

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No. 11-033989

Employee: Richard Campbell, deceased
Dependent: Carrie Campbell, widow
Employer: Trees Unlimited, Inc.
Insurer: FirstComp Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 14, 2014. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued October 14, 2014, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 30th day of July 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Richard Campbell, deceased

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the Commission should reverse the award of the administrative law judge.

This claim results from an unexplained single-car accident that occurred on April 11, 2011, on Highway 71 south of Joplin, Missouri. The testifying experts agree, and it appears to be wholly uncontested by the parties, that it is impossible to determine why employee's car left the road and traveled over a 30-foot cliff at highway speed. I have nothing but utmost sympathy for claimant and for employee's family and friends as a result of their grievous loss. But I must respectfully disagree that these facts establish a compensable workers' compensation claim following the 2005 amendments to the Missouri Workers' Compensation Law. The courts have recently made clear that a compensable workers' compensation injury must be shown to have occurred *because* an employee was at work, and not merely *while* the employee was at work. *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315, 320 (Mo. App. 2012). Because I am convinced claimant failed to make such a showing, I believe the claim must be denied.

At the outset, I wish to briefly address insurer's¹ arguments, neither of which I find persuasive. First, insurer suggests that claimant failed to show that employee was in the course of his employment at the time of the motor vehicle accident. But employee was a small-business owner driving a work vehicle on a Monday in an area where he was known to make sales calls and perform other professional duties. Claimant provided persuasive testimony from witnesses who were able to establish employee's characteristic behaviors and work habits, and he appears by all accounts to have been very active and involved in the business, and to have very rarely taken personal time away from work during the typical work week. In my view, the circumstantial evidence is overwhelming that employee was "at work" when the accident occurred.²

Second, insurer argues that employee's death resulted directly or indirectly from an idiopathic cause, and is therefore not compensable under § 287.020.3(3) RSMo. Insurer highlights the weakness in its own argument, though, when it points out that the record permits only speculation as to the cause of employee's motor vehicle accident or death, because it was insurer's burden to establish, as an affirmative defense premised on a factual proposition, that employee's injuries resulted from an *identifiable* idiopathic cause. See § 287.808 RSMo and *Taylor v. Contract Freighters, Inc.*, 315 S.W.3d 379 (Mo. App. 2010).

Having provided the foregoing comments, I note that the parties asked the administrative law judge to determine whether employee's motor vehicle accident arose out of and in the

¹ Although the appellant identifies itself before the Commission as the "employer/insurer," it does not appear to me from this record that employer disputes this claim, as the deceased employee was the "sole owner" (i.e. sole shareholder) of the employer, Trees Unlimited, Inc., *Transcript*, page 30, and the claim is pursued by his surviving spouse (i.e. his apparent successor in interest).

² My own past experience running a business strongly suggests to me that there are very few occasions when a small-business owner is *not* at work.

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course of his employment. *Transcript*, page 8. The relevant statutory inquiry, therefore, is § 287.020.3(2) RSMo, which provides, as follows:

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.

Remarkably, the parties, the administrative law judge, and now the majority of the Commission have overlooked the relevant and controlling statutory test set forth above. No less authority than the supreme court of our state has made clear that any inquiry into whether an employee's injuries arose out of and in the course of employment must turn on the foregoing language. See *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 511-12 (Mo. 2012); *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 674 (Mo. 2009).

Turning to subsection (a), I am convinced that claimant has failed to prove that the motor vehicle accident was the prevailing factor causing employee's death. Although the administrative law judge (quite reasonably) credited the testimony from claimant's expert Dr. Stein that the trauma to employee's body from the motor vehicle accident *would have been sufficient* to cause employee's death, the statute requires a showing that the accident was the prevailing factor that *actually caused* employee's death. As insurer correctly points out in its brief, Dr. Stein stopped short at providing an opinion that the trauma from the motor vehicle accident was the prevailing factor that caused employee's death. Given the absence of a forensic autopsy in this case, as well as the testimony from Dr. Mitchell that employee may have been in the throes of a serious medical emergency (or may already have been deceased) at the time of the impact, it appears to me that the cause of employee's death is not a matter for lay understanding.

