"Equal Exposure" And the Compensability of Claims In Missouri Workers' Compensation Law

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The cardinal requirement of the Workers' Compensation Law (hereinafter "Law") as to the compensability of any claim is that an employer is liable for the payment of benefits only if an injury or death results from an accident or from an exposure to an occupational disease which arises out of and in the course of an employee's employment.[1]

The determination of which activities arise out of employment requires consideration as to whether there is, under all the circumstances, a reasonable relation between the event in question and the duties which an employer's employee has been hired to perform.[2]

An employee's accident or exposure to occupational disease takes place in the course of the employee's employment when it occurs within the period of the employee's employment, at a place where the employee may reasonably be present and at a time that the employee is reasonably fulfilling the duties of the employee's employment.[3]

As part of sweeping legislative changes in 2005, the Law's provisions as to which claims arise out of and in the course of employment were substantially amended. The pre- and post-2005 versions of portions of Mo. Rev. Stats. Section 287.020, noting deletions from the pre-2005 Law in brackets ([ ]) and the additions in boldface are:

> Sec. 287.020.3. (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. [The injury must be incidental to and not independent of the relation of employer and employee. Ordinarily, gradual deterioration or progressive degeneration of the body cause by aging shall not be compensable, except where the deterioration or degeneration follows an incident of employment.] An injury by accident is comensable 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.
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> (2) An injury shall be deemed to arise out of and in the course of employment only if:
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> (a) It is reasonably apparent, upon consideration of all the circumstances, that the [employment] accident is [a substantial] the prevailing factor in causing the injury; and
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> (b) [It can be seen to have followed as a natural incident of the work; and
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> (c) It can be fairly traced to the employment as a proximate cause and
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> (d)] It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;
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> (3) An injury resulting directly or indirectly from idiopathic causes is not compensable;
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> (4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.
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> Sec. 287.010.5: [Without otherwise affecting either the meaning or in-

1. Mo. Rev. Stats. § 287.120.1; *Wells v. Brown*, 33 S.W.3d 190 (Mo. 2000); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999); *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512 (Mo. 1999); *Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502 (Mo. 1996); *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534 (Mo. 1996).

2. *Arnold v. Wigdor Furniture Company*, 281 S.W.2d 789 (Mo. 1955).

3. *Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502 (Mo. 1996); *Chambers v. SDX, Inc.*, 948 S.W.2d 448 (Mo. Ct. App., E.D. 1997); *Hilton v. Pizza Hut*, 892 S.W.2d 625 (Mo. Ct. App., W.D. 1994); *Jordan v. Farmers State Bank*, 791 S.W.2d 1 (Mo. Ct. App. 1990).

