**IN THE SUPREME COURT OF MISSOURI**

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No. SC98122

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MARAL ANNAYEVA, Appellant,

v.

SAB of the TSD of the City of St. Louis, Respondent,

and

TREASURER OF THE STATE OF MISSOURI,
as custodian of the Second Injury Fund,
Respondent.

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Appeal from the Labor and Industrial
Relations Commission
#13-000909

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# SUBSTITUTE REPLY BRIEF OF APPELLANT MARAL ANNAYEVA

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*Corp v. Joplin Cement Co.*, 337 S.W.2d 252 (Mo.banc. 1960)

*Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo.banc 2012)

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II.

**The Labor and Industrial Relations Commission erred in finding that Employee did not prove that her injuries occurred "in the course of" her employment with Employer, because Missouri law holds that an injury occurs in the course of the employment relationship when it takes place within the time and place where the employee may reasonably be engaged in either fulfilling the duties of her employment, or something incidental thereto, such that the Commission should have followed Missouri law and determined that Employee's injuries occurred in the course of her employment because Employee was found to have been injured while she was traveling upon Employer's premises as she was headed to her assigned work area when she slipped and fell upon a foreign substance on the floor.**

*Abel v. Mike Russell's Std. Serv.*, 924 S.W.2d 502 (Mo.banc. 1996).

*Lincoln Univ. v. Narens,* 485 S.W.3d 811 (Mo.App. 2016)

Mo.Rev.Stat. §287.020.5 (2017)

## ARGUMENT I

**The Labor and Industrial Relations Commission erred in finding that Employee did not prove that her accident "arose out of" her employment with Employer, because Missouri law holds that an injured worker does not need to identify the specific cause of a slip-and-fall accident where reasonable inferences can be drawn from the sufficient competent evidence to establish the cause as being the presence of a work-related risk source, such that the Commission should have followed Missouri evidentiary law and determined that Employee's injuries arise out of her employment with Employer because the reasonable inference to be drawn from the accident was that the slip-and-fall occurred as a result of an accumulation of salt, dirt and moisture which had been tracked into Employer's building from Employer's parking lot.**

### I. The histories in the medical records

The briefs of both respondents address the "arising out of" issue largely by arguing that the medical histories do not support Claimant's case. Respondents' argument is based upon the false assumption that medical histories are recorded for the purpose of *documenting legal liability*. They are not. Medical histories are recorded for the purpose of *providing proper medical care*. Physicians want to know the general mechanism of injury so that they know how to investigate and treat the medical problem. For instance, if a person has knee pain, the doctor wants to know if the knee was struck

by a blunt force (which would point to either a fracture or a torn meniscus), as opposed to whether it simply began hurting on its own (which would point to an arthritic condition or other disease process). Professor McQuade, an expert on the legal aspects of medical records, says this:

> The adequacy of the notes in a medical record varies markedly with the ability and diligence of the people who make them. It takes time and effort to keep good records and some people do not take the time and make the effort. In pressure situations indeed it may be next to impossible to record the events properly. Medical records often have to be made when people are busy, or during a crisis. With the best will in the world important items will be left out under these conditions.

J. Stanley McQuade, *Medical Information System for Lawyers*, p. 4, 1989. Given this, is it any wonder that the most complete history that was taken in this matter was done by a student at a medical school?[1] (Tr. 547). *Of course* he was the most detailed of the medical providers: he had licensed chiropractors watching over his shoulder and co-signing his notes. (See, e.g., Tr. 542, 544, 554).

Further, respondents' argument is speculative, stating Claimant "did not mention this" or "did not mention that" to the medical providers. Respondents were not present when the medical personnel took their histories. They don't know what was and wasn't said. Respondents had every opportunity to depose the people who took these histories, but didn't do so. Instead, they waited until the case got to the appellate stage to propound speculative arguments in place of documented facts.

After she fell, Respondent Employer sent Claimant to Concentra for medical care.