Consequently, claimant was required to provide expert medical testimony to meet her burden of proof. "Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 461 (Mo. App. 2008). Because claimant has failed to provide an expert medical opinion that the motor vehicle accident was the prevailing factor causing employee's death, I am convinced that claimant has failed to satisfy the requirements of subsection (a) set forth above, and that the claim must be denied as a result.

However, even if the testimony from Dr. Stein is deemed sufficient to satisfy claimant's burden of proof under subsection (a) above, I believe claimant has failed to satisfy subsection (b). The courts have interpreted the language of this subsection to involve a causal connection test that employees must satisfy in order to prove that an injury has

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arisen out of and in the course of employment. See *Johme*, 366 S.W.3d at 510-11, quoting *Miller*, 287 S.W.3d at 674. In the *Johme* decision, the Supreme Court of Missouri held that an employee who fell while making coffee at work did not sustain injuries that were compensable under workers' compensation. *Id.* at 512. The *Johme* employee fell in her office kitchen after making a new pot of coffee, per workplace custom, to replace a pot of coffee from which she had taken the last cup. *Id.* at 506. The *Johme* court found that the risk or hazard that resulted in the employee's fall was "turning and twisting her ankle and falling off her shoe." *Id.* at 511. The Court held that the employee "failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her 'normal nonemployment life.'" *Id.* at 512.

In so holding, and in specifically contrasting a "work-related risk" versus a "risk to which the employee was equally exposed" outside of work, the *Johme* court made clear that our analysis under § 287.020.3(2)(b) must begin with an identification of the specific risk or hazard from which the employee's injuries came, followed by a quantitative comparison whether the employee was equally exposed to that specific risk in normal nonemployment life. Following the Court's reasoning, the result of that quantitative comparison will tell us whether the risk is related or unrelated to employee's work, and in turn, whether the employee's injuries were sufficiently causally connected to work, which will resolve the question whether an employee's injuries arose out of and in the course of employment.

Notably absent from the award of the administrative law judge is any identification of the risk or hazard that caused the motor vehicle accident of April 11, 2011. It appears to me that the record lacks any evidence whatsoever to support such a finding. As a result, this Commission is unable to perform the causal connection test identified by the court in *Johme* as determinative of the issue whether an employee's injuries have arisen out of and in the course of employment, and the claim fails under the relevant and controlling decision in *Porter v. RPCS, Inc.*, 402 S.W.3d 161 (Mo. App. 2013). In *Porter*, the court determined that an employee "failed to prove that she sustained injuries arising out of and in the course of her employment because she failed to identify a specific risk or hazard that caused the accident." *Id.* at 174. The *Porter* decision recognizes the logical impossibility of performing the causal connection test mandated by § 287.020.3(2)(b) where an employee fails to identify the injury-producing risk or hazard. In my view, the *Porter* decision is dispositive here and requires reversal of the administrative law judge's award.

I acknowledge the recent case of *Gleason v. Treasurer of the State*, 455 S.W.3d 494 (Mo. App. 2015), wherein the Court distinguished *Porter* and held that an employee who fell from the top of a railcar was not precluded from an award of benefits merely because he could not recall why he fell. I would note, however, that in distinguishing *Porter*, the *Gleason* court was operating under the assumption that the risk source that caused the employee's injuries in *Porter* was "walking on a smooth surface." 455 S.W.3d at 501. But the actual holding in *Porter* was that the employee "failed to establish how she fell and, therefore, failed to show that she was exposed to an unusual risk of injury that was not shared by the general public." 402 S.W.3d at 174 (emphasis added). The employee in

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Porter failed to prove her case not because her injuries resulted from the risk of walking on a smooth surface, but because she failed to establish the risk or hazard that caused her claimed injuries. That is precisely the situation before us.

I view the *Gleason* court's comments distinguishing *Porter* in the nature of dicta, as they were unnecessary to support the court's ultimate holding that an employee suffered injuries arising out of and in the course of his employment when they were the obvious product of his work activity that involved walking along the top of a 25 foot tall railcar. Here, on the other hand, claimant's death was not the obvious product of his work activities. This is not a motor vehicle accident that resulted from some identifiable risk or hazard to which employee would be unequally exposed as a product of his frequent driving for work. If employee had encountered a dangerous condition of the roadway itself, or was forced to swerve to avoid the unsafe actions of another driver, or if his motor vehicle accident resulted from *any* identifiable aspect of his work activity of driving for employer, I believe claimant would have a better argument that the *Gleason* case supports a finding in his favor with respect to § 287.020.3(2)(b).