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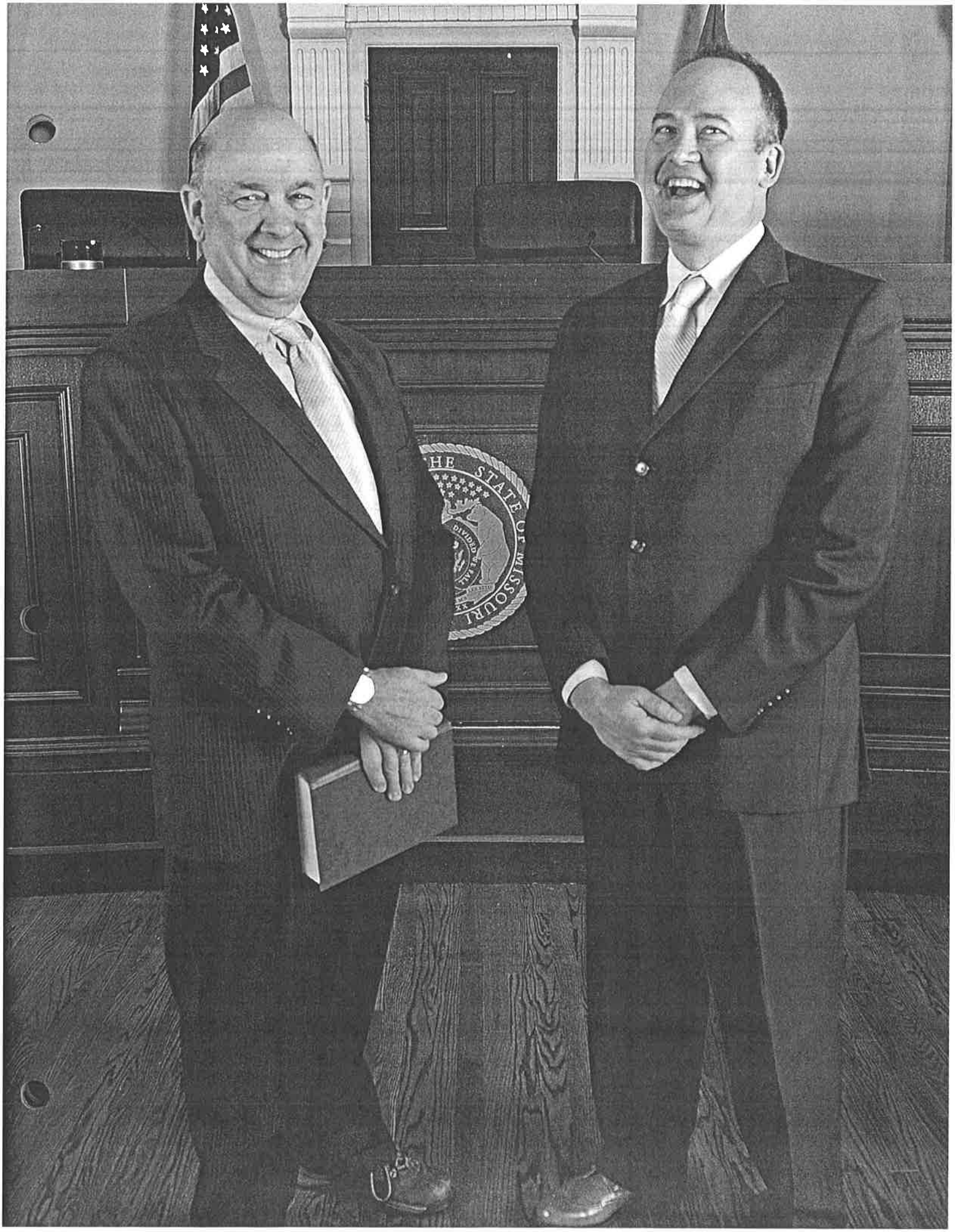

terpretation of the abridged clause, "personal injuries arising out of or in the course of such employment," it is hereby declared not to cover workers except while engaged in or about the premises where their duties are being performed, or where their services require their presence as part of such service.] Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable. The "extension of premises" doctrine is abrogated to the extent it extends liability for accidents that occur on property not owned or controlled by the employer even if the accident occurs on customary, approved, permitted, usual or accepted routes used by the employee to get to and from their place of employment.

Sec. 287.020.10. 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, 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.

Various courts of appeals considered and construed these provisions before they first came to the attention of the Missouri Supreme Court in *Miller Highway and Transportation Commission*.[4]

In *Miller*, the employee was walking briskly at work toward his truck when he felt a pop and his knee began to hurt. He testified that his work did not require him to walk in an unusually brisk way, that he normally walked 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. The Missouri Supreme Court affirmed the Missouri Labor and Industrial Relations Commission's (the "Commission") denial of compensation stating, in part:

> The meaning of [the Law's amended] provisions is unambiguous. An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved — here, walking, — is one to which the worker would have been exposed equally in normal non-employment life. The injury here did not occur because Mr. Miller fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment. Under sections 287.020.2, .3 and .10 as currently in force, that is insufficient . . . . Accordingly, the injury is not compensable, as there is no causal connection of the work activity to the injury other than the fact of its occurrence while at work.[5]

Shortly thereafter, the Missouri Court of Appeals, Western District, decided *Stricker v. Children's Hospital*.[6] In *Stricker*, a registered nurse sustained an injury to her ankle in the parking garage of her employer caused by the heel of her work shoe. The employer argued that the employee was at no greater risk when she sustained her accident an injury. The court disagreed with this argument and awarded compensation, finding that the employee testified that she wore these shoes only at work and that the employer approved the work shoes.

