# In the Missouri Court of Appeals
# Eastern District

DIVISION TWO

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| SANDY JOHME, | ) | No. ED96497 |
| | ) | |
| Respondent, | ) | |
| | ) | Appeal of Labor and Industrial |
| v. | ) | Relations Commission Award |
| | ) | Cause No. 08-069091 |
| ST. JOHN'S MERCY HEALTHCARE, | ) | |
| | ) | |
| Appellant. | ) | Filed: October 25, 2011 |

**Facts and Procedural History**

This is a worker's compensation case in which we apply § 287.020.3(2)[1] and discuss the "comfort doctrine." Sandy Johme worked as a billing representative for St. John's Mercy Healthcare. Ms. Johme worked on the lower floor of a satellite office and typed charges and denials in the computer system for doctors. On 23 June 2008, Johme left her cubicle and went to the kitchen area of the office, began making coffee, turned, and slipped off the side of her sandal injuring her right hip. The floor did not have any irregularities or hazards, and there is no evidence of St. John's negligence.

The Administrative Law Judge ("ALJ"), Hon. Connie Lane, denied Johme's claim for worker's compensation benefits. Judge Lane ruled that Johme was not performing her duties at the time of the fall, that she "just fell," and that she would have

[1] MO. REV. STAT. § 287.020.3(2) (2006).

been exposed to the same hazard or risk in her normal non-employment life. The Labor and Industrial Relations Commission ("Commission") disagreed and awarded Johme temporary total disability payments, past medical expenses, and permanent partial disability. Aggrieved, St. John's now appeals.

## Standard of Review

We may modify, reverse, remand for rehearing, or set aside the Commission's decision only if it acted without or in excess of its powers; the award was procured by fraud; its findings of fact do not support the award; or there was not sufficient competent evidence in the record to substantiate the award. *Miller v. Mo. Hwy & Transp. Comm'n*, 287 S.W.3d 671, 672 (Mo. banc 2009) (citing MO. REV. STAT. § 287.495.1 (2000)). In the absence of fraud, the findings of fact made by commission within its powers shall be conclusive and binding. § 287.495.1. We must review the entire 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." *Id.* (internal citation and quotation marks omitted). When relevant facts are not disputed, the issue as to whether an accident arose out of and in the course of employment becomes a question of law, which we review *de novo. Id.*

## Discussion

St. John's raises two issues on appeal:

(1) Whether the Commission's finding that Johme twisted her ankle is supported by sufficient competent evidence in the record;

(2) Whether the Commission award is supported by sufficient competent evidence in that Johme's accident did not arise of and did not occur within the course and scope of her employment as required by MO. REV. STAT. § 287.020.3 (2006).

*A. Insufficient evidence for finding that Johme "twisted" her ankle*

St. John's first objects to the Commission's findings of fact that "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 onto her back." St. John's specifically claims that there is insufficient evidence for the finding that Johme "twisted" her ankle.

In the absence of fraud, the findings of fact made by Commission within its powers are conclusive and binding upon this Court. § 287.495.1. Though Johme never testified that she twisted her ankle—only that she turned and fell off of her sandal—a report drafted by Johme's supervisor, Nora Faucett, immediately following the accident stated that Johme said she had twisted her ankle. The Commission properly evaluated the conflicting evidence, and determined that Johme had twisted her ankle. Because the Commission acted within it powers, and there are no allegations of fraud, this finding of fact, as well as all remaining findings of fact by the Commission are binding upon this Court. Therefore, St. John's first claim is without merit.

*B. Insufficient evidence for finding that accident did not arise out of and occur during the course and scope of Johme's employment*

In St. John's second claim for relief, they essentially argue that that the accident did not arise out of, and did not occur within, the scope of Johme's employment under §

287.020.3(2) (2005).[2] For the following reasons, we reverse the decision of the Commission and remand for a decision consistent with our analysis.

An employer is "liable, irrespective of negligence, to furnish compensation under the [Worker's Compensation Law] for personal injury . . . of the employee by accident arising out of and in the course of the employee's employment." *Stricker v. Children's Mercy Hospital*, 304 S.W.3d 189, 192 (Mo. App. W.D. 2010) (citing § 287.120.1). In 2005, the Missouri Legislature amended several provisions of our worker's compensation law, narrowing the definitions of "injury," "accident," and "arising out of and in the course of." *Id.* (citing *Miller*, 287 S.W.3d at 672-73). The articulated legislative purpose of the 2005 amendments was to raise the threshold for obtaining workers' compensation. "Consequently, the cases interpreting those terms and applying a liberal construction of those statutes were abrogated." *Id.*[3]

The essential uncontested facts are that while making coffee at work Johme slipped off her sandal, fell to the floor and injured her pelvis. Notwithstanding the exact details, these facts alone are sufficient to support the Commission's conclusions. *See Miller*, 287 S.W.3d at 673. But whether the injury arose out of the employment depends on if it came "from a hazard or risk unrelated to the employment which workers would have been equally exposed outside of and unrelated to the employment in non-

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[2] Section 287.020.3(2) provides:

> (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
>
> (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.

[3] The amendment abrogated and rejected *Bennett v. Columbia Health Care & Rehabilitation*, 80 S.W.3d 524 (Mo. App. W.D. 2002); *Kasl v. Bristol 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 cases. § 287.020.10.

employment life." *Id.* (citing § 287.020.3(2)(b)). "An injury is not compensable because work was a trigger or precipitating factor." § 287.020.2. 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.