But according to the only eyewitness testimony available, employee simply drove his vehicle off the highway, for completely mysterious reasons. The risk or hazard of driving one's vehicle off the highway for unknown reasons was no more related to employee's work as a lumber wholesaler than the risk of falling for unexplained reasons was to the work of the coupon sorter in the *Porter* case. The decisions cited above—including *Gleason*—make clear that the employee must show something more than that work merely furnished an occasion for the injury to take place. There must be some identifiable causal connection between the work and the claimed injuries. Because I am unable to identify any such causal connection in this case, I would reverse the award and decision of the administrative law judge and enter an award denying compensation.

Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Richard Campbell (deceased) Injury No. 11-033989
Dependents: Carrie Campbell
Employer: Trees Unlimited, Inc.
Additional Party: N/A
Insurer: Firstcomp Insurance Company
Hearing Date: 7/8/2014 & 7/9/2014 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 4/11/2011
5. State location where accident occurred or occupational disease was contracted: NEWTON COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted: MOTOR VEHICLE ACCIDENT.
12. Did accident or occupational disease cause death? YES Date of death? 4/11/2011
13. Part(s) of body injured by accident or occupational disease: DEATH
14. Nature and extent of any permanent disability: DEATH
15. Compensation paid to-date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? NONE

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- 17. Value necessary medical aid not furnished by employer/insurer? NONE
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$799.11/\$418.58
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: NONE

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

BURIAL BENEFITS: \$4,650.65

DEATH BENEFITS BEGINNING 4/11/2011 AND INTO THE FUTURE

22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

23. Future requirements awarded: DEATH BENEFITS

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount totaling 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

CHARLES BUCHANAN, ANDREW BUCHANAN, AND WILL PETERSON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard Campbell (deceased) Injury No. 11-033989
Dependents: Carrie Campbell
Employer: Trees Unlimited, Inc.
Additional Party: N/A
Insurer: Firstcomp Insurance Company
Hearing Date: 7/8/2014 & 7/9/2014 Checked by: MEH

The parties appeared before the undersigned administrative law judge on July 8 -9, 2014 for a final hearing. The claimant appeared in person represented by Charles Buchanan, Andrew Buchanan, and Will Peterson. The employer and insurer appeared represented by Joseph Ebbert. Memorandums of law were filed by August 4, 2014.

The parties stipulated to the following facts: On or about April 11, 2011, Trees Unlimited, Inc., was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Firstcomp Insurance Company. On the alleged injury date of April 11, 2011, Richard Campbell was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about April 11, 2011, the claimant sustained a motor vehicle accident. The motor vehicle accident occurred in Newton County, Missouri. The employer was notified of employee's injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the motor vehicle accident, the employee's average weekly wage was sufficient to allow the maximum compensation rate of \$799.11 for temporary

total and permanent total disability as well as death benefits, and a compensation rate of \$418.58 for permanent partial disability compensation. No temporary disability or death benefits have been paid to the claimant. The employer and insurer have paid no medical or funeral benefits. The attorney fee being sought is 25%. The parties further agree that the vehicle being driven by the employee at the time of the motor vehicle accident was owned by the employer. The parties agree that Carrie Campbell was employee's spouse on April 11, 2011, and is a dependent of the employee.

ISSUES:

1. Whether the claimant sustained an accident which arose out of the course and scope of employment.
2. Whether the accident caused the injuries and disabilities for which benefits are being claimed, or whether it was caused by an idiopathic condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Richard Campbell, the deceased employee who is the subject of this claim, was the owner and operator of the employer, Trees Unlimited, Inc. He started the company in 1987. Mr. Campbell worked as a salesperson and managed the operation of the company until the date of the accident.

Trees Unlimited was a wholesale lumber company. They handled engineered wood products and sold the product primarily to retail lumber yards. Their only office was located on 32nd Street in Joplin, Missouri. The salespersons acted as wholesale brokers and sold lumber over the phone. Most of the product was delivered direct from the wood mills to customers and some engineered wood product was also stored and sold out of this location. The company's market was roughly Springfield to Nevada to the east, Pittsburg, Siloam Springs, and a two hour radius of Joplin, Missouri. This was 120-150 mile radius.