In *Pile v. Lake Regional Health System*,[7] the Missouri Court of Appeals, Southern District, reviewed the claim of a nursing supervisor who, while attending to a patient, moved quickly from the patient's room, turned the corner on the employer's carpeted hallway, and stumbled, sustaining fractures to her foot. The court reversed the Commission's denial of benefits, stating:

> 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 to 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.[8]

However, in *Bailey v. Phelps County Reg. Med. Center*,[9] the same district affirmed an award of the Commission which denied compensation regarding an injury to a nurse whose knee popped out of place while walking quickly at work, finding it neither arose out of nor in the scope of her employment.

The following year, the Missouri Court of Appeals, Southern District, again took up the issue in *Whiteley v. City of Poplar Bluff*.[10] In *Whiteley*, a police officer was reaching in his patrol car to clean his windshield when he strained his neck. The court affirmed the Commission's award of benefits, citing *Pile* for support on the basis that compliance with an employer's written policy provided a clear nexus to the employee's work, without reference to the employee's equal exposure to the risk of injury in normal non-employment life.

Perhaps, in part, due to the aftermath of the *Pile* decision, the Missouri Supreme Court revisited the issue in *Johme v. St. John's Mercy Healthcare*,[11] and reversed an award of compensation by the Commission. An employee who injured her ankle while making coffee at work failed to prove that her injuries arose out of her employment, since there was no evidence of any causal connection

4. 287 S.W.3d 671 (Mo. 2009).
5. 287 S.W.3d 671 at 674.
6. 304 S.W.3d 189 (Mo. Ct. App., W.D. 2009).
7. 321 S.W.3d 463 (Mo. Ct. App., S.D. 2010).
8. 312 S.W.3d 463 at 467.
9. 328 S.W.3d 770 (Mo. Ct. App., S.D. 2011).
10. 350 S.W.3d 70 (Mo. Ct. App., S.D. 2012).
11. 366 S.W.3d 504 (Mo. 2012).

between the source of the risk of the injury and any employment activity or condition of the employment, as opposed to a risk to which the employee was equally exposed in normal non-employment life, other than the fact of the occurrence of the injury while the employee was in the course of employment. The court thus implicitly overturned or abandoned the *Pile* precedent and the "nexus" test it had introduced.

Since *Johme*, courts have applied the 2005 amendments more uniformly. In *Duever v. All Outdoors, Inc.*,[12] and in *Pope v. Gateway to the West Harley Davidson*,[13] the Missouri Court of Appeals, Eastern District, weighted in on the issue. In *Duever*, an employee slipped and fell on ice on his employer's parking lot after conducting a safety meeting. The employer argued that the risk of falling on an icy parking lot was one to which the employee would have been equally exposed in non-employment life. The court first distinguished *Miller* as not involving a condition of the premises that cause the injury stating ". . . as a direct function of his employment . . ., Duever was in an unsafe location [and] sustained an injury due to an unsafe condition (the ice itself) over which he had no control."[14] It distinguished *Johme* on the same basis.

In *Pope*, an employee who was injured when he fell down stairs at work while wearing work boots and carrying a work-required helmet was injured ". . . because he was at work, and not simply because [he] sustained an injury while at work . . . ."[15] according to the court, even though he wore work boots and would carry his motorcycle helmet outside of work, since there was no evidence that he normally carried his motorcycle helmet while descending stairs in his normal non-employment life. The court seemed to have shifted the burden onto the employer on that issue:

> . . . unlike the facts in *Johme*, the record contains no evidence that Pope's boots contributed to or cause him to fall. In *Johme*, there was evidence that the shoes that the employee work both at work and outside of work were a cause of her fall. Unlike *Johme*, although Pope testified that he often wore his boots outside of work, the record lacks any evidence that Pope fell because of his boots. Moreover, the record contains no evidence that Pope normally carried his motorcycle helmet while descending stairs in his normal, non-employment life. Even if Pope were an avid motorcyclist, we will not presume facts not found in the record. Given the absence of such facts, we find little factual basis for the argument that Pope was equally exposed to the risk of walking down stairs while holding a motorcycle helmet in his normal, non-employment life.[16]