[1] Mr. Lev Furman. (Tr. 554). His evaluation at the Logan College of Chiropractic's

(Tr. 1043). Concentra is well known as having a large presence in treating work-related injuries, and they took a history of the accident happening at work. (Tr. 1043). Their billing was sent to Respondent Employer, not to a group medical plan. (Tr. 1043). So if any medical provider would feel it is necessary to record the cause of Claimant's slip and fall, it would be Concentra. But they didn't. And that is probably because they, like all medical offices, are more concerned with the nature of the injury than the legal cause of the fall.

Along those same lines, respondents point to the *timing* of the history in the chiropractic records of walking through salt at work. (Tr. 547). They say the history is not credible since the medical records *before that* say nothing about walking through salt. In other words, respondents are arguing to the Court that Employee decided – at some point in time prior to seeing the chiropractor – to make up a story about walking through salt. And so, if we follow the logic of that argument, then we have to deal with the medical records which *follow* the chiropractor's history, as the entry just seven days later mentions nothing about salt or ice. (Tr. 593). That means that respondents are arguing that Claimant consciously decided to *abandon* the salt story seven days later. That is not a reasonable argument.

## II. Determinations of the credibility of witnesses

It is undisputed that the Commission has the power to determine factual issues.

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clinic was co-signed by a licensed chiropractor, Dr. Allison Harvey, D.C. (Tr. 554).

That power, however, is not boundless. Missouri's Constitution states that all findings of administrative agencies are subject to judicial review to determine if they are supported by competent and substantial evidence upon the whole record. Article V, Section 18, Constitution of Missouri (1970). Similarly, the Supreme Court has said:

> [n]othing requires this Court to review the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the Commission's decision. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo.banc 2003). The whole record is considered to determine if there is sufficient competent and substantial evidence to support the Commission's award. *Id*. "An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence." *Id*. "When the relevant facts are not in dispute, the issue of whether an accident arose out of and in the course of employment is a question of law requiring de novo review." *Miller v. Missouri Highway Transp. Comm'n*, 287 S.W.3d 671, 672 (Mo.banc. 2009).

*Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo.banc 2012). "A decision is against the overwhelming weight of the evidence if we are left with a firm impression that it is wrong." *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 452 (Mo.App. 2004), citing *King v. City of Independence*, 64 S.W.3d 335, 338 (Mo. App. 2002).

The Courts have set parameters around the Commission's witness credibility determinations. The Supreme Court said in *Corp v. Joplin Cement Co.*, 337 S.W.2d 252 (Mo.banc 1960), that:

> [t]he Industrial Commission has the right to pass upon the credibility of witnesses, but where the record reveals no conflict in the evidence or impeachment of any witness, the reviewing court may find the award was not based upon disbelief of the testimony of the witnesses.

*Id.*, at 258. Cases subsequent to *Corp* have interpreted it to mean that the ruling in *Corp* is applicable "where the record is wholly silent concerning the Commission's weighing of credibility." *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

In the present case, it is not disputed that Claimant slipped and fell at work. And it is not disputed that she has a Somatic Symptom Disorder which is causing her to perceive symptoms which are not supported by physical examination. The only real dispute is whether Claimant committed what the Commission essentially perceived as a Freudian slip, when she said that the floor was "normal" before she explained that the floor was soiled. A speculatively deduced Freudian slip is not a dispute; it's an illogical presumption borne out of a misunderstanding of a legitimate medical condition.

And there was no impeachment of Claimant or her expert witnesses. Claimant's testimony was not shown to have varied. She was not shown to have a history of being untruthful. Neither respondent provided any witnesses which would tend to impeach her testimony, and in fact, Respondent Employer provided the testimony of Dr. Harbit, who supported the fact that Claimant has a Somatic Symptom Disorder, (Tr. 1225), as well as Mr. Kaver, who testified there is no evidence in the medical records of malingering. (Tr. 1330). So there was no impeachment which would provide a reasonable or substantial basis for refusing to believe the uncontradicted testimony of Claimant.