The office consisted of a two story log cabin styled building. The office area was open with several desks. The business did not have a receptionist. The salespeople kept their own calendars. There were three salespersons: Mr. Campbell, Bill Griffiths, and Reggie Graue, as well as a couple of men working in the yard cutting and loading lumber.

Bill Griffiths, employee's brother in law and co-worker, testified at the hearing. He worked as a salesperson of the employer. One of his duties was to monitor the cash flow of the business. He would print a report from the bank as soon as he got into the office in the morning. This was a day to day balance sheet that showed daily cash flow. If the employee was in the office, Mr. Griffiths would take it and put it on his desk. If Mr. Campbell was not in the office the employee would call and Mr. Griffiths would give him the balance information over the phone. This was the practice every morning for the employee to either see the report or call in for the information.

Mr. Griffiths was familiar with the work the employee did for the company and his routine. The employee worked full time and had no other employment. He typically worked 9 a.m. to 5 p.m. Monday through Friday. Mrs. Campbell testified her husband would leave the house between 8:30 and 8:45 a.m. and return home around 5:00 p.m. She said he would tell her if he was not working on a particular day. On occasion he would play golf with a customer, but he had not done so on April 11, 2011, as his clubs were in the garage. Once a month he would attend a 7:00 a.m. meeting at Freeman Hospital where he served on the board. He did not attend it the morning of the accident. He also served on several other boards and was involved in charitable activities, but none were south of Joplin, Missouri.

Although he had polio as a child, the employee had been a college athlete and attended school on a basketball scholarship. He continued to be very active and played golf weekly. He had last seen his family physician in January 2010, and had no health problems. Mrs. Campbell

testified that he had high cholesterol, which did not require medication. He had an angiogram performed in 2007. As a board member at Freeman Hospital he was asked to be a test patient for a new piece of equipment that had been received. Mrs. Campbell testified that her husband never complained of chest pain or fatigue. He also liked to hunt and fish. He and his son had traveled to Colorado, Montana, and Canada to hunt.

He was very active in his community of Carthage, Missouri, where he sat on several boards and was involved in various charities. Mr. Campbell had another property where he raised cattle and worked on the weekends. He did not take care of this property on a daily basis. Mr. Campbell's brother was the caretaker of this property. Mrs. Campbell testified that this property was 7 miles to the south of Carthage, between Diamond, Missouri and Interstate 44. This is located to the east of Joplin. Their farm property contained an orchard and 200 strawberry plants, which her husband tended, in addition to the cattle.

It was common for Mr. Campbell to travel away from the office as part of his duties. He drove a company-owned vehicle. The employee also had a privately owned vehicle which he used for personal use.

He would be in and out of the office each day, staying in contact with the office over a company-owned cell phone. While out of the office he would call on customers. He also regularly drove by lumber yards to see what they were buying, from who, and their inventory. It was easy to see what lumber a lumber yard had in stock because it was stored outside and the name of the company was usually painted on the side of the stack of lumber. The employee would also do this to research competitors to see what they were buying and determine how much they were paying for it. Both Mr. Griffiths and Carrie Campbell, the claimant's wife, testified that it was common for the employee to do this on a regular basis. Mrs. Campbell

testified that her husband would often drive through lumberyards to check the inventory, even during the evenings or after the lumber yards were closed.

The employee typically worked in southern Missouri and southwest Arkansas and regularly called on customers in this area. These customers included Meeks, T.H. Rogers, Sunbeam, K & S Wire Products, Crowder Industries, Home Depot, Lowes, Meeks, and Herman's.

Mr. Griffiths testified that on the Saturday morning immediately preceding the accident he played 18 holes of golf with the employee. They did not use a golf cart; the employee walked and carried his own clubs. The employee did not complain or appear to be having any physical difficulty.

Mr. Griffiths testified that on April 11, 2011, the employee called in to check on the bank balance as he did every day. The phone records show that Mr. Campbell called into the office at 8:39 a.m., 9:28 a.m., and 9:29 a.m. Mr. Griffiths said it was common for the employee to be out of the office in the morning and in the office in the afternoon. He said it was Mr. Campbell's practice to make arrangements if he was not going to be in the office. Mr. Campbell did not mention any personal errands or that he would be taking any personal time that day.