The court recognized the abandonment of the *Pile* precedent implicit in the *Johme* decision in a footnore: "In *Johme*, the Missouri Supreme Court indicated that the two-step *Pile* test is no longer the appropriate analysis for determining whether an injury arose out of and in the course of employment."[17]

Recently, in *Dorris v. Stoddard County*,[18] the Missouri Court of Appeals, Southern District, revisited the issue. In *Dorris*, an employee was walking with her direct supervisor across a public street to review some new construction of a building built by the employer. The street had cracks in it and it was busy, so the employee was watching for traffic and was not looking down at the pavement when she tripped and fell, sustaining injuries to her shoulder. The court affirmed the Commission's award of compensation, rejecting the argument that the employee was equally exposed to the risk of her injury in her non-employment life. The court also affirmed the finding of the cause of the accident being made by circumstantial evidence. "There is no requirement that Claimant must personally identify the specific cause of her fall; a reasonable inference regarding the cause was sufficient."[19]

In *Scholastic, Inc. v. Viley*,[20] the employee was injured while leaving work when he slipped and fell in an icy parking lot subject to the control of the employer. The employer appealed the Commission's award of benefits, arguing that the employee faced an equal risk of injury walking across identical parking lots during his non-employment life. The court disagreed with the employer, citing the explanation in *Pope* that courts "consider whether [the claimant] was injured *because* he was at work as opposed to becoming injured merely *while* he was at work."[21] As in *Duever v. All Outdoors, Inc.*,[22] the court noted that the employee's injury was cause by an unsafe condition on the ground of the employer's worksite.[23] The court cautioned against a general identification of the hazard or risk in question, and, disregarding *Hager v. Syberg's West-*

12. 371 S.W.3d 863 (Mo. Ct. App., E.D. 2012).
13. 404 S.W.3d 315 (Mo. Ct. App., E.D. 2012).
14. 371 S.W.3d 863 at 867.
15. 404 S.W.3d at 321-22.
16. 404 S.W.3d at 321.
17. 404 S.W.3d at 317.
18. 436 S.W.3d 586 (Mo. Ct. App., S.D. 2014).
19. 436 S.W.3d at 590.
20. WD 77456 (Mo. Ct. App., W.D. 2014).
21. *Scholastic, Inc.*, slip op. p. 5, citing *Pope* at 320.
22. 371 S.W.3d 863 (Mo. Ct. App., E.D. 2012).
23. *Scholastic, Inc.*, slip op. p.5.

port,[24] relied on the *Dorriss* court's explanation that the *Duever* court had implicitly determined that the non-employment hazard to be compared to the employment hazard which caused the employee's injury was the hazard at the particular location of the employee's injury, rather than any similar general hazard the employee might have encountered elsewhere in non-employment life.

Conclusion

Legislative amendments to the Worker's Compensation Law in 2005 regarding which claims arise out of and in the course of employment were intended to restrict injuries and accidents the Law considers to be compensable. Nevertheless, it is Section 287.020.3(2)(b), which was not changed in 2005, that has received the most attention by the courts.

While the "because at work" and "while at work" dichotomy may seem difficult, at best, to discern, the claims of employees like those in *Miller* and *Johme* who are unable to identify any risk factor associated with their employment as the cause of their accidents will continue to be unlikely, at best, to succeed.

As courts continue to explore the Law's equal exposure provisions, practitioners are well-advised to keep abreast of the evolving judicial trends and interpretation of what constitutes a compensable accident and injury under the Missouri Workers' Compensation Law.

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24. 304 S.W.3d 771 (Mo. Ct. App., E.D. 2010). "*Hager* was decided before *Johme, Duever,* and *Dorriss,* does not distinguish *Miller*, and does not examine whether the employee was exposed to the risk of that *particular* icy parking lot in his employment versus his non-employment life." *Scholastic, Inc.*, slip op. p. 6, fn. 9. In *Hager*, the Missouri Court of Appeals, Eastern District, declined to extend an employer's premises to include the area of the parking lot where its employee fell and was injured after leaving work.