## III. Brief of Respondent Second Injury Fund

The argument of Respondent Fund takes particular aim at a couple of questions

and answers between Claimant and her counsel. Respondent Fund insinuates that Claimant's counsel pressured his Claimant to "clarify" her description of the accident scene, after she said that the floor was "normal." (Brief of Respondent Fund, p. 13). The insinuation is that Claimant's counsel didn't like the answer he got, and therefore pushed for a better answer. Respondent Fund's trial attorney was Ms. Caroline Bean. (Tr. 1). First of all, it should be noted that neither she, nor counsel for Respondent Employer, objected at trial to even one question asked by Claimant's counsel on a direct examination that encompassed forty-three pages. (Tr. 5-47). On appeal, Ms. Bean used the services of another attorney in her office, Mr. David L. McCain, to write their Respondent Treasurer's Substitute Brief. Mr. McCain was not present when the trial took place. As evidenced by the contemporaneous comments from the Administrative Law Judge, Claimant was a very soft-spoken witness. (Tr. 19-20). She had to be encouraged to speak more loudly, as those in attendance could not hear her. (Tr. 19-20). So Claimant's counsel asked her: did you say normal?", he was not asking Claimant to *clarify* her answer, he was asking her to *repeat* her answer because *she could not be heard*. But Mr. McCain would not know that, since he was not there. Instead, he tries to further his argument by portraying the line of questioning from Claimant's counsel as improperly "coaching the witness:" an argument which is both incorrect and offensive.

## ARGUMENT II

**The Labor and Industrial Relations Commission erred in finding that Employee did not prove that her injuries occurred "in the course of" her employment with Employer, because Missouri law holds that an injury occurs in the course of the employment relationship when it takes place within the time and place where the employee may reasonably be engaged in either fulfilling the duties of her employment, or something incidental thereto, such that the Commission should have followed Missouri law and determined that Employee's injuries occurred in the course of her employment because Employee was found to have been injured while she was traveling upon Employer's premises as she was headed to her assigned work area when she slipped and fell upon a foreign substance on the floor.**

### I. Both respondents have confused the legal concepts

Professor Larson, in his well-known treatise on workers' compensation law, said this about the phrase "arising out of and in the course of employment":

> Few groups of statutory words in the history of law have had to bear the weight of such a mountain of interpretation as has been heaped upon this slender foundation. It is not surprising, then, that to make the task of construction easier, the phrase was broken in half, with the "arising out of" portion construed to refer to causal origin, and the "course of employment" portion to the time, place, and circumstances of the accident in relation to the employment. There are plentiful dicta which tell us that each test must be independently applied and met.

*Larson's Workers' Compensation, Desk Edition*, §3.01. Missouri has viewed and treated

the tests as separate and distinct, both of which must be met before a claim is found to be compensable. *Pope v. Gateway to the West Harley Davidson*, 404 S.W.3d 315 (Mo.App. 2012) (noting that the *Miller* court found that the worker's accident did occur in the course of employment). *See also, Campbell v. Trees Unlimited, Inc*., 505 S.W.3d 805 (Mo.App. 2016) (deciding whether an injury that occurred while the worker was traveling was "in the course of" employment).

The difference between the two tests is in what they each require. As indicated in Professor Larson's quote, the "arising out of" test, which was the subject of Claimant's first Point Relied On, involves a search for a *cause-and-effect* relationship between the employment and the injury. So it is the "arising out of" test which requires the search for a "risk source." Larson, *supra* at §3.01. That has to be contrasted with the requirements of the "in the course of" test, which is a search for a *time-and-place* relationship between the employment and the injury. "An injury occurs 'in the course of' employment 'if the injury occurs within the *period* of employment at a *place* where the employer reasonably may be fulfilling the duties of employment.'" (emphasis added). *Abel v. Mike Russell's Std. Serv.*, 924 S.W.2d 502, 503 (Mo.banc 1996) (*quoting Shinn v. General Binding Corp.*, 789 S.W.2d 230, 232 (Mo.App. 1990)).