Carthage, Missouri is located to the north of Joplin, Missouri. Trees Unlimited was originally located in Carthage, Missouri, and later moved to Joplin. The employee lived in Carthage, near the post office. Because he did not want to change the mailing address of the company, he had kept the same post office box since the company was opened. Both Mr. Griffiths and Carrie Campbell testified that the employee would pick up the mail at the post office on the way into the office.

On the morning of Monday, April 11, 2011, Carrie Campbell testified that she left the house between 6:30 – 6:45 a.m. to go to their daughter's house about a half a mile away to

babysit her grandchild, as was her regular practice. Mr. Campbell was still home when she left. She called him at 7:33 a.m. to ask him to bring her some prune juice for their grandchild on his way to work. She said he stopped to drop off the juice. He stayed for about 10 – 15 minutes and then left. Mrs. Campbell said that her husband seemed fine that morning.

Mr. Griffiths testified he arrived at the office about 7 a.m. and printed off the bank records. Mr. Campbell was not in but he expected him later as it was his practice to work out of the office in the morning. He recalls the employee calling in as usual and they discussed the bank balances and what was going on at work that day. He did not remember anything unusual about the phone call.

Mr. Campbell's phone records show that he made a total of three calls to the office that morning, at 8:39 a.m., 9:28 a.m., and 9:29 a.m. Two calls were made to Mr. Campbell from the office, at 10:30 a.m. and 11:01 a.m.

Other calls on the phone records from that morning are: 7:44, 8:08, 9:23, and 10:27 both to and from Lee Foster, a developer for The Village of Hazel Commons. Mrs. Campbell testified that her and her husband owned some property near Bull Shoals Lake that they were talking to Mr. Foster about buying this property to build a senior housing development. She said that this would also affect Trees Unlimited as they were hoping to provide the lumber for the development. This project never came to fruition. At 8:19 an incoming call from Sierra Pacific, a lumber supplier.

He also received a call 9:10 from his sister in law, who was involved in historic preservation. Mr. Campbell was helping her coordinate a delivery of roofing products that day.

Known in April 2011 as Highway 71, this roadway was renamed to Highway 49 since the accident¹. It is a four lane divided highway that proceeds north to south, traveling past Carthage, Missouri, south to Joplin, Missouri, and then further south into Rogers, Arkansas. Right before noon, Mr. Campbell was traveling north on Highway 71. At approximately 12:00 p.m. he was involved in a one vehicle accident about 7 ½ miles south of Joplin, Missouri.

Charles Ramsey testified by deposition. He was traveling north bound on Highway 71 on the date of the accident. The weather was clear. Mr. Ramsey was traveling in the right lane behind a large tractor trailer. He noticed the brake lights of the tractor trailer come on briefly a couple of times. He estimates he and this truck were traveling about 70 miles per hour. He saw Mr. Campbell's truck move from the right lane, in front of the truck, and into the left, or passing, lane. He then saw the employee's truck drive into the median and straight down the median. Mr. Ramsey testified that the employee did not swerve or hit the brake lights. He next saw a puff of dirt or smoke and the truck launched into the air and disappeared. He pulled into the median and up to the area where the truck went into the ravine. He described the median as concave, sloping on both sides with no ridges. Mr. Ramsey saw the vehicle on the other side of the creek bed and called 911. He told the investigating officer that it appeared the driver had fallen asleep.

Sharon Purcell, another witness to the accident, testified by deposition. She was traveling south bound toward the bridge. She noticed the truck as it was airborne but did not see anything that happened before that.

The accident report shows that Mr. Campbell's vehicle left the roadway and traveled 499 feet before leaving the edge of the embankment. It then hit the ground twice on the far side of the creek bed before landing on its roof partially under the bridge. The left hand lane has a

¹ Highway 49 will be referred to in this award as Highway 71.

guardrail prior to reaching the bridge. The median is 51 feet wide. There are two sets of rumble strips, one at the edge of the roadway and the shoulder and another at the edge of the shoulder and the median.

