury). None of the changes or omissions in the 2005 amendments would suggest that the requirement for relatedness to work as measured in both pre 2005 and post 2005 case law has been altered. The only relevant change has been to the “prevailing” factor test, and that is not at issue in the case herein.

To exclude injuries such as in *Johme*, *Pile* and *Whiteley* would be to create a debate from thin air that was not intended or created by the 2005 amendments, causing vast uncertainty as to when an injury does or does not arise out of and in the course and scope of employment, to the detriment of millions of employers and employees alike. The Court is not being asked to read into or exclude additional meaning into the text of the

statute, only to determine if certain classes of activities at work still fit within the protections of workers' compensation, as has long been expressed by the same exact plain language we have today as we have had in Missouri for generations.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2011, I filed the foregoing with the Missouri Supreme Court and a copy was served using the court’s electronic filing system and by regular U.S. postal service mail (1 copy) to attorneys for appellant and respondent:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 and 55.03

The undersigned hereby certifies that the foregoing brief has a 8,226 word count and is typed in font not smaller than 13 point Times New Roman and stored to a WordPerfect 5X file. The brief complies with the page length requirements of Rule 84.06(b). This brief contains the information required by Rule 55.03.

By: /s/ Randy Charles Alberhasky
Randy Charles Alberhasky

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