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IN THE SUPREME COURT OF MISSOURI

SANDY JOHME,	)	
	)	
Respondent,	)	
	)	**SC Number: 92113**
v.	)	
	)	
ST JOHN'S MERCY HEALTHCARE,	)	
	)	
Appellant.	)	

SUBSTITUTE BRIEF OF RESPONDENT SANDY JOHME

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JURISDICTIONAL STATEMENT

This case comes before the Missouri Supreme Court having been transferred by the Missouri Court of Appeals for the Eastern District.

This case was first tried before the Division of Workers' Compensation in the City of St. Louis, appealed to and reversed by the Labor and Industrial Relations Commission, and then appealed to the Court of Appeals for the Eastern District, pursuant to § 287.495 RSMo 2000. The Award of the Labor and Industrial Relations Commission was reversed by the Court of Appeals, but on the Court's own Motion this matter was transferred to the Supreme Court.

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STATEMENT OF FACTS

Introduction

At issue before the Court is whether the "Comfort Doctrine" was abrogated by the 2005 changes to the Workers' Compensation Law ("WCL"), whether the Employee's injury occurred during an activity of mutual benefit to the Employer, whether there is a "Common Law" of Workers' Compensation, and whether the two-step analysis utilized by the Court in *Pile v. Lake Regional Health Systems,* 321 S.W.3d 463 (Mo.App.S.D. 2010) is supported by statute or case law. Employee respectfully submits that her injury of June 23, 2008 arose out of and occurred in the course and scope of her employment, and thus, the Commission's Award must be affirmed.

Procedural History/Relevant Facts

On June 23, 2008, Claimant, Ms. Sandy Johme ("Employee"), was working in her usual capacity as a patient billing representative for St. John's Mercy Healthcare ("Employer"), in a building in Maryville Center, located a mile or so away from the main St. John's Mercy Medical Center campus in St. Louis County, MO. Her job was all "desk work"; she did billing "for the doctors at St. John's." (Tr. 9-10) She worked on one of three (3) floors in the building that were reserved only for St. John's employees (Tr. 10); there were no other employers with employees on those floors. Each floor had a small kitchen-type area in the center of the floor, a room equipped with refrigerators, microwaves and commercial coffee makers, all provided by Employer for the use of all employees, management and non-management alike.

(T. 10). Employer provided, free of charge, all of the coffee, filters and condiments for the coffee. The kitchen area was U-shaped, with the coffee maker on the counter in one corner of the "U".

On June 23, 2008, Employee's work day began at 9:00 a.m., and the injury occurred around 10:00 a.m. that morning. Employee had left her desk, which was about thirty (30) steps away from the kitchen area, to obtain a refill on her cup of coffee (Tr. 11). She took the last cup of coffee from the pot, and, as was the usual practice in the office for those who used the kitchen and drank coffee, she made another pot of coffee, using the pre-measured bags of grounds and filters provided by the Employer. (Tr. 12-13). The office coffee makers are unlike the "Mr. Coffee-type" of coffee makers that one would use in one's personal home, rather, the office coffee makers are big, commercial-type Bunn coffee makers. (Tr. 13)

"Coffee is made all day long" in the little kitchen area, and the company culture is such that since several employees drink from the pots all day, coffee is made "especially if it's in the morning", but "…not just in the morning, in the afternoon after we [the employees] eat lunch we [the employees] make more coffee." (Tr. 12)

Employee did not make coffee at home; her coffee pot was put away, as she was not there during the day. (Tr. 15-16) On the weekends, she did not make coffee at home; she only made breakfast for herself and her daughter. (Tr. 15) The only place that Employee made coffee is at work.

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As she finished making the new pot of coffee the day of the injury, Employee turned (she could not remember months after the accident exactly why she turned, perhaps to throw away the used coffee filter or used grounds, or leave the room), twisted her right ankle, her right foot slipped off her sandal, and she fell first onto her right side and then on to her back. (Tr. 14, Tr. 23-24, 315, 316) She was alone in the kitchen, and after the fall dragged herself up off the floor by using the counter. Eventually a co-worker came into the kitchen, and an ambulance was called for Employee. She was taken to Employer's own hospital, the nearby St. John's Mercy Medical Center, and treated for a broken pelvis. (Tr. 13, 14, 23-24, 315, 316).

In the history on the "Co-worker Injury Report", Exhibit G, completed by Employee on August 13, 2008, approximately three (3) weeks after the accident, Employee stated that "I was making coffee in the department's kitchen I was standing at the coffee pot & [sic] when I turned to walk back to my desk, I felt my shoe…." (Tr. 315) (and here the statement is continued on the second sheet of the Report, indicated by an arrow and a notation "other side") "suddenly on the floor. As I pulled myself up and leaned against the counter I realized I couldn't walk." (Tr. 315-316).

While Employee was waiting for the ambulance to arrive, her supervisor, Nora Faucett, talked to her. (Tr. 23) In Exhibit G, the "Co-worker Injury Report St. John's Mercy", Ms. Faucett stated the Employee gave her a contemporaneous history at 10:05 a.m. on June 23, 2008 (approximately five (5) minutes after the accident) that Employee had been making coffee in the kitchen, turned to throw away the used

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grounds in the trash, twisted her ankle and fell off her shoe, that she then fell backwards, landing on the floor. (Tr. 315-316)

Administrative Law Judge Cornelius Lane, after a Hearing in a which the only issue was whether or not the Employee's injuries "arose out of or in the course of" her employment with Employer, in his Award on Hearing dated April 16, 2010 determined that the Employee "just fell" and that "…she would have been exposed to the same risk or hazard in her normal non-employment life." *Division of Workers' Compensation Award on Hearing, ("ALJ Award"),* 4.