Sergeant Mike Frazier with the Missouri Highway Patrol, testified by deposition. He investigated the accident and prepared the accident report. The accident did not qualify under the department's criteria for accident reconstruction analysis, because there did not appear to be any felony involved. So there was none performed. He testified that the employee's vehicle traveled a total of 499 feet. The left tire came off the pavement 162 feet from the guardrail and the right tire 126 feet from the guardrail. When the vehicle left the berm of the embankment, it traveled 184 feet in the air, landed and then flew rear over front end, and landed on its top.

Sergeant Frazier testified that Mr. Campbell was in the vehicle and his right arm was nearly severed. There was less blood than he would have expected. In his report he notes "statement from witnesses and observations of driver's body showed a possibility that driver was deceased prior to the impact. However this cannot be positively determined." He testified that this was based on the lack of blood and that the employee ran into the median and maintained his speed.

He then went to Trees Unlimited and notified Bill Griffiths of the accident and then to the Campbell's home in Carthage, Missouri and notified Mrs. Campbell.

The Newton County Coroner, Mark Bridges, issued a report pronouncing Mr. Campbell's death at 12:12 p.m. on April 11, 2011. The cause: "Blunt force trauma to the chest and head due to a single vehicle accident." Toxicology tests were negative except for caffeine. Lee Ireland, an Investigator and Deputy Coroner for the Newton County Coroner's Office, testified by deposition. He responded to the scene of the accident. He did not see the body in the vehicle. He took possession of it after the EMT's had removed it and carried it across the creek bed. He

then met the funeral home at a nearby farmer's house. Mr. Campbell was then transported to the funeral home. Mr. Ireland examined the employee and drew a blood sample. He described Mr. Campbell's chest as "totally broken." He testified, "Well, when the chest is torn up that bad, it actually just – it feels like Jell-O when you push on it. It means the ribs are broken, there's no support. And without actually cutting into the body, you're not going to know what they pierced or tore." He did not cut or do an internal examination because it was apparent there was internal organ damage.

When asked if it was possible that Mr. Campbell died of a heart attack before the impact, Mr. Ireland would not say one way or the other. When asked if there was anything that could have been done to answer that question if it had been posed to him at the time, he answered, no "because of all the destruction in the upper torso of the body" he would not have been able to determine it with any reliability. On the death certificate he indicated cause of death as "blunt force trauma" and "vehicle accident." The interval between onset and death was indicated as unknown. He testified this is because he did not know if he was dead when he hit or for how long he was alive afterwards.

Reggie Graue visited the accident scene later that afternoon. He testified that he walked along the median but he did not go down to the creek bed. He also went to the salvage yard where the employee's truck had been towed. He took out what personal items he could find. Mr. Graue said that he did not expect to find much, since it was not Mr. Campbell's personal vehicle, and he never put much in the truck. There was debris consisting of various parts of the vehicle in the bed of the truck that had been gathered at the scene. The employee's cell phone was absent, it has never been located. Nor was any mail located. Mr. Campbell's body was cremated and no autopsy was performed. Funeral expenses totaling \$4,650.65 were presented in Claimant's Exhibit 5. Mrs. Campbell paid this bill, the insurer has paid no funeral expenses.

The claimant presented the deposition testimony of Dr. Kenneth Stein. Dr. Stein is a critical care physician who treats trauma patients and teaches in the residency program at St. Louis University. He reviewed the accident report; the photos taken by the Highway Patrol; the Newton County Coroner's Affidavit; the deposition of Lee Ireland; the depositions of witnesses to the accident Sharon Purcell and Charles Ramsey; and medical records from Dr. Carter, Mr. Campbell's family physician; and the CT angiogram performed at Freeman Health Systems in 2007.

Dr. Stein testified that he did not believe that Sergeant Frazier had enough information to conclude that Mr. Campbell died prior to the impact. He explained several reasons the employee would not have significant blood loss at his right shoulder. Based on the severe damage to Mr. Campbell's chest he could have torn his aorta, the large blood vessel coming off the chest. He said when the car is traveling 70 miles per hour and suddenly decelerates the body continues to move and the aorta can be torn. This is like cutting a garden hose and nothing is going to the half that is cut away. The heart could have been crushed at the time of injury. If his heart was squeezed enough he could have gone into a fatal arrhythmia. Furthermore, with all the ribs broken they could have punctured the heart. He explained that the impact resulting from this accident could account for all of these scenarios.