The only "risk" involved here was that of making coffee, or more generally, performing normal kitchen-related activities. While Johme testified that the office culture dictated the last person to pour a cup of coffee should make a new pot, this is not sufficient to establish the injury is a function of her employment as a billing representative. Similarly, the injury here did not occur because Johme fell due to some condition of her employment. She wore sandals to work of her own accord, and there is no allegations that the floor of the kitchen area had any spills or other hazards. In short, while making coffee Johme unexpectedly slipped off her sandal, fell and injured her pelvis. Nothing about her employment as a billing representative caused the fall and injury, and we should not say it "arose out of" her employment. Prior to the 2005 amendments, Johme's argument would have been more persuasive, but the Legislature has since raised the bar. Under the current scheme, the above stated facts simply do not meet the threshold for an award of worker's compensation.

*C. The "personal comfort" doctrine and the two-step Pile approach*

The Commission's decision to award benefits is based on its finding that the *personal comfort* doctrine is consistent with § 287.020.3(2) after the 2005 amendments, as well as the use of the two-step approach to § 287.020.3(2)(b) employed by the court in

*Pile v. Lake Regional Health Systems*, 321 S.W.3d 463 (Mo. App. S.D. 2010). The use of this *personal comfort* doctrine[4] led to the erroneous award, and the *Pile* approach is not currently supported by statute or case law.

The Commission provides a definitional history of the phrase "arising out of and in the course of" under Missouri worker's compensation law dating back to the early twentieth-century. It asserts that *courts traditionally* recognized that some activities were inevitable and essential to workers' personal comfort and convenience, and that an injury which arose during the performance of one of these activities was nevertheless compensable. The Commission acknowledged the 2005 amendments affecting the meaning of the phrase, and argued that the personal comfort doctrine was nevertheless consistent:

> The rationale of the doctrine is that humans have basic need that must be met throughout the workday (hunger, thirst, elimination) and the benefit of tending to those needs inures not only to the employee, but to the employer as well. Thus 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. We find this rational is still sound and consistent with § 287.020.3(2).

The Commission's reliance on the *personal comfort* doctrine is inappropriate because it directly contradicts the legislature's explicit instructions for construing provisions of the act. Prior to 2005, the statute provided for a liberal interpretation. Currently the statute reads "Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of

[4] This writer's "personal comfort" is enhanced by smoking. A slip while engaging in this "personal comfort" surely would not result in compensation benefits.

worker's compensation, and any reviewing courts shall construe the provisions of this chapter *strictly*. § 287.800 (emphasis added). Under strict construction, we give the statute its plain meaning and refrain from enlarging the law beyond its meaning. *Stricker*, 304 S.W.3d at 192.

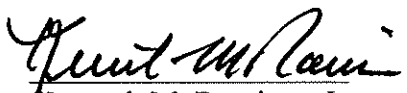
Had the legislature intended to qualify the meaning of "arising out of and in the course of" of employment, it could have done so in the 2005 amendments. Instead, the *personal comfort* doctrine language is conspicuously absent, and reading it into the statute violates the requirement that we strictly construe the Act's provisions. The plain language of the statute does not contain a *personal comfort* qualification, therefore the Commission acted beyond its powers in applying the doctrine. Furthermore, as previously stated the Legislature specifically sought to make it more difficult to obtain worker's compensation, and such a doctrine is not consistent with this purpose.

The Commission also employed the two-step approach to § 287.020.3(2)(b) used by the court in *Pile v. Lake Regional Health Systems*, 321 S.W.3d 463 (Mo. App. S.D. 2010). In *Pile*, 321 S.W.3d at 467, the Southern District borrowed from the decision of the Commission and adopted the following analysis for subsection (b).

> The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related the employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. 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.
> A worker's activity can provide the nexus needed to show an injury from a hazard or risk related to the employment.

This analysis does not logically interpret the statute. It does not because there is no Common Law of Workers Compensation. Worker's Compensation is in derogation of the Common Law and strictly statutory. We are hesitant to adopt this analysis given that our Supreme Court very recently decided a case applying § 287.020.3(2)(b) and did not provide such a rigid framework. *See Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 672 (Mo. banc 2009). Further, the Southern District did not cite any mandatory or persuasive authority as a basis for adopting the approach other than the Commission's decision in that case.

We would reverse the decision of the Commission, and remand for a decision consistent with opinion. But, because of the general interest of this question and the failure to find *Pile* persuasive, we transfer to the Supreme Court pursuant to Rule 83.02.



Kenneth M. Romines, J.

Kathianne Knaup Crane, P.J., concurs in result.
Lawrence E. Mooney, J., concurs in transfer in a separate opinion.

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**OPINION CONCURRING IN RESULT**

I concur in the decision to transfer, but not in the majority's opinion.

I agree that the record here is thin, but I would affirm the Commission. The majority opines that the only risk to the worker here was from performing normal kitchen-related activities, but neglects to mention the worker was apparently emptying the grinds from a large commercial coffee-maker. A normal worker's kitchen would not have such a coffeemaker. Applying strict construction, the worker was not thus equally exposed to risk of injury. Thus, I would conclude substantial evidence supports the award.

More importantly, I cannot agree with the majority's cramped interpretation of the 2005 amendments to our workers' compensation statutes. First, the fact that the amendments raised the bar on compensability does nothing to answer how high the bar has been raised. Moreover, the failure to mention the personal-comfort doctrine in the abrogating statute of the 2005 amendments is as meaningful as the failure of the legislature to endorse the personal-comfort doctrine. Also, the

majority surmises without explanation that the personal-comfort doctrine offends strict construction. What the majority ignores is that the doctrine exists because allowing a worker to attend to his or her personal needs benefits the employer. I cannot conclude that the legislature intended to revoke a worker's right to get a drink of water, to take a bathroom break, or to have a sip of coffee without the modest protections of our workers' compensation system.

Lawrence E. Mooney

LAWRENCE E. MOONEY, JUDGE