The Labor and Industrial Relations Commission ("Commission") in its "*Final Award Allowing Compensation (Reversing Award and Decision of Administrative Law Judge*" ("*Commission Award*") dated February 22, 2011, found that Employee took the last cup of coffee in the pot, and that it was customary in Employer's office that the person that took the last cup of coffee make another pot of coffee, and that Employee did not clock out while making the new pot of coffee. *Commission Award*, 1-2. The Commission noted that "[W]e believe it is a matter of common knowledge that throughout the course of a workday, workers undertake activities that do not fall squarely within their assigned duties, which activities minister to their personal needs. Workers get drinks and snacks. Workers use the restroom. Workers even make coffee." *Commission Award*, 3. The Commission concluded that the personal comfort doctrine, enunciated as early as 1930[1], not only survived the 2005 changes to the Workers' Compensation Law ("WCL"), but was still sound and consistent with

[1] *Jackson v. Euclid-Pine Inv. Co.*, 22 S.W.2d 849 (Mo.App.1930)

the 2005 amendments to RSMo § 287.020.2. In coming to this conclusion, the Commission utilized the two-step analysis from the 2010 decision out of the Southern District Court of Appeals, *Pile v. Lake Regional Health Systems*, 321 S.W.3d 463 (Mo.App.S.D. 2010). The Commission found that Employee's activity of making coffee was incidental to and related to her employment, and the Commission did not need to proceed to the second step of the *Pile* analysis, whether the Employee was equally exposed to the hazard or risk in normal, nonemployment life. (*Commission Award*, 5)

In its Opinion dated October 25, 2011, the Eastern District Court of Appeals, Division Two, while confirming that it was bound by the findings of fact of the Commission, determined that the only "risk" involved with the accident was "making coffee or, more generally, performing normal kitchen related activities," and that for the case to be compensable, Employee must have fallen as some "function of her employment" to have had a compensable fall. *Slip Opinion*, 5. The Court found that *Pile* Court's two-step analysis "did not logically interpret the statute" (RSMo § 287.020.3(2)(b)) because there was "no common law of workers' compensation". *Slip Opinion*, 8.

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STANDARD OF REVIEW

The Missouri Constitution, Article V, Section 18, provides for judicial review of the Commission's Award to determine whether it is authorized by law and supported by competent and substantial evidence upon the whole record. *Richard v. 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 Commission, pursuant to RSMo § 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 Commission acted without or in excess of its power; 2) that the Award was procured by fraud; 3) that the facts found by the 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. Whether the Award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. *Id.*

On appeal, questions of law are given *de novo* review. *DeBose 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 Commission's interpretation and application of the law, and no deference is afforded to the Commission's interpretation of the law. *Schoemehl v. Treasurer*, 217 S.W.3d 900,

901 (Mo banc. 2007). The issues for the Court's resolution, whether the Commission possessed jurisdiction to determine the Fund's subrogation recovery from the proceeds of the third-party action, 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.

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POINTS RELIED ON

I. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN AWARDING BENEFITS BECAUSE THE AWARD IS SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE IN THE RECORD, AND THE SPECIFIC FINDINGS OF FACT BY THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ARE BINDING ON APPELLATE COURTS ABSENT VERY SPECIFIC EXCEPTIONS NOT PRESENT IN THIS CASE.

Brenneisen v. Leach's Standard Serv. Station, 806 S.W.2d 443 at 445, (Mo.App.E.D. 1991)

Miller v. Mo. Highway Transportation Commission, 287 S.W.3d 671 (Mo.banc 2009)

Stricker v. Children's Mercy Hosp., 304 S.W.3d 189, (Mo.App.W.D. 2009)

§ 287.495.1 RSMo (2010)

II. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN AWARDING BENEFITS BECAUSE THE EMPLOYEE'S INJURY AROSE FROM A HAZARD OR RISK RELATED TO HER EMPLOYMENT, AND THE TWO-STEP ANALYSIS ENUNCIATED IN *PILE V. LAKE REGIONAL HEALTH SYSTEMS*, 321 S.W.3d 464 (MO.APP.S.D. 2010) LOGICALLY INTERPRETS § 287.020.3(2) RSMo. 2005.

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Ahern v. P & H, 254 S.W.3d 129 (Mo.App.E.D. 2008)

Miles v. Lear Corporation, 259 S.W.3d 64 (Mo.App.E.D. 2008)

Pile v. Lake Regional Health Systems, 321 S.W.3d 464 (Mo.App.S.D. 2010)

§ 287.120.1 RSMo

§ 287.120.7 RSMo

§ 287.020.2 RSMo

§ 287.020.3(2) RSMo

§ 287.120.3.2(b) RSMo 2005

III. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN THAT THE "PERSONAL COMFORT DOCTRINE" WAS NOT ABROGATED BY THE 2005 CHANGES TO THE WORKERS' COMPENSATION LAW AND IS STILL GOOD LAW AND CONSISTENT WITH RSMO § 287.020.2(2)

Bivins v. St. John's Regional Health Center, 272 S.W.2d 446 (Mo.App.S.D. 2008)

Brenneisen v. Leach's Standard Serv. Station, 806 S.W.2d 443 (Mo.App.E.D. 1991)

Hilton v. Pizza Hut, 892 S.W.2d 625 (Mo.App.W.D. 1994)

IV. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE BECAUSE EVEN IF THE EMPLOYEE'S INJURY AROSE FROM A HAZARD OR RISK UNRELATED TO HER EMPLOYMENT, THE

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<u>EMPLOYEE WAS NOT EQUALLY EXPOSED TO THE HAZARD OF RISK IN HER NORMAL UNEMPLOYMENT LIFE.</u>

Hilton v. Pizza Hut, 892 S.W.2d 625 (Mo.App.W.D. 1994)

Kloppenberg v. Queen Size Shoes, Inc., 704 S.W.2d 234 (Mo. 1986)

Miller v. Mo. Highway Transportation Commission, 287 S.W.3d 671 (Mo.banc 2009)

§287.020.10 RSMo

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ARGUMENT

I. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN AWARDING BENEFITS BECAUSE THE AWARD IS SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE IN THE RECORD, AND THE SPECIFIC FINDINGS OF FACT BY THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ARE BINDING ON APPELLATE COURTS ABSENT VERY SPECIFIC EXCEPTIONS NOT PRESENT IN THIS CASE, IN THAT THE FACTS IN THIS CASE WERE HIGHLY CONTESTED AND SUPPORT THE COMMISSION'S AWARD CONCLUDING EMPLOYEE DID NOT "MERELY SLIP OFF HER SANDAL."