Since Missouri has treated the two tests as being separate and distinct, Claimant addressed the "arising out of" test in her *first* Point Relied On, and the "in the course of" test in her *second* Point Relied On. The problem presented by both of the respondents' briefs is that they did not similarly address the two tests separately in their response, but

instead, mixed the two concepts. Both of the respondents' briefs improperly used the "risk analysis" concepts from the "arising out of" test (i.e. the cause-and-effect test) to argue against the time-and-place question raised in Claimant's second Point Relied On. Neither one of them ever discussed the "in the course of" findings of the Commission.

## II. The claim of both respondents of a 2005 material change in statutory law

Both respondents argue strenuously that there were statutory changes which eliminated the situation – which they say Claimant is proposing – where an injury could be compensable simply because it occurred at work. First of all, Missouri law has never ascribed to the theory that an injury is compensable simply because it occurred while at work.[2] Neither has Claimant. Claimant's argument is this: the Commission's "in the course of" analysis was deficient because it didn't include an inquiry into whether Claimant's accident falls within one of several long-standing doctrines which serve to expand the time-and-place requirement of the law.[3] One of these doctrines is the "extension of premises" doctrine.[4] Prior to legislative changes in 2005, Missouri law recognized it. *Wells v. Brown*, 33 S.W.3d 190, 192 (Mo.banc 2000). It is true that there were legislative changes in 2005, but the relevant change was not to Mo.Rev.Stat.

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[2] See *McCall v. McCall Amusement Inc.*, 748 S.W.2d 827, 832 (Mo.App. 1988).

[3] For a discussion of these various doctrines, see B. Michael Korte, 29 *Missouri Practice, Workers' Compensation Law and Practice*, Chapter 2(C) 2003.

[4] Another is the personal comfort doctrine, which would also be applicable.

§287.020.3(2) (2017), as respondents suggest, but rather to Mo.Rev.Stat. §287.020.5 (2017). Yes, §287.020.3(2) was changed. But the change didn't alter the decades-old language that all injuries must arise out of and in the course of employment.[5] The relevant change was to §287.020.5, because it altered the extension of premises doctrine discussed in *Wells* by finding that after 2005 the extension of premises doctrine only applies when the accident occurs on property owned or controlled by the employer. *Lincoln Univ. v. Narens*, 485 S.W.3d 811, 819 (Mo.App. 2016). See also *Scholastic, Inc. v. Viley*, 452 S.W.3d 680 (Mo.App. 2014), and *Missouri Dep't of Soc. Services v. Beem*, 478 S.W.3d 461 (Mo.App. 2015).

Neither respondent addressed the "in the course of" issue. Claimant's accident was before she had clocked in, but she was covered by the extension of premises doctrine because she was on her employer's premises.

[5] The most significant 2005 change to Mo.Rev.Stat. §287.020.3(2) is that it changed an injured worker's *burden of proof* from the standard of "a substantial factor" to "the prevailing factor." In another legislative change, the legislature rejected and abrogated certain cases *interpreting* the definition of "arising out of and in the course of the employment." Mo.Rev.Stat §287.020.10 (2017). The legislature could have, but did not, reject or abrogate the earlier cases cited by Claimant. Instead, the legislature codified the extension of premises doctrine that applies here in Mo.Rev.Stat. §287.020.5.

## CONCLUSIONS

Claimant asserts that the Commission erred as a matter of law in determining the issues of "arising out of", "in the course of", and "medical causation." The substantial and competent weight of the evidence proves that it is reasonable to infer that Claimant's injury arose from a work-related risk source, while she was on Employer's premises, such that it should have been found that her injuries arose out of and in the course of her employment. The decision of the Commission majority, to overrule the opinions of the expert witnesses, should also be reversed in favor of a ruling which states that the substantial and competent evidence proves that some of Employee's subjective complaints are not a result of lying or malingering, but rather, a result of a Somatic Symptom Disorder.

Respectfully submitted,
SCHUCHAT, COOK & WERNER

/s/ Dean L. Christianson
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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby states that on this 6th day of January 2020, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet.

The undersigned further certifies that this brief complies with the page limitations contained in Rule 84.06(b), and that the brief contains 3,475 words. Further, this brief complies with Rules 84.06(c) and 55.03.

/s/ Dean L. Christianson
_____
Dean L. Christianson