Dr. Stein also testified that there is no evidence from Mr. Campbell's "previous medical history that at this particular point in time he would have any sudden medical event happen." He said, "It would be very unlikely and in all reasonable probability within a certain degree of, with a reasonable degree of medical certainty he did not have a heart attack." When asked if he would need additional diagnostic testing to determine if the employee was alive or dead when the accident occurred, Dr. Stein replied, "I can say that there was major trauma. We already know there was major trauma. As to exactly which multitude of other things were damaged other than

his chest being like Jello I can't say for certain." He said it would be too speculative to say that he died beforehand. When asked if his opinions were speculation as well he responded, "No, those are reasonably found opinions based upon the major amount of trauma that his body endured."

The insurer presented the deposition testimony of Dr. Erik Mitchell. Dr. Mitchell is a forensic pathologist employed at Frontier Forensics as well as a Deputy Coroner. He reviewed the photographs taken by the Highway Patrol, the accident report, medical records from Freeman Hospital, two depositions, a Humatec report, and the report from Dr. Schmidt. Dr. Mitchell testified that he could not reach an opinion to the cause of death because he did not have enough information. He had an opinion on what the possibilities were, one of which was that Mr. Campbell died prior to the trauma, but again he said there was not enough information to know. The probabilities of this were very low, in the single digits. The accident data regarding the percentage of accidents caused by medical emergencies he said was small, about 1.3 percent. He said he had the potential for a heart attack based on his cholesterol and age. He also said that there was not sufficient information to determine why Mr. Campbell did not react.

On cross-examination he agreed that the type of accident Mr. Campbell had is the type to cause the injuries described by Dr. Stein. Dr. Mitchell said that the accident would be consistent with a blunt-force trauma injury to the chest that would be sufficient to cause the employee's death. That was the only thing he could conclude to a reasonable degree of medical certainty.

The insurer presented the live testimony of Steven Phillip Buckley. Mr. Buckley works for Humatec as a mechanical engineering consultant. He performs and testifies to accident reconstruction opinions. Objections to his testimony regarding medical opinions are sustained and will not be considered in this award. He reviewed documents, depositions and visited the accident site. He testified that Mr. Campbell left the right lane at 527 feet from the launch; hit

the first rumble strip 382 feet and the median at 337 feet from the edge of the embankment. He further concluded that the airbag deployed in 25 milliseconds, and before the steering column crushed the employee's chest after this. He found no evidence of failure of the brakes or steering systems. He found no obstacles present. He said Mr. Campbell left the right hand lane 5.24 seconds prior to leaving the edge of the embankment, hit the first rumble strip at 3.8 seconds and entered the median at 3.34 seconds. The employee made no attempt to stop. The cruise control was engaged, and he was traveling 68.5 miles per hour when he left the embankment. On cross-examination he testified that he was not a biomechanics expert and was not making any opinion as to biomechanics. He made no conclusion whether Mr. Campbell attempted to stop as that was not something he was asked.

William Nelson, the President of Humatec, testified on behalf of the insurer. He deals with ergonomics, biomechanics, human factors, exercise physiology, athletes and sports injuries, and product development. He is not a medical doctor. He testified that he deals with injury causation, where he takes a diagnosis and uses the facts as they are developed to reach an opinion on causation of various injuries. He was asked to determine the probable cause of Mr. Campbell's vehicle veering off the highway on the date of the accident. All objections to medical opinions reached by Mr. Nelson and any testimony as to any medical causation is sustained, and his testimony regarding any medical opinions is not considered as part of this award.

Allowed opinions include his conclusion that the rumble strips should have gotten the attention of Mr. Campbell, and his opinion that he does not believe Mr. Campbell reacted appropriately.

On rebuttal, the claimant called Dr. Bruno Schmidt, an accident reconstructionist. He has a PhD in physics, was a professor at MSU for several years and then the Vice President of

Academic Affairs before retiring in 2005. He remains a professor Emeritus at MSU. Before reaching his opinion, he reviewed the time and distance calculations, visited the scene, and reviewed records and depositions. He concluded that because of the embankment of the median, he would expect Mr. Campbell to be channeled into the median, and the elevation of the depression in the median would cause him to move to the left. He said that by the time Mr. Campbell's vehicle was in the median, he was 150 feet to the south end of the guardrail. This would take about 1.5 seconds. The experts agreed that normal reaction time for a person is 1.6 seconds.