The Eastern District's Opinion properly determined that there was sufficient evidence for the Labor and Industrial Commission's finding that Employee "twisted" her ankle and, ([I]n the absence of fraud, the findings of fact made by Commission within its powers are conclusive and binding upon this Court. *Slip Opinion* 3. While the Court found that the Commission properly evaluated the conflicting evidence when it determined that Employee had twisted her ankle, in the recitation of facts in the Opinion, the description of the accident in not just one place, but four places in the Opinion, is incorrect, and those four descriptions of the accident are not even consistent with each other. On page 1 of the Opinion the accident is described as occurring when "….Johme left her cubicle…..began making coffee, turned, and

slipped off the side of her sandal injuring her right hip." On page 4 of the decision, the Opinion states that "[t]he essential uncontested facts are that while making coffee at work, Johme slipped off her sandal, fell to the floor and injured her pelvis." This in incorrect. The circumstances surrounding the fall were highly contested, and this statement is internally inconsistent with the first part of the Opinion's "Discussion" regarding Employer's first issue raised on appeal, that is: "[w]hether the Commission's finding that Johme "turned and twisted her ankle, which caused her foot to slip off her sandal" is supported by sufficient competent evidence…" *Slip Opinion,* 5. The Opinion notes that fact in the Commission's finding Employee twisted her ankle is binding on the Court. The assertions in the Slip Opinion that Employee simply "slipped off her sandal" ignores the Commission's binding specific findings of fact. The Opinion later notes that "[S]he wore sandals to work of her own accord…" without mentioning the twisted ankle, although there is no evidence that wearing sandals had anything to do with the fall, and that, again, the Court states "….while making coffee Johme unexpectedly slipped off her sandal…." (*Slip Opinion,* 5) once again completely disregarding the twisted ankle. These inconsistencies are very important in that the Court bases part of its decision on this misconstrued version of events, the "merely slipping off a sandal".

These types of cases are very dependent on the individual facts in each specific case: Every case involving the phrase "arising out of and in the course of employment" should be decided upon its own particular facts and circumstances and not by reference to some formula. *Brenneisen v. Leach's Standard Serv. Station,* 806 S.W.2d 443, 445

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(Mo.App.E.D. 1991), citing *Wamhoff v. Wagoner Corp. Electric*, 354 Mo. 711, 190 S.W.2d 915, 917 (Mo.banc. 1945). Each case must turn upon the point of whether, under its particular circumstances, the injury arose from something that had become incidental to the employment. *Hilton v. Pizza Hut*, 892 S.W.2d 625, 630-631 (Mo.App.W.D. 1994).

Any decision as to whether or not Employee's injury "arose out of her employment or occurred in the course and scope of her employment" must be based on a consistent set of facts, the facts as determined by the Commission, which are binding on this Court. The Opinion is not based on the consistent facts found by the Commission and should be reconsidered in light of those inconsistencies.

When relevant facts are not in dispute, the issue as to whether an accident arose out of and in the course of employment becomes a question of law, which the Court reviews *de novo*. *Id.*, *Stricker v. Children's Mercy Hosp.*, 304 S.W.3d 189, 191 (Mo.App.W.D. 2009). The relevant facts in this case are disputed. There was a dispute as to whether the Employee slipped and fell, or twisted her ankle, slipped off of her sandal, and fell, or whether something different happened all together. In this case, the facts of the fall itself were completely disputed. In the case of disputed facts, the findings of fact made by the Commission within its powers are conclusive and binding on an appellate court. *Lacy v. Federal Mogul*, 278 S.W.3d 691, 699 (Mo.App.S.D. 2009).

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

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Commission acted without or in excess of its power; 2) that the Award was procured by fraud; 3) that the facts found by the 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). "Only in rare cases will we [the appellate courts] find an award by the Commission to be contrary to the overwhelming weight of the evidence." *Roberts v. Missouri Highway and Transp. Comm'n*, 222 S.W.3d 322, 331 (Mo.App. 2007). This is not one of those cases.

In the instant matter, the Commission found that "[A]s 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 onto her back." *Commission Award*, 2. The contemporaneous history from the Employee, given on the date of accident, just moments after the fall, to Employee's supervisor, was that "…she [Employee] had been making coffee in the kitchen, turned to throw away the used grounds in the trash, twisted her ankle, fell off her shoe, and then fell backwards, landing on the floor." (Employee's Exhibit G, Tr. 315-316).

The facts in the instant matter differ significantly from the facts in *Bivins v. St. John's Regional Health Center,* 272 S.W.3d 466 (Mo.App.S.D. 2008). In *Bivins*, the Commission concluded that the Employee's injury was not compensable because it resulted from an *unexplained* (emphasis added) fall, that Ms. Bivins "just fell" or "simply or merely fell", *Id*. at 450, and was thus not rationally connected to the Ms. Bivins' work. *Id*. at 451. In the instant matter, Employee fell because she turned and

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twisted her right ankle, which caused her right foot to slip off of her sandal, and she fell onto her right side and then onto her back. The instant matter is not a "*Bivins*" case.

II. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN AWARDING BENEFITS BECAUSE THE EMPLOYEE'S INJURY AROSE FROM A HAZARD OR RISK RELATED TO HER EMPLOYMENT, AND THE TWO-STEP ANALYSIS ENUNICATED IN *PILE V. LAKE REGIONAL HEALTH SYSTEMS*, 321 S.W.3d 464 (MO.APP.S.D. 2010) LOGICALLY INTERPRETS § 287.020.3(2) RSMo. 2005.

The Eastern District concluded that the two-step analysis required by *Pile v. Lake Regional Health Systems*, 321 S.W.3d 464 (Mo.App.S.D. 2010) does not logically interpret § 287.020.3(2) and does not apply the *Pile* analysis to the instant matter, thereby choosing not to follow in this case the previous decisions of a Missouri appellate court, the Southern District, in *Pile* and a more recent case following *Pile*, *Whiteley v. City of Poplar Bluff*, (Mo.App.S.D. 10/11/2011).

Pile required, in the application of Section 287.020.3(2)(b) RSMo, a two-step analysis. The first step in the analysis is to "determine whether the hazard or risk is related or unrelated to the employment." *Pile* at 467. If, and only if, the "hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life." *Id*.

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§ 287.020.3(2) RSMo 2005 requires that an injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The Eastern District concluded that the *Pile* analysis does not logically interpret the statute "…because there is no Common Law of Workers Compensation." *Slip Opinion,* 8. This assertion is not correct. There is, in fact, a "Common Law of Workers' Compensation", in that each and every time a court interprets the WCL it creates "Common Law". In 2008, in the first opportunity that the Court had to evaluate the 2005 amendments to the WCL, in an opinion from the same Eastern District, albeit another Division, the Court made clear that this is the case. *Ahern v. P & H*, 254 S.W.3d 129 (Mo.App.E.D. 2008). The *Ahern* court, in discussing a definition of "idiopathic", concluded that the Claimant in *Ahern* erred by reading a definition of idiopathic into § 287.020.10, noting that § 287.020.10 is silent regarding the definition of "idiopathic", and that such definition has been traditionally defined through case law. *Id.* at 133. Unless a statute clearly abrogates common law by express statement or by implication, the common law stands. *Mika v. Central Bank of Kansas City*, 112 S.W.3d 82, 90 (Mo.App.W.D. 2003). The *Ahern* Court concluded that since Section 287.020.10 neither expressly nor implicitly abrogates earlier case law interpretations of the

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definition of idiopathic, the Commission did not err in using the definition of "idiopathic' found by this Court in *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525 (Mo.banc 1993), the *Alexander* definition of idiopathic was still good law. *Ahern* at 133.

The Court in the instant matter erred when it concluded that there is no "Common Law" of Workers' Compensation, and used that conclusion to determine that the *Pile* two-step analysis does not logically interpret § 287.020.3(2)(b).

In order to apply the first step of the *Pile* two-step analysis, a determination of whether hazard or risk was related or unrelated to Employee's employment with Employer, Commission concluded that in the instant matter, an analysis of the "comfort doctrine" was necessary.

Before the Commission, Employer argued that Section 287.020.3(2) should be read such that if an Employee got up to answer the call of nature and use the restroom facilities, and twisted his or her ankle coming out of the stall, that would be a non-compensable injury. If an Employee got a drink from the water fountain, and in turning from the water fountain, twisted his or her ankle and fell, that would not be a compensable injury. Employer urges the conclusion that because these activities, and like activities, as they are not part of "assigned duties", are therefore not "related to" Employee's employment.

§ 287.120.1 RSMo holds an Employer liable, regardless of fault, when an employee sustains an injury "arising out of or in the course of his employment." An employee has sustained a compensable injury arising out of and in the course of

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employment "where an employee's acts were reasonably incidental to commencement of employee's work and were also of benefit to the employer" *Miles v. Lear Corporation*, 259 S.W.3d 64 (Mo.App.E.D. 2008), citing *James v. CPI Corp*., 897 S.W.2d 92, 95 (Mo.App.E.D. 1995). The benefit to the employer need not be tangible or great. *James, Id.*

An injury "arises out of" the employment if it is a natural and reasonable incident of the employment; the injury occurs "in the course of employment" if the accident occurs within the period of employment, at a place where the Employee may be reasonably fulfilling the duties of employment. The tests are separate, and both must be met before an injury may be determined compensable. *Simmons v. Bob Mears Wholesale Florist*, 167 S.W.2d 92, 95 (Mo.App.E.D. 1995). An injury arises out of employment "when there is a causal connection between the nature of the employee's duties, or conditions under which he is required to perform them in the resulting injury." *Id.*

A "fulfillment of employment duties" is not the standard for concluding whether or not an injury is compensable, but rather a finding under Section 287.120.1 RSMo as to whether or not Employee's injury "arose out of" or occurred "in the course of" his employment is necessary to determine compensability. There is no nexus of "fulfillment of employment duties" required by statute nor to be found in any case law.

Likewise, Ms. Johme's injury cannot be precluded as a recreational activity, and the analysis in the seminal case of *Seiber v. Moog Automotive, Inc*., 773 S.W. 2d 161

(Mo.App.E.D. 1989) as to whether or not a given activity is "incidental to employment" is useful in the instant matter. In *Seiber*, the employee was injured while playing basketball on her employer's premises during her unpaid lunch break. This Court concluded that the employer had acquiesced to basketball playing activity in that it had become a regular incident of employment. In 1990, in response to *Seiber*, the Missouri General Assembly added paragraph 7 to Section 287.120, creating a forfeiture of benefits for voluntary recreational activities. Appellants in *Seiber* asserted that the amendment precluded all *Seiber*-like claims. Section 287.120.7 RSMo 1990.

The court in *Miles, supra*, reaffirmed that *Seiber* does not preclude all recreation claims, but merely shifts the burden onto the employee to establish compensability under one of the exceptions of Section 287.120. The amendment was enacted "to enable employers to limit their liability for recreational injuries *that otherwise would have been incidental to the employment*." *Miles, supra*, at 4, citing *Jones v. Trans World Airlines, Inc*., 70 S.W.3d 468, 471 (Mo.App.W.D. 2001) (citing *Wilson v. Monsanto*, 926 S.W.2d 48, 50 (Mo.App.E.D. 1996). (emphasis added). In *Seiber*, employer furnished the court and ball, only allowed the activity during unpaid breaks, and was otherwise indifferent to employees' participation. In *Miles*, Lear (the employer) furnished (albeit passively) the court and ball, even allowed the activity during paid breaks, and was otherwise indifferent. *Miles, Id*. In the instant matter, Employer actively furnished the coffee, the coffee maker, etc. to employees for the kitchen (used by employees and management alike), Employee was "on the clock" when she was in the kitchen area and was not at or even on a break. In *Miles*, the

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Court, in analyzing other cases involving questions regarding activities "incidental to employment", concluded that pre-and post-amendment precedent further supported a conclusion that Miles's activity was incidental to his employment. *Miles, Id.*

Employee's injuries also arose within the course of employment under the second part of the test, which refers to time, place and circumstances under which injuries are received, *Automobile Club Inter-Insurance Exchange*, 663 S.W.2d at 242, 245 (Mo.banc 1984), in that the employee was on the clock, during the period of time that she was expected to be engaged in the furtherance of Employer's business, and was on the Employer's premises when the injury occurred, and was engaged in an activity incidental to the furtherance of the Employer's business. Employee was just steps away from her desk, for just a few minutes, grabbing a cup of coffee. In a matter not even as clear as the instant matter, *Bybee v. Ozark Airlines*, 706 S.W.2d. 570, 572 (Mo.App.E.D. 1986), the Court found that an employee injured in a parking lot while en route to his car to put air in one of his tires was performing an activity beneficial and incidental to his employment and, thus, entitled to Workers Compensation benefits. The Court reasoned that the company provided breaks and allowed employees to use tools during those breaks, which, to the company's benefit, encouraged employees to remain on the company premises. *Id*. In the instant matter, the kitchen room with the coffee pot was provided for the use of employees and management alike, and employees stayed "on the clock" while they were on Employer's premises.

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If the Employee, in making the coffee, was performing an activity of a "personal nature," the question that must be decided by the Court is whether the nature of the personal activity engaged in by Employee, at the time she was injured, removed the Employee from the sphere of the employment relationship. There must be some relationship, a nexus, between the employment, and the personal activity engaged in when employee was injured. Such a nexus, or causal connection, is established if the injury results from a natural and reasonable incident of employment or if the activity engaged in at the time Employee fell could be construed as a mutual benefit to the Employer. This "mutual benefit doctrine" was discussed, at length, by the Supreme Court in *Wamhoff v. Wagner Electric Corp*., 354 Mo. 711, 190 S.W.2d 915, 917, (Mo.banc 1945).

An injury suffered by an Employee while performing an act for the mutual benefit of the Employer and the Employee is usually compensable for when some advantage to the Employer results from the Employee's conduct. Her act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of and in the course of employment; and this rule is applicable even though the advantage to the Employer is slight. 71 C.J., page 675 section 420. The Commission, in findings of fact binding on this Court, found that the Employee's act of making coffee "inured to the Employer's benefit" because it benefited the comfort of Employer's employees, as well as their energy and focus. *Commission Award*, 5.

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Employee, as was the custom of all who used the kitchen area, was making a new pot of coffee because she used the last cup. Employer provided the kitchen room, the coffee, the coffee pots, the refrigerator and all other accoutrements of the kitchen area, and the kitchen area was used only by the employees of Employer. The custom of making a new pot of coffee was part of the corporate culture at Employer, and applied to all employees who used the kitchen area, management and non-management alike.

III. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN THAT THE "PERSONAL COMFORT DOCTRINE" WAS NOT ABROGATED BY THE 2005 CHANGES TO THE WORKERS' COMPENSATION LAW AND IS STILL GOOD LAW AND CONSISTENT WITH RSMO. § 287.020.2(2)

The Commission, in its decision, concisely summarized the development of the law in this area, noting that

> [I]n the earliest days of our workers' compensation law the phrase "arising out of and in the course of" was not defined. When deciding the cases under the new law, Missouri courts turned to the law of states with more mature workers' compensation laws to see how the phrase was interpreted in those states.
>
> The consensus of authority is to the effect that an injury to an employee arises "in the course of his employment, when it occurs within the period of his employment, at a place where he might reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in the

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> performance of some task incidental thereto. Necessarily, the converse of the rule must also apply, so that, where, at the time his injury is received, the employee is engaged in a voluntary act, not known to, or accepted by, his employer, and outside of the duties for which he is employed, the injury cannot be said to have been received in the course of his employment.

The Commission continued:

> Likewise it is commonly held that an injury may be said to arise "out of the employment, when it is reasonably apparent, upon a consideration of all the facts and circumstances that a causal connection exists between the conditions under which the employee's work is required to be done, and the resulting injury. An injury arises out of the employment if it is a natural and reasonable incident thereof, even though not forseen or anticipated; but, in all events, it must be the rational consequence of some hazard connected therewith.

Commission Award, 6-7.

It is a matter of matter of common knowledge that that throughout the course of a workday, workers undertake activities that do not fall squarely within their assigned duties, which activities minister to their personal needs. We have not, as Employer would ask the Court to accept, reached the point where Employees are like robots that don’t need to satisfy the most basic of human urges: thirst, hunger, and elimination. Employees need to get a drink. Human beings need to use the restroom. Employees, with the equipment provided by the Employer, following Employer’s corporate culture, make coffee. These are simply the facts of human life, these facts

were, as the Commission properly noted, as “true 80 years ago as well” when courts were quickly called upon to consider the meaning of "arising out of and in the course of employment" in the context of some inevitable worker activities.

As early as 1929, in *Smith v. Levis-Zukoski Mercantile Co*., 14 S.W.2d 470 (Mo.App. 1929) the Courts adopted the personal comfort doctrine. Employers assert that the 2005 changes to the WCL have removed the “personal comfort doctrine” from the WCL. The essential issue before this Court is whether the personal comfort doctrine is consistent with the statutory definition of § 287.020.2 RSMo. Nothing in the changes to the WCL in 2005 have abrogated that doctrine. The rationale that the Courts developed over 80 years ago is still sound and is consistent with RSMo. § 287.020.3(2).

The rationale of the personal comfort doctrine has always been that the very basic needs of human beings, including thirst and elimination, must be met throughout the workday. Workers are not machines, without the basic primal needs of human beings. The benefit of tending to those needs inures not only to the employee, but to the employer as well. Therefore, where 1) a benefit inured to the employer, 2) the extent of the departure from one's duties was not so great that an intent to temporarily abandon the job could be inferred, and 3) the method chosen to tend to one's comfort was not so unusual and unreasonable that the conduct could not be considered an incident of the employment, courts have routinely held that risks arising from tending to personal comfort were risks related to employment.

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The authorities also hold that [the risk]...may even be one arising from the act of the employee in the doing of something ancillary to his or her employment, and essential to his or her own personal comfort and convenience.

If the injury is received while the employee is engaged in doing something incidental to the employment, though not strictly within the limits of the duties he or she is obliged to perform, the case will nevertheless be compensable. The injury may arise by accident "in the course of the employment, even though the act itself may be primarily personal to the employee, so long as it tends ultimately to react to the benefit of the employer." *Jackson v. Euclid-Pine Inv. Co*., 22 S.W.2d 849, 851 (Mo. App. 1930).

The 1993 changes to the law, although further limiting the words "arising out of and in the course of employment", did not abrogate the basic common law meaning of the phrases, but merely defined the outer limits of the meanings.

In 2005, the legislative changes to the WCL abrogated all cases dealing with the definition of "accident" and "injury":

> 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 Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, I*nc., 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 cases.

§ 287.020.10 RSMo 2005.

Under prior case law the phrases "arising out of" and "in the course of" employment were two distinct tests; both had to be satisfied in order to establish compensability of injuries. The phrase "in the course of employment" refers to the time, place and circumstances under which the injury occurs. This requirement was satisfied if the accident occurred during the period of employment "at a place where the employee may reasonably be fulfilling the duties of employment." "[A]n injury 'arises out of ' employment if it was a natural and reasonable incident thereof." *Kloppenberg v. Queen Size Shoes, Inc*., 704 S.W.2d 234 (Mo. 1986).

In *Hilton v. Pizza Hut*, 892 S.W.2d 625, 630-31 (Mo.App.W.D. 1994), the Court emphasized the fact-specific nature of workers' compensation cases on this issue, stating: "Every case involving the phrase "arising out of and in the course of employment" should be decided upon its own particular facts and circumstances and not by reference to some formula." *Brenneisen v. Leach's Standard Serv. Station*, 806 S.W.2d 443 at 445, (Mo. App. E.D. 1991) (citing *Wamhoff, supra, at 917).* Each case must turn upon the point of whether, under its particular circumstances, the injury arose from something which had become an incident to the employment. *Hilton*, 892 S.W.2d at 630-31.

The facts here are distinguishable from those in *Bennett, Drewes*, and *Kasl*. In those abrogated cases, the claimants sustained injuries from accidents that were

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not caused by an external work condition. See *Bennett*, 80 S.W.3d at 527 (injured after walking and knee popped); *Drewes*, 984 S.W.2d at 514 (injured after falling in break room while walking straight across a clear floor (facts similar to the *Miller* case); and *Kasl*, 984 S.W.2d at 853 (injured after falling from walking on her foot that had fallen asleep). Here, the Commission determined that Employee turned, twisted her ankle, and slipped off her shoe, resulting in a fall.

Employer asserts that the instant case is factually identical to *Bivins v. St. John's Regional Health Center*, 272 S.W.2d 446 (Mo.App.S.D. 2008), in which the injury was due to an "unexplained fall". In *Bivins*, the Commission found that the Ms. Bivins "just fell". The evidence, and the Commission's findings, in the instant matter, are very different: Unlike the unexplained *Bivins* fall, Employee was turning after making the coffee, twisted her ankle, she slid off her sandal, and she fell to the floor. The facts in the cases are utterly dissimilar. *Bivins* does not apply, nor does the *Mille*r case.

Employee, unlike the Claimant in *Miller*, was injured in an actual "event", a twist, sprained ankle, slip and fall, unlike Mitchell Miller. In *Miller*, Claimant was walking on an even road surface when his knee happened to pop. There was no trip, slip, twist or fall. The *Miller* Court was very clear in its analysis that it found this lack of such a slip or trip of other type of motion to be of great import. The factual situation in *Miller* is unlike the factual situation in the instant matter. In the instant matter, Employee turned and twisted her ankle and then fell to the floor, completely dissimilar

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to the facts in the *Miller* case. In the instant matter, there is also a causal connection of the work activity to the injury, unlike in *Miller*.

The Commission's reasoning is more appropriate than that of the Court, in that the Court, in referring to, and quoting, on page 5 of the Opinion both *Miller* and Section 287.020.3(2)(b), RSMo. 2005, omits the term "unrelated", a term that was unchanged from the pre-2005 statute. The Opinion states: Further, "[a]n 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 . . . is one to which the worker would have been exposed equally in normal non-employment life." *Miller*, 287 S.W.3d at 674. RSMo. § 287.020 actually reads, in relevant part,

> (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
>
> (2) An injury shall be deemed to arise out of and in the course of the employment only if:
>
> (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

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(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. (Emphases added).

The omissions of the relevant parts of the statute, and, particularly, the complete wholesale deletion of the line "…outside of and unrelated to the employment in normal nonemployment life" is telling, particularly given the Opinion's wholesale rejection of the two-step analysis of an injury under § 287.020 required by *Pile* and *Whiteley.* An analysis of whether or not the hazard or risk is "unrelated" to employment is essential to determine the compensability of an injury under RSMo. § 287.020.3(2).

Applying the rules of statutory construction to the dictates of strict construction, required by the 2005 changes to the WCL, actually results in a conclusion opposite to that of the Court: The comfort doctrine, rather than being abrogated, was in fact specifically allowed to remain part of the common law of the WCL.

The 2005 changes to the WCL require strict, rather than liberal, construction of the law. RSMo.§ 287.800.1. Strict construction does not mean that no law exists outside of that created in the statute, only that such law cannot be in conflict with the text of the statute. "Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms." *State ex rel KCP&L Greater v. Cook*, WD73462 at 7 (Mo.App.W.D. 9/13/2011), citing *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo.App.W.D. 2010). Strict construction requires the court give the statute "it's plain meaning and refrain from enlarging the law beyond

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that meaning." *Stricker, supra*. "A strict construction is one which limits the application of the statute by the words used." *Chrisman v. Terminal Railroad Assn. of St. Louis*, 157 S.W.2d 230 (Mo. App., 1942). However, in *Board v. Eurostyle, Inc*., 998 S.W.2d 810 (Mo.App.S.D. 1999) , the Court said "[B]ut by the expression "strict construction" is meant that the scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed, *and not that the language of the terms shall be unreasonably interpreted.* [emphasis added]. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction, but should give effect to the plain meaning of words and where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment." *Id*. [emphasis added]. Strict construction, however, does not mean, as the Court concludes in the instant matter, that "[C]ourts 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." Sutherland Statutory Construction (7th ed. 2009).

Other states have applied this defined liberal construction, in contrast, as allowing for an interpretation of the statute that is at odds with the plain meaning of the text, but accomplishes the purpose of the legislature, for example, *Board of Education of Community Consolidate Sch. Dist. No. 59 v. IL Board of Education*, 740 N.E.2d 428 (Ill. App., 2000). Liberal statutory construction signifies an interpretation which produces broader coverage or more inclusive application of statutory concepts. Liberal construction is ordinarily one which makes a statute apply to more things or in more

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situations than would be the case under strict construction. Statutes should be interpreted so that the manifested purpose or object of the statute can be accomplished. Thus, a statute is liberally construed when its letter is extended to include matters within the spirit or purpose of the statute." [internal citations omitted]. *Id.*

The legislature in 2005 abrogated very specific doctrines of workers' compensation common law in the 2005 changes. In discussing the effect of the 2005 changes to the WCL, the Court in *Sells v. Ozark*, 333 S.W.3d 498 (Mo.App.S.D. 2011), in analyzing this very issue, noted that the relevant parts of the law under consideration in *Sells* – the notice provisions of § 287.420 – (like the "equal exposure" language of § 287.287) were not altered either by any change in wording within the phrase or by the addition, deletion, or alteration of any other provisions within the section having an operative effect upon it. *Sells* at 507. The Court went on to state that "[W]hile it is well established that a statutory revision is intended to have some effect," what the legislature intended is to be concluded from the language which it used," citing *State v. Sivoboda*, 658 S.W.2d 24, 26 (Mo. banc 1983) (citing *Bradley v. Elsberry Drainage Dist.*, 425 S.W.2d 950 (Mo. 1968)). *Sells* at 507-508. Here, as was the case with the phrase in *Sells*, the language used by the legislature in its 2005 revision of this section was directed to other provisions and requirements within the section but left the phrase at issue intact and in the same grammatical position…." *Sells, supra, at 507.*

In construing this section, we initially turn to § 1.120, RSMo 2000, which provides that: "The provisions of any law or statute which is reenacted, amended or

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revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment." "This statute is consistent with the general rule that when part of a statute is repealed by an amendatory act, the provisions retained are regarded as a continuation of the former law while those omitted are treated as repealed." *Kelly v. Hanson*, 984 S.W.2d 540, 544 (Mo.App. 1998) (quoting *State ex rel. Klein v. Hughes*, 351 Mo. 651, 173 S.W.2d 877, 880 (1943)). The Supreme Court of Missouri has further explained this rule, stating:

[W]here a statute is amended only in part, or as respects only certain isolated and integral sections thereof and the remaining sections or parts of the statute are allowed and left to stand unamended, unchanged, and apparently unaffected by the amendatory act or acts, it is presumed that the Legislature intended the unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act.

Citizens Bank & Trust Co. v. Dir. of Revenue, State of Mo., 639 S.W.2d 833, 835 (Mo. 1982) (quoting *State ex rel. Dean v. Daues*, 321 Mo. 1126, 14 S.W.2d 990, 1002 (1929)).

Furthermore, "[i]n construing a statute a fundamental precept is that the legislature acted with knowledge of the subject matter and the existing law." *Holt v. Burlington N. R.R. Co.*, 685 S.W.2d 851, 857 (Mo.App. 1984). In revising the workers' compensation statutes as a whole, the legislature clearly expressed its intent to negate the effects of various cases and their progeny relevant to some of the sections and terms of the workers' compensation chapter. [footnotes omitted]. No such actions were

directed toward section 287.420, and, particularly, the legislature made no mention of prior cases interpreting the notice exception at issue here. Such an omission signals an intentional acceptance of existing case law governing the unchanged portion of section 287.420. *Sells, supra*, at 508. In the 2005 changes to the WCL, the phrase at issue – "[I]t (an 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 unemployment life" – remained absolutely intact and in the same grammatical position.

The fact that the Legislature left the "equally exposed" phrase intact means that 1) it knew workers' compensation common law existed and 2) it found certain doctrines objectionable, and they specifically changed those doctrines. The Legislature could have abrogated the common law doctrine of personal comfort and convenience, but it chose not to do so.

The Legislature made no change to §287.020.3(2)(b), although it did specifically abrogate three cases that 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'", specifically, the *Kasl*, *Drewes* and *Bennett* cases referenced above. The case law interpretations abrogated related to new definitions for those terms created by the 2005 legislation. However, the 2005 changes to the WCL do not specifically abrogate the personal comfort doctrine.

The abrogated cases are not related to the question presented in the instant matter.

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Bennett is not about personal comfort doctrine. The holding in *Bennett* was confined to the definition of accident and whether or not walking as an activity could be considered to "arise out of" employment. *Kasl* does not concern the personal comfort doctrine.

The Court's opinion in *Kasl* turned on whether or not having a foot falling asleep constituted a hazard related to employment. Of the three cases, *Drewes* is the only case to discuss the personal comfort doctrine, but the finding in *Drewes* does not pertain to the question of whether the risk was related to employment or the equal exposure question. The case only *interprets* the personal comfort doctrine.

Post-2005 cases, such as *Miller and Stricker,* have left open the door for personal comfort doctrine when the activity still falls within the definition of "arise out of and in the course of employment" in § 287.020.3(2). As long as the activity can been seen as a condition of employment and there is a causal relationship between that activity and the accident which caused the injury, the requirements of the statute have been met.

Under strict construction, the court must only determine if the plain meaning of the words "unrelated to employment" still allows for compensation for injuries that occur while the employee was engaging in employer approved activities for personal comfort or convenience. To exclude these injuries would be outside the spirit of the law, and would mean that every time an employee rises from their appointed work space, the employer and the employee both lose the protections of the workers compensation system – an absurd result.

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Employee is not asking the Court to read additional meaning and definitions into the text of the statute, only to determine if a certain class of behavior still fits within the protections of workers' compensation as expressed in its plain language.

IV. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE BECAUSE EVEN IF THE EMPLOYEE'S INJURY AROSE FROM A HAZARD OR RISK UNRELATED TO HER EMPLOYMENT, THE EMPLOYEE WAS NOT EQUALLY EXPOSED TO THE HAZARD OF RISK IN HER NORMAL UMEMPLOYMENT LIFE.

The Commission found that Employee did not make coffee at home; her coffee pot was put away, as she was not there during the day. (Tr. 15-16) On the weekends, she did not make coffee at home; she only made breakfast for herself and her daughter. (Tr. 15) The only place that Employee made coffee is at work.

The Employer in the instant matter urges that the injury is not compensable because it happened when Employee was making coffee, that the Employee made coffee in her non-work life, and that this is akin to the "merely walking at work" in *Miller*, that Employee was "equally exposed" to this type of injury in her "everyday life."

However, mindful of the standard that every case, as the *Hilton* court emphasized, given that in the fact-specific nature of workers' compensation cases, each case "…involving the phrase "arising out of and in the course of employment" should be decided upon its own particular facts and circumstances and not by reference to

some formula," it is the specific facts of each case that is important. *Hilton, supra*, at 630-31. There is no evidence in this case that the employee was "equally exposed" to such twists, slips or falls in her everyday life.

The *Miller* Court very particularly notes that, in laying out the facts of the *Miller*, that Miller's work did not require him to walk in an unusually brisk way; that he normally walks briskly at home and did nothing different than usual when walking at work that day; that nothing about the road surface, his work clothes or the job caused any slip, strain or unusual movement; and that he did not fall or otherwise sustain any additional injuries due to the popping. He just felt a pop. This is not the case in the instant matter. Employee was making coffee in the break room, turned to perform some task, twisted her ankle, her foot slipped off her sandal, and she fell, landing on her right hip.

To conclude that an injury like the instant injury is non-compensable because Employee makes coffee or could twist, slip and fall at home equally at work or when an Employee is not at work would mean that very few accidents would ever be compensable, and would make an absurdity of the workers' compensation system. To accept Employer's reasoning would mean that because an employee could trip on a frayed carpet, or trip and fall on the steps, or trip and fall over a power cord, or fall out of a chair, or cut oneself on a knife in a restaurant, or pick up a box, and because those accidents could happen in non-work life, those injuries would never be compensable. The absurd result of accepting Employer's interpretation of the WCL would mean that Employees could not answer the call of nature or get a drink at the drinking fountain

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without the risk of stepping outside the workers' compensation system, and the employer would likewise lose the protections of the workers' compensation system, and risk finding itself in civil court.

The Court concluded that the only "risk" involved in Ms. Johme's actions on June 23, 2008 was that of "making coffee", or more generally, "performing kitchen related duties." This conclusion misconstrues the law and the facts. The Opinion makes no analysis, at all, of the equal exposure portion of the statutory scheme, and ignores the Commission's findings of fact that Johme did not make coffee at home, that her coffee maker was put away, and she was not equally exposed to "coffee making" and the set-up of Employer's "kitchen", as found by the Commission. Rather than analyzing the facts in this accident, and choosing to evaluate the "type" of activity that Johme was engaged in, the Opinion sweeps an entire group of undefined activities, "kitchen related duties", into one noncompensable group, without any basis in law, statute or fact for doing so. Does the Court mean, then, that a restaurant worker who is using a knife and cuts himself is not to be compensated because he uses knives at home? This analysis would lead to an abundance of absurd and irrational results.

Concurring in a Separate Opinion to the majority decision in a case shortly following the instant matter, *Cooper v. Chrysler Group*, ED96549 (Mo.App.E.D. 12/13/2011) Judge Kenneth Romines, (ironically the author of the Opinion in the instant matter), stated: "I write only to note that this is the inevitable result of the narrowing of the definition of "accidental injury" by the Legislature. The required result of such "narrowing" can be seen in the manner in which we recently applied this

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Legislative dictate in *Johme v. St. John's Mercy Healthcare*, ED96467 (Mo. App. E.D. 2011). Clearly the Legislature prefers jury trials." *Cooper v. Chrysler , ED96549, Slip Opinion*, 11. Claimant submits that at least, in this conclusion, Judge Romines is correct. To find the injury in the instant matter non-compensable would open the door to exactly that result: A flooding of the civil circuit court system with cases in which any action of any type or kind that one undertakes in normal, non-employment life that one might also do at work that have been denied as compensable by the Employers and Insurers, resulting in exactly the *Cooper* situation: Case after case where matters based on accidents that pre-2005 changes to the WCL would have been compensable would result in cases pending simultaneously in the civil courts and the worker's compensation system.

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CONCLUSION

The Labor and Industrial Relations Commission's Final Award Allowing Compensation is supported by substantial competent evidence on the record as a whole. Based upon the weight of the evidence presented, the Commission's finding that the Employee's injury occurred in and arose out of her employment is correct. For the foregoing reasons, this Court should affirm the Commission's Award in the above-referenced matter.

Respectfully Submitted,

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Certificate of Service

The undersigned hereby certifies that a copy of the Respondent's Substitute Brief has been served upon Maurice D. Early, Attorney for Employer/Appellant, via the Court's eFiling system, a registered user.

/s/Ellen E. Morgan

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Certificate of Compliance

The undersigned hereby certifies that the number of words in Respondent's Substitute Brief complies with the limitations set forth in Rule 84.06 and that the number of words in the Brief is 10,733. The undersigned relied on the word count feature on this firm's word processing system to arrive at that number.

/s/ Ellen E. Morgan

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