He reviewed the time calculations made by Mr. Buckley. He agreed that it would take him 3.8 seconds from the time employee's car hit the rumble strip until he launched, and 3.3 seconds from the time the left tire went into the median to launch.

Dr. Schmidt did not feel Mr. Campbell had evasive options available because he could not return to the highway at 70 miles per hour, and due to the raised berm at the end of the median, he could not appreciate the creek was there. To the left would be oncoming southbound lanes and a concrete abutment. He did not think the employee could hit the brakes because he probably had the cruise on, and if the vehicle was bouncing it would be hard to get his foot on the brake pedal. Dr. Schmidt said the median was made up of clumps of dirt and was rough. He said that if Mr. Ramsey described it as smooth he did not believe he was driving 70 miles per hour.

Trees Unlimited was destroyed by the major tornado that struck Joplin, Missouri on May 22, 2011. All records were destroyed and the business did not reopen afterwards.

After carefully considering all of the evidence, I make the following rulings:

1. Whether the claimant sustained an accident which arose out of the course and scope of employment.

An injury is in the “‘course and scope of employment’ if the action occurs within a period of employment at a place where the employee may reasonably be fulfilling the duties of employment. *Harness v. Southern Copyroll, Inc.* 291 S.W.3d 299, 305 (Mo. App. S.D. 2009). As a general rule, injuries incurred by an employee coming or going to work are not compensable. In *Doerr v. Teton Transp., Inc.*, 258 S.W.3d 514 (2008), the Southern District Court of Appeals found: “An exception to this general rule involves an employee whose work entails travel away from the employer’s premises,” citing *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 611. Furthermore, “In the case of a traveling employee, the employee is considered to be in the course of his employment continuously during the trip except when a distinct departure on a personal errand is shown,” *Doerr*, 258 S.W.3d 523 (quoting *Smith v. District II A and B*, 59 S.W.3d 558, 559 (Mo.App.2001)).

In determining whether Mr. Campbell’s death arose out of the course and scope of employment, it is necessary to consider the particular facts and circumstances of this case. *Harness* at 305.

Mr. Campbell was at the place and at a time he was reasonably supposed to be. He was driving a company vehicle a few minutes before noon on a Monday. He was driving towards his office from the area in which he normally called on clients and checked inventory at various locations. He had been on the phone with his office and with clients all morning. There is no evidence showing he was on any kind of deviation or establishing a distinct departure personal errand.

The claimant has sustained their burden of proving the employee was in the course and scope of his employment at the time of the motor vehicle accident.

2. Whether the accident caused the injuries and disabilities for which benefits are being claimed, or whether it was caused by an idiopathic condition.

There is no evidence to conclude that Mr. Campbell died from any cause other than the traumatic crushing injuries to his chest. The insurer has argued an idiopathic cause must have caused the employee to die of unrelated reasons and this actually caused the motor vehicle accident. Their own expert, Dr. Mitchell, testified that it would be speculation. I find that evidence supports the opposite. The employee was in good health, was very active, and had not indicated to anyone that he was having any sort of medical complaint.

Both Dr. Stein testified that to a reasonable degree of medical certainty, the injuries Mr. Campbell sustained were a sufficient trauma to cause his death. Dr. Mitchell agreed, testifying that this was the only conclusion he could reach to a reasonable degree of medical certainty.

They also argue that the lack of blood loss from the arm wound is evidence that the employee's heart was not beating at the time of the impact. I find Dr. Stein credible in his explanation that the damage to Mr. Campbell's chest was sufficient to stop his heart from beating and therefore prevent his arm from bleeding for several reasons. He testified "those are reasonably found opinions based upon the major amount of trauma that his body endured."

Carrie Campbell, dependent of the deceased employee, Richard Campbell, is awarded death benefits in the amount of \$799.11 per week from the date of the accident to the present and into the future in accordance with the Missouri Workers' Compensation Law. The insurer shall also pay death benefits incurred in the amount of \$4,650.65.

Attorney for the claimant, Charles Buchanan, Andrew Buchanan, and Will Peterson, are awarded an attorney fee totaling 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: _____
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation