

Spring 2013

## Equal Exposure Brews Frustration for Employees: Court Filters Personal Comfort Doctrine through Workers' Compensation Amendments

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### Recommended Citation

Breanna Hance, *Equal Exposure Brews Frustration for Employees: Court Filters Personal Comfort Doctrine through Workers' Compensation Amendments*, 78 MO. L. REV. (2013)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol78/iss2/11>

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## NOTE

# “Equal Exposure” Brews Frustration for Employees: Court Filters Personal Comfort Doctrine Through Workers’ Compensation Amendments

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

BREANNA HANCE\*

### I. INTRODUCTION

In 2005, the Missouri General Assembly comprehensively reformed the state’s workers’ compensation system.<sup>1</sup> To achieve reform, the legislature enacted revisions to nearly thirty sections of Missouri’s workers’ compensation statute.<sup>2</sup> Among other significant amendments was a revision to Missouri Revised Statutes section 287.020.3(2),<sup>3</sup> which defines whether an injury is deemed to “arise out of and in the course of employment” thereby qualifying for workers’ compensation.<sup>4</sup> The statute, which previously required an

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1. S.B. 1 & 130, 93rd Gen. Assemb., Reg. Sess. (Mo. 2005).

2. See The Workers’ Compensation Law, MO. REV. STAT. §§ 287.010-287.811 (Supp. 2011); Mo. Alliance for Retired Ams. v. Dep’t of Labor & Indus. Relations, 277 S.W.3d 670, 674 (Mo. 2009) (en banc) (“Senate Bills Nos. 1 and 130 amended 30 sections of chapter 287, RSMo 2000, the Missouri’s workers’ compensation law . . .”).

3. *Miller v. Mo. Highway & Transp. Comm’n*, 287 S.W.3d 671, 673 (Mo. 2009) (en banc).

4. MO. REV. STAT. § 287.020.3(2) (“An injury shall be deemed to arise out of and in the course of employment only if: (a) [i]t is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injure; and (b) [i]t 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.”).

employee to show that his or her *employment* was a *substantial factor* in causing the injury, now requires an employee to show that the *accident* was *the prevailing factor* in causing the injury.<sup>5</sup> By limiting the scope of section 287.020.3(2), the legislature called into question many of the common law doctrines previously employed by judges to determine whether an injury was compensable under workers' compensation.<sup>6</sup>

In a recent case, *Johme v. St. John's Mercy Healthcare*,<sup>7</sup> the Supreme Court of Missouri greatly narrowed the judicially-created personal comfort doctrine.<sup>8</sup> The doctrine states that an employee's acts tending to his or her personal comfort are incidental to employment and thereby covered under workers' compensation.<sup>9</sup> In *Johme*, the plaintiff was injured at work while making coffee in the office kitchen.<sup>10</sup> Although she was ministering to a personal comfort, the court reversed the Labor and Industrial Relations Commission's award of workers' compensation benefits.<sup>11</sup> Addressing the "arising out of and in the course of employment" requirement, the court held that in order to recover under workers' compensation, an employee must show the injury was caused by a work-related risk that the employee was not equally exposed to outside of employment.<sup>12</sup>

This Note will examine the status of the "arising out of and in the course of employment" requirement after *Johme*. Part II begins with an analysis of the facts and holding of *Johme*. Next, Part III synthesizes the background of workers' compensation laws in Missouri, including the establishment of the workers' compensation system, the development of the personal comfort doctrine, the 2005 statutory revisions, and two post-2005 cases interpreting the changes. Part IV outlines the court's rationale in deciding *Johme*. Finally, Part V discusses the impact of *Johme* on the "arising out of and in the course of employment" requirement. This Note argues that: (1) *Johme* abrogated the use of the personal comfort doctrine to satisfy the "arising out of and in the course of employment" requirement, consistent with the 2005 statutory revisions;<sup>13</sup> (2) *Johme* clarified the standard of proof for future claimants to show an injury arose out of and in the course of employment;<sup>14</sup> and (3) the court's rule is susceptible to criticisms for departing from the original goals of workers' compensation.<sup>15</sup>

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5. See *infra* note 135 and accompanying text.

6. See 29 MISSOURI PRACTICE: WORKERS' COMPENSATION LAW AND PRACTICE § 2.7 (2d ed. 2012).

7. 366 S.W.3d 504 (Mo. 2012) (en banc).

8. See *infra* Part V.A.

9. *Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 609 (Mo. App. S.D. 1968).

10. *Johme*, 366 S.W.3d at 506.

11. *Id.* at 512.

12. *Id.* at 511.

13. See *infra* at Part V.A.

14. See *infra* at Part V.B.

15. See *infra* at Part V.C.

## II. FACTS AND HOLDING

Sandy Johme worked as a billing representative for St. John's Mercy Healthcare when the accident that gave rise to her workers' compensation claim took place.<sup>16</sup> Johme's duties as a billing representative took place in an office building and included "desk work," such as typing charges into a computer.<sup>17</sup> Located roughly thirty steps away from Johme's desk was an office kitchen, where St. John's provided a coffee station for use by all employees.<sup>18</sup>

On the morning of June 23, 2008, Johme went to the kitchen to fill up her coffee.<sup>19</sup> Because she took the last cup of coffee from the pot, she began brewing a new pot, as was the customary practice in the office.<sup>20</sup> As she finished making the coffee, Johme "turned and then went on the side of her shoe and went down."<sup>21</sup> At the time of the accident, Johme was wearing sandals "with a thick heel and a flat bottom, with a one-inch thick sole."<sup>22</sup> Johme pulled herself up using a counter and realized she could not walk.<sup>23</sup> A co-worker came into the kitchen and retrieved Johme's manager.<sup>24</sup> Johme was taken by ambulance to the hospital, where she was treated for a fractured pelvis.<sup>25</sup>

Following the fall, Johme and her manager completed an injury report.<sup>26</sup> Johme reported that she "was standing at [the] coffee pot [and] when [she] turned to walk back to [her] desk, [she] felt [her] shoe suddenly on the floor."<sup>27</sup> Johme's manager stated in the report that Johme was "making coffee in the kitchen, turned to put [coffee] grounds in [the] trash, twisted [her] ankle and fell off [her] shoe, fell backwards and landed on [the] floor."<sup>28</sup> Emergency room records indicate "Johme reported [tripping] at work because

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16. *Johme*, 366 S.W.3d at 505.

17. Brief of Employee/Respondent Sandy Johme at 5, *Johme*, 366 S.W.3d 504 (No. SC 92113), 2011 WL 3584283, at \*5; Brief of Appellant/Employer St. John's Mercy Healthcare at 5, *Johme*, 366 S.W.3d 504 (No. SC 92113), 2011 WL 3136644, at \*5.

18. *Johme*, 366 S.W.3d at 506.

19. Brief of Employee/Respondent, *supra* note 17, at \*5.

20. *Johme*, 366 S.W.3d at 506.

21. Brief of Appellant/Employer, *supra* note 17, at \*6. Johme testified that she did not remember exactly what she was doing when was injured. *Johme*, 366 S.W.3d at 506 n.2. She said she could have been turning to go back to her desk or turning to go to the counter. *Id.*

22. *Johme*, 366 S.W.3d at 506.

23. Brief of Employee/Respondent, *supra* note 17, at \*7.

24. *Johme*, 366 S.W.3d at 506.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (alteration in original).

of the shoes she was wearing.”<sup>29</sup> At the time of the fall, the kitchen’s floor was not irregular or hazardous.<sup>30</sup>

Johme filed a claim for benefits under workers’ compensation.<sup>31</sup> Missouri Revised Statutes section 287.120 provides that:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person[.]<sup>32</sup>

The definitions contained in section 287.020 explain:

(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.<sup>33</sup>

Johme testified that she did not make coffee at home.<sup>34</sup> The administrative law judge (ALJ) denied Johme’s claim for benefits, finding: (1) she was not performing work duties at the time she fell, and (2) she was “equally exposed to the same hazard or risk” of “just [falling]” in her normal, non-employment life.<sup>35</sup>

The Labor and Industrial Relations Commission (Commission) reversed the ALJ’s denial of benefits.<sup>36</sup> The Commission’s decision first discussed the history of workers’ compensation and the effect of the legislature’s 2005

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29. *Id.*

30. *Id.*

31. *Id.*

32. The Workers’ Compensation Law, MO. REV. STAT. § 287.120.1 (Supp. 2011).

33. *Id.* § 287.020.3(2).

34. *Johme*, 366 S.W.3d at 507.

35. *Id.* at 506-07.

36. *Id.* at 507.

amendments to the workers' compensation statutes.<sup>37</sup> Specifically, the Commission noted that revised section 287.020.3(2) abrogates prior case law interpretations of the phrase "arising out of and in the course of employment,"<sup>38</sup> citing the legislature's enactment of section 287.020.10, which states:

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.<sup>39</sup>

Using the *Pile* test,<sup>40</sup> the Commission determined Johme's claim was compensable under workers' compensation by applying the personal comfort doctrine to the "arising out of and in the course of employment" standards of section 287.020.3(2).<sup>41</sup> The Commission held that making coffee was "incidental to and related to" Johme's employment under the personal comfort doctrine, and therefore it was unnecessary to proceed to part two of the *Pile* analysis to determine whether she would have been "equally exposed" to the risk outside of her employment.<sup>42</sup> The Commission awarded Johme disability payments and past medical expenses.<sup>43</sup>

St. John's appealed the Commission's decision, arguing the conclusion was not based on sufficient, competent evidence to satisfy the "arising out of and in the course of employment" requirement of section 287.020.3(2).<sup>44</sup> The

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37. *Id.* at 507-08. The 2005 legislative revisions are more thoroughly discussed herein. See *infra* at Part III.C.

38. *Johme*, 366 S.W.3d at 508.

39. The Workers' Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011).

40. *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. S.D. 2010). The *Pile* court employed a two part test to determine whether an injury arose out of and in the course of employment: (1) "determine whether the hazard or risk is related or unrelated to the employment[.]" and (2) "if the hazard or risk is unrelated to employment . . . determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life." *Id.* at 467. Under the test, if "the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk . . . is related to employment." *Id.*

41. *Johme*, 366 S.W.3d at 508.

42. *Id.* at 508-09

43. *Id.* at 509.

44. *Id.*

Missouri Court of Appeals, Eastern District proposed reversing the award of compensation, but instead transferred the case (post opinion) to the Supreme Court of Missouri “because of the general interest of this question and the failure to find *Pile* persuasive.”<sup>45</sup>

Using a de novo standard of review, the Supreme Court of Missouri held that Johme’s fall while making coffee in the office kitchen was not compensable under the Missouri workers’ compensation statutes because it was not an injury that “arose out of and in the course of employment” under section 287.020.3(2).<sup>46</sup> The court reasoned that (1) the “cause of her injury – turning and twisting her ankle and falling off her shoe – [did not have] a causal connection to her work activity other than the fact that it occurred in her office’s kitchen while she was making coffee,” and (2) Johme presented insufficient evidence to show she was subject to a lesser risk of this type of injury in her normal, non-employment life.<sup>47</sup>

### III. LEGAL BACKGROUND

Workers’ compensation was established as a bargain between employers and employees and was codified into Missouri statutory law nearly a century ago.<sup>48</sup> The workers’ compensation statutes<sup>49</sup> provide employees with compensation for “personal injury or death of the employee by accident arising out of and in the course of the employee’s employment.”<sup>50</sup> Prior to 2005, courts applied common law doctrines such as the “personal comfort doctrine” to claims to determine whether an injury “arose out of and in the course of employment.”<sup>51</sup> In 2005, the Missouri General Assembly revised multiple sections of the workers’ compensation chapter, making significant changes to the system, particularly to the burden of proof and the “arising out of and in

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45. *Id.* at 509 n.10; *Johme v. St. John’s Mercy Healthcare*, No. ED 96497, 2011 WL 5056300, at \*5 (Mo. App. E.D. Oct. 25, 2011), *rev’d*, *Johme*, 366 S.W.3d 504.

46. *Johme*, 366 S.W.3d at 509-12.

47. *Id.* at 511.

48. *See State ex rel. Elsas v. Mo. Workmen’s Comp. Comm’n*, 2 S.W.2d 796, 798 (Mo. 1928) (“On November 2, 1926, at the biennial general election in Missouri, the electorate voted upon the Missouri Workmen’s Compensation Law of 1925, which had been duly passed by the Legislature and approved by the Governor”); *State ex rel. Chang v. Ely*, 26 S.W.3d 214, 216 (Mo. App. W.D. 2000) (“The Missouri Workers’ Compensation Act . . . became effective in 1926”).

49. *See* The Workers’ Compensation Law, MO. REV. STAT. §§ 287.010-287.811 (Supp. 2011).

50. *Id.* § 287.120.1; *see also De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 644 (Mo. 1931).

51. *Johme*, 366 S.W.3d at 507-08.

the course of employment” requirement.<sup>52</sup> Prior to *Johme*, several cases interpreted the revisions.<sup>53</sup>

The following subparts focus on the “arising out of and in the course of employment” requirement. This Part first reviews the establishment of workers’ compensation in Missouri. Next, it introduces the personal comfort doctrine as a tool for determining whether an injury arises out of and in the course of employment. Subsequently, this Part outlines the 2005 statutory revisions to Missouri’s chapter on workers’ compensation. Finally, this Part concludes with an analysis of two cases leading to *Johme* that applied the “arising out of and in the course of” requirement following the 2005 amendments.

### A. Establishment of the Workers’ Compensation System

The Missouri legislature passed the state’s first workers’ compensation law in 1925.<sup>54</sup> Prior to the establishment of workers’ compensation, employees could sue their employers under common law negligence for injuries related to workplace accidents.<sup>55</sup> Under common law negligence, however, employees were often barred from recovery by the fellow servant rule,<sup>56</sup> assumption of risk,<sup>57</sup> and/or contributory negligence,<sup>58</sup> among other defenses.<sup>59</sup> Thus, an injured worker could “recover for work-related injuries only if he or

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52. See S.B. 1 & 130, 93rd Gen. Assemb., Reg. Sess. (Mo. 2005).

53. See, e.g., *Miller v. Mo. Highway & Transp. Comm’n*, 287 S.W.3d 671 (Mo. 2009) (en banc); *Pile v. Lake Reg’l Health Sys.*, 321 S.W.3d 463 (Mo. App. S.D. 2010).

54. The Workmen’s Compensation Act, 1925 Mo. Laws 375; see also *Bass v. Nat’l Super Mkts., Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc) (“In 1925, Missouri’s legislature adopted its first workmen’s compensation law, 1925 Mo. Laws 375, directing that “[a]ll of the provisions of this act shall be liberally construed with a view to the public welfare.” (citations omitted)). While the original workers’ compensation system was elective for employers, amendments to the statute in 1974 and 1990 made the law compulsory for all employers with five or more employees and all construction industry employers who have one or more employees. I MISSOURI WORKERS’ COMPENSATION LAW § 1.4 (3d ed. 2004).

55. *Bass*, 911 S.W.2d at 619.

56. A common-law doctrine “holding that an employer is not liable for an employee’s injuries caused by a negligent coworker.” BLACK’S LAW DICTIONARY 693 (9th ed. 2009).

57. “The act or an instance of a prospective plaintiff’s taking on the risk of loss, injury, or damage.” BLACK’S LAW DICTIONARY 143 (9th ed. 2009).

58. “A plaintiff’s own negligence that played a part in causing the plaintiff’s injury and that is significant enough (in a few jurisdictions) to bar the plaintiff from recovering damages.” BLACK’S LAW DICTIONARY 1133 (9th ed. 2009).

59. *Bass*, 911 S.W.2d at 619; see also Amanda Yoder, Note, *Resurrection of a Dead Remedy: Bringing Common Law Negligence Back into Employment Law*, 75 MO. L. REV. 1093, 1097 (2010).



she could prove the accident resulted solely from the employer's negligence."<sup>60</sup> Studies estimated that of the 50,000 workplace injuries reported in Missouri in 1921, seventy-five percent of workers received no compensation for those injuries.<sup>61</sup> Additionally, of the 25,000 workers killed or injured in industrial accidents in 1921, only twenty percent of their families received compensation.<sup>62</sup>

Responding to employees' lack of redress for workplace injuries, and based on the increasing number of industrial accidents,<sup>63</sup> the Missouri General Assembly passed the state's first workers' compensation law in 1925.<sup>64</sup> The Workmen's Compensation Act was approved by public referendum and implemented in 1926.<sup>65</sup> The fundamental purpose of workers' compensation was to "place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment."<sup>66</sup> The goal was to "provide simple and nontechnical compensation" for injured employees.<sup>67</sup>

The workers' compensation chapter within Missouri's Revised Statutes provides a no-fault based form of compensation for injured workers.<sup>68</sup> The system is based on the underlying concept of insurance<sup>69</sup> and creates a statutory contractual relationship between employers and employees.<sup>70</sup> Under workers' compensation, employers must compensate their employees for any personal injury or death that arises out of and in the course of employment, regardless of whether the employer was negligent.<sup>71</sup> Rather than merely sup-

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60. *Bass*, 911 S.W.2d at 619.

61. *Todd v. Goostree*, 493 S.W.2d 411, 416 n.2 (Mo. App. W.D. 1973).

62. *Id.*

63. *Bass*, 911 S.W.2d at 619.

64. The Workmen's Compensation Act, 1925 Mo. Laws 375.

65. *State ex rel. Elsas v. Mo. Workmen's Comp. Comm'n*, 2 S.W.2d 796, 797 (Mo. 1928).

66. *Wolfgeher v. Wagner Cartage Serv., Inc.*, 646 S.W.2d 781, 783 (Mo. 1983).

67. *Bethel v. Sunlight Janitor Serv.*, 551 S.W.2d 616, 618 (Mo. 1977) (en banc).

68. *Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 56 (Mo. 1998), *overruled by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

69. *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 645 (Mo. 1931).

70. *Bass v. Nat'l Super Mkts., Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc).

71. *De May*, 37 S.W.2d at 644 (quoting Workmen's Compensation Act, § 3, 1927 Mo. Laws 492). The 1927 statute stated "[i]f both employer and employee have elected to accept the provisions of this act, the employer shall be liable irrespective of negligence, to furnish compensation under the provisions of this act for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person." 1927 Mo. Laws 492. The current statute states "[e]very employer . . . shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment . . . and every employer and employees of such employer shall be released from

plementing common law remedies, workers' compensation completely replaced them.<sup>72</sup>

Workers' compensation is often viewed as a bargain between employers and employees.<sup>73</sup> Under the bargain, employees "surrender[] the right to sue their employers at common law in exchange for lower but certain compensation . . . in all . . . accidental work-related injuries."<sup>74</sup> Conversely, employers surrender their common law defenses and accept absolute liability in exchange for protection from paying out full common law damages.<sup>75</sup> According to Chief Justice Teitelman of the Supreme Court of Missouri, "the essential [components] of the workers' compensation bargain . . . are (1) the certainty of 'a sure and speedy means of compensation for injuries suffered in the course of employment' and, (2) the availability of compensation irrespective of fault."<sup>76</sup>

As the statute indicates, not all workplace injuries are covered under workers' compensation.<sup>77</sup> Whether an employee is entitled to recover benefits is decided "on a case-by-case basis depending on individual facts."<sup>78</sup> The burden of proof falls on the workers' compensation claimant seeking recovery.<sup>79</sup> Once the claimant establishes an accident, he or she must show the injury "has arisen out of and in the course of employment."<sup>80</sup>

While Missouri courts often refer to "arising out of and in the course of employment" as one element of a workers' compensation claim, the condition actually involves two separate and distinct tests: "arising out of" and "in the course of."<sup>81</sup> "Arising out of" employment denotes a "causal connection

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all other liability whatsoever[.]" The Workers' Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011).

72. *Gunnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632, 636 (Mo. App. E.D. 2002).

73. *Mo. Alliance for Retired Ams. v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 675 (Mo. 2009) (en banc).

74. *Id.*

75. *Gunnett*, 70 S.W.3d at 636.

76. *Mo. Alliance for Retired Ams.*, 277 S.W.3d at 684 (Teitelman, C.J., dissenting) (quoting *St. Lawrence v. Trans World Airlines, Inc.*, 8 S.W.3d 143, 149 (Mo. App. E.D. 1999)).

77. The Workers' Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011); see *Wheaton v. Reiser Co.*, 419 S.W.2d 497, 499 (Mo. App. W.D. 1967).

78. *Mo. Alliance for Retired Ams.*, 277 S.W.3d at 680 (holding "workers excluded . . . by the narrower definitions of 'accident' and 'injury' [in the 2005 amendments] have a right to bring suit under common law").

79. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. 2012) (en banc).

80. MO. REV. STAT. § 287.020; *Johme*, 366 S.W.3d at 509.

81. *Abel ex rel. Abel v. Mike Russell's Standard Serv.*, 924 S.W.2d 502, 503 (Mo. 1996) (en banc).

between the [work] conditions . . . and the employee's injury."<sup>82</sup> "In the course of" employment refers to the time, place, and manner of the accident.<sup>83</sup> The claimant must show his or her injury meets both tests in order to recover compensation.<sup>84</sup>

Although the legislature has attempted to define this requirement,<sup>85</sup> there is no precise formula for determining whether an injury arises out of and in the course of employment.<sup>86</sup> Under the original workers' compensation statute, commissioners and judges were instructed to construe the act's provisions liberally in favor of compensation.<sup>87</sup> Missouri case law reveals a continuing struggle by courts to reconcile the statute's general definitions with an endless variety of factual situations where employees' injuries are loosely related to the employment duties or premises.<sup>88</sup> Accordingly, courts have adopted a variety of doctrines and rules to apply the "arising out of and in the course of employment" requirement.<sup>89</sup> Prior to 2005, judges employed these doctrines in combination with the statutory limits to determine whether a claimant's injury was compensable under workers' compensation.<sup>90</sup>

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82. *Id.* ("An accident arises out of the employment relationship 'when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.'" (quoting *Kloppenburger v. Queen Size Shoes, Inc.*, 704 S.W.2d 234, 236 (Mo. 1986) (en banc), *overruled by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc))).

83. *Id.* ("An injury occurs 'in the course of' employment 'if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment.'" (quoting *Shinn v. General Binding Corp.*, 789 S.W.2d 230, 232 (Mo. App. E.D. 1990))).

84. *Id.* at 504.

85. MO. REV. STAT. § 287.020.3(2).

86. *Blatt v. Metro. Life Ins. Co.*, 413 S.W.2d 533, 535 (Mo. App. E.D. 1967).

87. MO. REV. STAT. § 287.800 (2000) ("All of the provisions of this chapter shall be liberally construed with a view to the public welfare") (amended 2005); *see also* *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 673 (Mo. 2009) (en banc).

88. *Garrett v. Indus. Comm'n.*, 600 S.W.2d 516, 519 (Mo. App. W.D. 1980).

89. *See* *Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 608 (Mo. App. S.D. 1968) ("Courts have hopefully devised and variably apply a farrago of special doctrines and rules in an effort to cope with the endless variety of factual situations which continually deluge them in workmen's compensation cases."). *See generally* 29 MISSOURI PRACTICE: WORKERS' COMPENSATION LAW AND PRACTICE, *supra* note 6, § 2.3 (citing such doctrines as the "personal comfort doctrine," the "assault doctrine," the "going and coming doctrine," the "extension of premises doctrine," and the "street hazard doctrine").

90. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 507-08 (Mo. 2012) (en banc).

*B. The “Personal Comfort” Doctrine*

The personal comfort doctrine is one of several common law doctrines developed by the courts to apply the “arising out of and in the course of employment” requirement to patterns of factual circumstances.<sup>91</sup> To recover under the Missouri workers’ compensation statutes prior to 2005, a worker’s injury had to be “incidental” to his or her employment.<sup>92</sup> The personal comfort doctrine states that certain unavoidable acts that minister to one’s personal comfort are considered “incidental” to his or her employment when committed at work.<sup>93</sup> Activities that qualify as “ministering to one’s personal comfort” include “satisfying thirst and hunger,”<sup>94</sup> using “toilet facilities,”<sup>95</sup> “preparing to begin or quit work[,]”<sup>96</sup> “seeking warmth, shelter or fresh air,”<sup>97</sup> applying cosmetics,<sup>98</sup> and returning to an assigned work area after a meal.<sup>99</sup>

The rationale for allowing recovery under the personal comfort doctrine is that activities tending to one’s personal comfort benefit the employer indirectly because they benefit the employee.<sup>100</sup> Additionally, such activities allow employees to concentrate more efficiently on their duties.<sup>101</sup> Because these acts advance the interests of the employer, the employee does not “thereby necessarily leave the course of employment” by ministering to them.<sup>102</sup> Further, because activities ministering to personal comfort are

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91. *Kunce*, 432 S.W.2d at 608-09.

92. MO. REV. STAT. § 287.020.3(1) (2000).

93. *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 514 (Mo. 1999) (en banc), *superseded by statute*, The Workers’ Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011); *Bell v. Arthur’s Fashions, Inc.*, 858 S.W.2d 760, 763-64 (Mo. App. E.D. 1993), *overruled by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc); *Moore v. St. Joe Lead Co.*, 817 S.W.2d 542, 543 (Mo. App. E.D. 1991); *Kunce*, 432 S.W.2d at 609.

94. *Drewes*, 984 S.W.2d at 514; *Goetz v. J.D. Carson Co.*, 206 S.W.2d 530, 534 (Mo. 1947); *Ford v. Bi-State Dev. Agency*, 677 S.W.2d 899, 902 (Mo. App. E.D. 1984); *Jones v. Bendix Corp.*, 407 S.W.2d 650, 653 (Mo. App. W.D. 1966).

95. *Ford*, 677 S.W.2d at 902; *Schultz v. Moerschel Prods. Co.*, 142 S.W.2d 106, 110 (Mo. App. W.D. 1940).

96. *Thompson v. Otis Elevator Co.*, 324 S.W.2d 755, 758 (Mo. App. E.D. 1959).

97. *Id.*

98. *Id.* at 759.

99. *DeVillie v. Hiland Dairy Co.*, 157 S.W.3d 284, 288 (Mo. App. S.D. 2005).

100. *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 537 (Mo. 1996) (en banc).

101. *Thompson*, 324 S.W.2d at 759.

102. *Id.* at 758 (“[E]mployees who minister to their personal comfort, within the time and space limitations of their employment, do not thereby necessarily leave the course of their employment.”); *Bybee v. Ozark Airlines*, 706 S.W.2d 570, 573 (Mo. App. E.D. 1986) (“To satisfy the requirement that the employee’s injury occurred ‘in the course of’ her employment, it is only necessary to prove that the injury occurred within the period of employment at a place where the employee may reasonably be, while she is engaged in the furtherance of the employer’s business, or in some activity

within the nature of the employee's duties, any injury causally connected to those activities is compensable.<sup>103</sup> With the mere "incidental" standard prior to the 2005 amendments, Missouri courts used the personal comfort doctrine as a shortcut to assess both the "arising out of" employment standard and the "in the course of" employment standard.<sup>104</sup>

One of Missouri's earliest applications of the personal comfort doctrine was in 1930.<sup>105</sup> In *Jackson v. Euclid-Pine Investment Company*, parents brought a claim for workers' compensation after their son died from exposure to high levels of carbon monoxide while cleaning an automobile at work.<sup>106</sup> The employee worked nights as a general caretaker and night watchman for a garage.<sup>107</sup> His duties involved cleaning cars, delivering cars to patrons, and moving cars within the garage.<sup>108</sup> The employee was found dead one morning due to carbon monoxide poisoning.<sup>109</sup> The court hypothesized that even if the man started the car within the garage to stay warm on the cold night, the injury still arose out of and in the course of employment, despite furthering his personal comfort.<sup>110</sup>

The Supreme Court of Missouri employed the personal comfort doctrine as early as 1956.<sup>111</sup> In *Culberson v. Daniel Hamm Drayage Company*, a tractor-trailer loader ate a sandwich on his lunch break and laid down in the shade under his trailer, waiting for the other men to finish eating in a nearby bakery.<sup>112</sup> After several minutes, the loader fell asleep.<sup>113</sup> Fifteen minutes later, the driver left the bakery and unknowingly ran over the sleeping man, causing his death.<sup>114</sup> The court held the loader did not "abandon his employment" by nursing his personal needs for shade and sleep while on a lunch break, and

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incidental thereto." (quoting *Yaffe v. St. Louis Children's Hosp.*, 648 S.W.2d 549, 550-51 (Mo. App. E.D. 1982))).

103. *James v. CPI Corp.*, 897 S.W.2d 92, 95 (Mo. App. E.D. 1995).

104. *See Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 514-15 (Mo. 1999) (en banc), *superseded by statute*, The Workers' Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011); *Cox*, 920 S.W.2d at 537; *James*, 897 S.W.2d at 95; *Jones v. Bendix Corp.*, 407 S.W.2d 650, 652-53 (Mo. App. W.D. 1966); *Thompson*, 324 S.W.2d at 758-59.

105. *Jackson v. Euclid-Pine Inv. Co.*, 22 S.W.2d 849 (Mo. App. E.D. 1930).

106. *Id.* at 850.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 852.

111. *Culberson v. Daniel Hamm Drayage Co.*, 286 S.W.2d 813, 817-18 (Mo. 1956).

112. *Id.* at 815.

113. *Id.*

114. *Id.*

the claimant was entitled to recover under workers' compensation because the injury arose out of and in the course of employment.<sup>115</sup>

Several other recent Missouri cases demonstrate the courts' use of the personal comfort doctrine. In *Jones v. Bendix Corporation*, a chair collapsed when a woman sat down to drink coffee in the office cafeteria before her shift began.<sup>116</sup> The court held that "satisfying [one's] physical needs immediately prior to . . . work" in an office-provided cafeteria was incidental to employment because the activity was a mutual benefit to employer and employee, and the injury thus arose out of and in the course of employment under the personal comfort doctrine.<sup>117</sup> Similarly, in *DeVille v. Hiland Dairy Company*, a worker stopped to talk to his fellow employees and injured his knee when turning to leave.<sup>118</sup> The employee was allowed recovery premised on the personal comfort doctrine, because the court classified the personal activity as being "incidental to employment."<sup>119</sup> Additionally, because of the personal comfort doctrine, an employee was entitled to recover under workers' compensation for injuries sustained when she tripped while walking to her employer's break room to eat lunch.<sup>120</sup>

For activities ministering to one's personal comfort to sufficiently relate to employment, warranting coverage under workers' compensation, the claimant must show:

[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 or unreasonable that the conduct could not be considered an incident of the employment[.]<sup>121</sup>

Prior to the legislature's 2005 revisions to the workers' compensation chapter, the personal comfort doctrine was a well-established tool used by courts to grant recovery under workers' compensation.<sup>122</sup> In 2005, however, the doctrine's status was called into question.<sup>123</sup>

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115. *Id.* at 818-19.

116. *Jones v. Bendix Corp.*, 407 S.W.2d 650, 651 (Mo. App. W.D. 1966).

117. *Id.* at 652-53.

118. 157 S.W.3d 284, 285 (Mo. App. S.D. 2005).

119. *Id.* at 288.

120. *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 514-15 (Mo. 1999) (en banc), *superseded by statute*, The Workers' Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011).

121. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 507 n.7 (Mo. 2012) (en banc).

122. *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 537 (Mo. 1996).

123. *Johme*, 366 S.W.3d at 507.

### C. 2005 Legislative Amendments

In 2005, the Missouri legislature revised the statutory chapter related to workers' compensation in order to restrict the types of injuries compensable under the system.<sup>124</sup> Governor Matt Blunt encouraged reform, fearing high workers' compensation insurance rates would "drive businesses out of Missouri."<sup>125</sup> Tom Deuschle, director of the Missouri Department of Labor and Industrial Relations, commented that the new system would reduce fraudulent claims.<sup>126</sup> Other business leaders argued the system was too skewed in favor of workers and sought balance in the workers' compensation system.<sup>127</sup> The 2005 revisions both mandated a different standard of review for workers' compensation claims and provided further instruction on the "arising out of and in the course of employment" requirement.<sup>128</sup>

The legislature's revisions impacted the standard of review in at least two significant ways. Prior to the amendments, judges and commissioners were instructed to construe the act's provisions liberally in favor of compensation.<sup>129</sup> The statute now calls for strict construction of the workers' compensation provisions, rather than the prior, liberal construction.<sup>130</sup> Additionally, judges and commissioners are now instructed to "weigh the evidence impartially without giving a benefit to either party."<sup>131</sup> Consequently, em-

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124. Worker's Compensation, 2005 Mo. Laws 907; *see, e.g.*, *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 672-73 (Mo. 2009) (en banc). The revised legislation did not include a legislative purpose. *See* 2005 Mo. Laws 907. Further, journals of the Missouri House and Senate record only motions and votes; no record of debate is made. *The Legislative Process in Missouri*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/content.aspx?info=/info/howbill.htm> (last visited Feb. 7, 2013).

125. Heather J. Carlson, *House Committee Approves Tougher Workers' Comp Bill*, SOUTHEAST MISSOURIAN, Feb. 25, 2005, <http://news.google.com/newspapers?id=OqcFAAAAIBAJ&sjid=IdYEAAAIBAJ&pg=3039,7303173&dq=missouri+%26+workers-compensation&hl=en>; *Blunt Signs Workers' Compensation Reform into Law*, ST. LOUIS BUS. J., Mar. 30, 2005, [http://www.bizjournals.com/stlouis/stories/2005/03/28/daily44.html?jst=b\\_in\\_hl](http://www.bizjournals.com/stlouis/stories/2005/03/28/daily44.html?jst=b_in_hl).

126. *Workers' Compensation Changes Effective August 28th*, KAN. CITY INFOZINE (Aug. 28, 2005), <http://www.infozine.com/news/stories/op/storiesView/sid/9891/>.

127. Michael Moroni, *The Missouri Workers' Compensation Legal Advisor System: Can It Be Resurrected Under the New Law?*, 34 S. ILL. U. L.J. 117, 126 (2009).

128. *See* The Workers' Compensation Law, MO. REV. STAT. §§ 287.800, 287.020 (Supp. 2011).

129. MO. REV. STAT. § 287.800 (2000).

130. MO. REV. STAT. § 287.800 (Supp. 2011).

131. *Id.* Previously, judges viewed evidence in favor of compensation. *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 673 (Mo. 2009) (en banc).

ployees now have a higher burden of proof in establishing a compensable injury.<sup>132</sup>

In their revisions, the legislature also clarified the “arising out of and in the course of employment” requirement.<sup>133</sup> The legislature narrowed the scope of injuries covered under the requirement by amending section 287.020.3(2), which explains when an injury is deemed to arise out of and in the course of employment.<sup>134</sup> The revised section 287.020.3(2) states:

- (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.<sup>135</sup>

The legislature also added a provision to the statute that rejects certain case law interpretations of the terms “accident”, “occupational disease”, “arising out of”, and “in the course of the employment.”<sup>136</sup> The provision abrogates the meaning of these terms as held in *Bennett v. Columbia Health Care and Rehabilitation*,<sup>137</sup> *Kasl v. Bristol Care, Inc.*,<sup>138</sup> *Drewes v. TWA*,<sup>139</sup>

132. *Leake v. City of Fulton*, 316 S.W.3d 528, 532 (Mo. App. W.D. 2010).

133. *See* MO. REV. STAT. §§ 287.020.3, 287.020.10 (Supp. 2011).

134. *Compare id.* §287.020.3(2), with MO. REV. STAT. §287.020.3(2) (2000); *see also Miller*, 287 S.W.3d at 672-73.

135. MO. REV. STAT. §287.020.3(2) (Supp. 2011) (emphasis added). The section previously stated that “[a]n injury shall be deemed to arise out of and in the course of the employment only if: (a) [i]t is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) [i]t can be seen to have followed as a natural incident of the work; and (c) [i]t can be fairly traced to the employment as a proximate cause; and (d) [i]t 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.” MO. REV. STAT. §287.020.3(2) (2000).

136. MO. REV. STAT. §287.020.10 (Supp. 2011).

137. 80 S.W.3d 524 (Mo. App. W.D. 2002), *superseded by statute*, The Workers’ Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011). In *Bennett*, a nurse’s aid with a history of knee problems sought to recover under workers’ compensation when she felt her knee pop twice at work, once when she walked around a patient’s bed and again when she carried linens up a flight of stairs. *Id.* at 526. The Western District interpreted “accident” broadly and stated that an injury did not have to be immediately preceded by a sudden fall or strain to be compensable; rather, an accident occurs if there is a mere “breakdown or a change in pathology.” *Id.* at 529 (quoting *Winsor v. Lee Johnson Constr. Co.*, 950 S.W.2d 504, 509 (Mo. App. W.D.



and their progeny.<sup>140</sup> *Drewes* directly discusses the terms “arising out of” and “in the course of” employment.<sup>141</sup>

In *Drewes v. TWA*, a Trans World Airlines (TWA) reservation agent sought to recover under workers’ compensation after she fell and injured her ankle while walking across a break room with her lunch.<sup>142</sup> The court noted an “injury must be *incidental to* and not independent of the relation of employer and employee” to arise out of employment.<sup>143</sup> Applying the personal comfort doctrine, the court held the claimant’s injury arose out of employment because activities “attending to one’s personal comfort [(for example, eating lunch) are] incidental to employment.”<sup>144</sup> Next, the court stated employees are in the course of employment “while engaged in or about the premises where their duties are being performed, or where their services require their presence as a part of such service.”<sup>145</sup> The majority held “[a]ccidents in or about [an employer’s] premises, during a scheduled, unpaid lunch break, occur in the course of employment.”<sup>146</sup> The court concluded *Drewes*’ injury was compensable under workers’ compensation.<sup>147</sup>

Based on the foregoing legislative revisions, the Supreme Court of Missouri held statutory “section 287.020.3(2) must control any determination of whether [an] injury . . . arise[s] out of and in the course of . . . employ-

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1997)). The court held the claimant suffered an “accident” because the worsening of a pre-existing condition qualifies as a change in pathology. *Id.* Further, the court following *Drewes* determined that walking was an integral part of claimant’s job performance and because she was engaged in activities incidental to her work duties at the times her knee popped, the injury arose out of employment. *Id.* at 531.

138. 984 S.W.2d 852 (Mo. 1999) (en banc), *superseded by statute*, The Workers’ Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011). In *Kasl*, a manager at a residential care facility sought workers’ compensation after she stood up to dispense medicine to a resident and, being unaware her foot had fallen asleep, fell and broke her ankle. *Id.* at 852. The court defined non-compensable idiopathic conditions as those unique or innate to the individual. *Id.* at 854. The majority declared, however, that “[c]ommon conditions exacerbated by employment requirements are not idiopathic.” *Id.* Because claimant’s foot falling asleep was a “common condition clearly related to her work[,]” the court affirmed claimant’s award of compensation. *Id.* at 854-55.

139. 984 S.W.2d 512 (Mo. 1999) (en banc), *superseded by statute*, The Workers’ Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011).

140. MO. REV. STAT. § 287.020.10 (Supp. 2011).

141. *Drewes*, 984 S.W.2d at 515-15.

142. *Id.* at 514.

143. *Id.* (internal quotation marks omitted).

144. *Id.* (quoting MO. REV. STAT. § 287.020.5 (1994)) (internal quotation marks omitted).

145. *Id.* at 514-15.

146. *Id.* at 515.

147. *Id.*

ment.”<sup>148</sup> Thus, following the 2005 amendments, the status of many of the common law doctrines employed to satisfy the “arising out of and in the course of employment” requirement, including the personal comfort doctrine, are unknown.<sup>149</sup>

#### D. Post-2005 Cases

Since the 2005 amendments, two cases provide Missouri courts with guidance on whether a claimant’s injury arises out of and in the course of employment. In *Miller v. Missouri Highway & Transportation Commission*, the Supreme Court of Missouri upheld the ALJ’s denial of workers’ compensation benefits under the revised statute.<sup>150</sup> Miller was employed by the Missouri Highway and Transportation Commission (MHTC), and worked as a crew member to repair roads.<sup>151</sup> As Miller walked briskly toward a truck to get repair materials, he heard his knee pop.<sup>152</sup> Following the pop, he felt significant pain in his knee, which required a surgery to repair.<sup>153</sup> The uncontested evidence showed that Miller was walking on an even road surface and “his work did not require him to walk in an unusually brisk way.”<sup>154</sup>

Miller’s employer denied his claim for workers’ compensation because it found his injury was not work-related.<sup>155</sup> The ALJ and Commission agreed that Miller failed to produce sufficient evidence that “he suffered a compensable injury as a result of a work-related accident arising out of and in the course of his employment.”<sup>156</sup> Upon transfer from the Eastern District, the Supreme Court of Missouri affirmed.<sup>157</sup>

The court reasoned that Miller’s injury was not compensable because “it did not arise out of his employment.”<sup>158</sup> After summarizing the 2005 revisions, the court clarified that the injury occurred *in the course of* employment, because it happened while Miller was at work, but did not *arise out of* his employment.<sup>159</sup> The majority, applying section 287.020.3(2), explained, “[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

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148. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. 2012) (en banc).

149. See 29 MISSOURI PRACTICE: WORKERS’ COMPENSATION LAW AND PRACTICE, *supra* note 6, § 2.7.

150. 287 S.W.3d 671, 674 (Mo. 2009) (en banc).

151. *Id.* at 671-72.

152. *Id.* at 672.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 674.

158. *Id.* at 673

159. *Id.*

risk involved – here, walking – is one to which the worker would have been exposed equally in normal non-employment life.”<sup>160</sup> Although the facts in *Miller* were similar to those in *Bennett*,<sup>161</sup> which allowed recovery where a “nurse’s knee ‘popped’ while she walked around a bed [to care for a patient] and again when she climbed a flight of stairs”, the court correctly noted that *Bennett* was expressly abrogated by the 2005 statutory revisions.<sup>162</sup>

Following *Miller*, the Southern District adopted a two-step analysis to determine whether an injury arises out of and in the course of employment.<sup>163</sup> In *Pile v. Lake Regional Health Systems*, a nurse turned a corner, stumbled, and twisted her ankle and foot while retrieving medicine for a patient.<sup>164</sup> The nurse sustained a small fracture and was diagnosed with brittle bones in her foot, caused by prolonged walking.<sup>165</sup> To determine whether the injury arose out of and in the course of employment, the court ruled that section 287.020.3(2) necessitates a two-step analysis.<sup>166</sup> The judges explained:

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 to employment . . . . 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.<sup>167</sup>

Applying the two-step analysis to the facts, the Southern District found the nurse’s injury was caused by her excess exposure to walking at work.<sup>168</sup> Because there was a clear nexus between the work-task and the injury, the court held it was unnecessary to consider whether she was equally exposed to the risk outside of work.<sup>169</sup> The court distinguished this case from *Miller*, noting “the risk . . . was not mere walking, but was instead the risk of tendonitis due to prolonged walking.”<sup>170</sup> Additionally, the judges pointed out

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160. *Id.* at 674.

161. *Id.* at 673; *Bennett v. Columbia Health Care & Rehab.*, 984 S.W.2d 852 (Mo. 1999) (en banc), *superseded by statute*, The Workers’ Compensation Law, MO. REV. STAT. § 287.020.10 (Supp. 2011). The facts of *Bennett* are more thoroughly discussed herein. See *supra* note 137.

162. *Miller*, 287 S.W.3d at 673-74.

163. *Pile v. Lake Reg’l Health Sys.*, 321 S.W.3d 463, 467 (Mo. App. S.D. 2010).

164. *Id.* at 465.

165. *Id.* at 465, 467.

166. *Id.* at 467.

167. *Id.*

168. *Id.* at 468.

169. *Id.* at 467.

170. *Id.* at 468.

that, contrary to *Pile*, *Miller* did not present any evidence of the cause of his injury or the extent he walked at work versus outside of work.<sup>171</sup>

Leading to *Johme*, both *Miller* and *Pile* were good law and provided courts with guidance on whether an injury arose out of and in the course of employment, warranting compensation under workers' compensation.

#### IV. INSTANT DECISION

##### A. *The Majority Opinion*

The Supreme Court of Missouri reversed the Commission's decision awarding workers' compensation benefits to *Johme*, finding that *Johme* failed to sufficiently prove her injury arose out of and in the course of her employment, as required by Missouri Revised Statutes section 287.020.3(2).<sup>172</sup>

Because the parties agreed that *Johme*'s fall in the office was the prevailing factor in causing her injury, subsection (a) of section 287.030.3(2) was satisfied and the court focused its attention on subsection (b).<sup>173</sup> Subsection (b) instructs that an injury "shall be deemed to arise out of and in the course of the employment only if . . . [it did] 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."<sup>174</sup>

Citing their recent decision in *Miller*, and strictly construing the language of the statute, the majority interpreted subsection (b) to mean that a claimant must show "a causal connection between the injury at issue and the employee's work activity."<sup>175</sup> If the injury occurred while at work but nothing about work caused the injury, the injury "arose during the course of employment, but did not arise out of the employment," and was not recoverable under section 287.020.3(2).<sup>176</sup> The court reiterated that an "injury is only compensable if it is shown to have resulted from a hazard or risk [that] the employee would not be equally exposed to in 'normal non-employment life.'"<sup>177</sup>

The majority noted that the Commission erred by (1) focusing on what *Johme* was doing when she was injured, rather than what the risk source of

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171. *Id.*

172. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 505 (Mo. 2012) (en banc).

173. *Id.* at 510.

174. The Workers' Compensation Law, MO. REV. STAT. § 287.020.3(2)(b) (Supp. 2011).

175. *Johme*, 366 S.W.3d at 510.

176. *Id.* at 511 (quoting *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 674 (Mo. 2009) (en banc)).

177. *Id.*

her injury was, and (2) focusing on whether the activity was “incidental to employment” rather than “the cause of her injury.”<sup>178</sup> Based upon the Commission’s errors and the foregoing analysis, the court reversed the Commission’s decision.<sup>179</sup>

Applying the facts of the case, the court did not find a causal connection between the injury at issue (fractured pelvis) and her work activity (making coffee).<sup>180</sup> Rather, the cause of Johme’s injury was twisting her ankle and falling off her shoe.<sup>181</sup> Because Johme failed to present any evidence that she was exposed to a lesser risk of turning, twisting her ankle, and falling off her shoe in her non-employment life than she was while making coffee at work, the court determined there was no causal connection between the injury and Johme’s work activity.<sup>182</sup>

Because Johme’s fall was caused by her shoe rather than her work-related task of making coffee, and because she was subject to the same risk of turning and slipping off her shoe in her non-employment life as she was while making coffee in the office kitchen, Johme’s injury had no causal connection to her work-related activity and did not warrant compensation under the post-2005 Missouri chapter on workers’ compensation.<sup>183</sup>

### B. *The Dissent*

Chief Justice Teitelman dissented on behalf of himself and Judge Prebil.<sup>184</sup> The Chief Justice argued that the plain language of section 287.020.3(2)(b) commands a two-step analysis.<sup>185</sup> Under this analysis, he stated, “if the risk is related to employment, . . . the equal exposure analysis does not apply.”<sup>186</sup> The dissenters criticized the majority’s “bright-line distinction between an injury that merely happens while one is working and an injury that is caused by working.”<sup>187</sup> Chief Justice Teitelman noted that when one is injured while completing a work-related task, the injury and the work-related task are “inextricably entwined.”<sup>188</sup>

Applying their logic, the two justices determined that because Johme was injured while completing a work-related task (administering to her per-

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178. *Id.*

179. *Id.* at 512.

180. *Id.* at 511.

181. *Id.*

182. *Id.* The court noted that Johme’s testimony indicating she did not make coffee at home was irrelevant because making coffee was not the risk of her injury – slipping off her shoe was. *Id.* at 511 n.12.

183. *Id.* at 511-512.

184. *Id.* at 512 (Teitelman, C.J., dissenting).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

sonal comfort), “her injury resulted from a work-related risk.”<sup>189</sup> Because *Johme*’s injury arose from a work-related risk, there was no need to determine whether she was equally exposed to the risk in her non-employment life, and she was entitled to recover under section 287.020.3(2).<sup>190</sup>

The dissenters warned that the majority’s rule would prevent other sedentary workers from recovering under workers’ compensation for injuries resulting from work-related tasks, and hinted that the majority’s analysis was overly restrictive.<sup>191</sup>

## V. COMMENT

Though *Johme* was a relatively straightforward case, its holding significantly impacts current workers’ compensation law in several ways. First, *Johme* eliminates the personal comfort doctrine as an absolute tool for recovery for workplace injuries. Second, the court’s opinion clarifies the “arising out of and in the course of employment” requirement after the 2005 revisions by reinforcing *Miller* and implicitly criticizing the *Pile* test. Finally, *Johme* introduces budding concerns into the structure of Missouri’s workers’ compensation system by potentially departing from the system’s original purpose.

### A. Personal Comfort Doctrine

After *Johme*, employees can no longer rely on the personal comfort doctrine to guarantee recovery under workers’ compensation. Although Missouri’s high court did not directly address or explicitly abrogate the personal comfort doctrine, the court’s analysis significantly limited it.<sup>192</sup> The personal comfort doctrine states that activities tending to personal comfort are incidental to employment, but *Johme* clarified, “it is not enough that an employee’s injury occurs while doing something related to or incidental to the employee’s work . . . .”<sup>193</sup> Thus, contrary to prior court applications, the personal comfort doctrine acts only as a tool to show that the injury occurred while the employee was acting *in the course* of employment, or while fulfilling duties of employment. The claimant must separately satisfy the *arising out of* employment standard.<sup>194</sup>

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189. *Id.*

190. *Id.* at 512-13.

191. *Id.* at 513.

192. See Thomas D. Billam, “*Personal Comfort Doctrine*” is Gone in Missouri, WALLACE SAUNDERS (June 7, 2012), <http://www.wallacesaunders.com/Resources/image/PDFs/legal%20alerts/Personal%20Comfort%20Doctrine%20in%20Missouri%20Work%20Comp%20is%20Gone.pdf>.

193. *Johme*, 366 S.W.3d at 511.

194. This approach to the personal comfort doctrine is accepted in other state courts. See *generally*, Kinnebrew v. Little John’s Truck, Inc., 989 S.W.2d 541 (Ark.

The court's elimination of the personal comfort doctrine as a theory of absolute recovery is consistent with the 2005 amendments. Three details provide support for the foregoing assertion. First, the legislature removed the vague "incidental to employment" language from the statute,<sup>195</sup> which formed the basis for the personal comfort doctrine.<sup>196</sup> The definition of a compensable injury in Missouri Revised Statutes section 287.020.3 now focuses on the *risk* of the injury and the risk's relation to the employment rather than whether the *injury* is "incidental to employment."<sup>197</sup> Accordingly, absolute recovery for injuries that occurred while tending to a personal comfort, without further proof of the risk of the injury, would sweep too broadly.

Second, the legislature enacted Missouri Revised Statutes section 287.020.10,<sup>198</sup> which expressly abrogates the use of the terms "arising out of" and "in the course" of employment as used in *Drewes v. TWA*.<sup>199</sup> In *Drewes*, the Supreme Court of Missouri employed the personal comfort doctrine to satisfy the "arising out of employment" requirement.<sup>200</sup> Because *Drewes* used the personal comfort doctrine to assess the "arising out of" analysis, and because section 287.020.10 disavows the term "arising out of" as used in *Drewes*, *Johme* is consistent with the amended statute because both disallow the personal comfort doctrine analysis to affect the "Arising out of" requirement. Finally, by limiting recovery under the personal comfort doctrine to acts ministering to personal comfort that also create an increased risk of the resulting injury, the court's decision will reduce fraud and the number of applicants entitled to recover, thereby reducing costs for employer's workers' compensation insurance. These outcomes are consistent with the purposes cited for the 2005 revisions.

In sum, the personal comfort doctrine survives only as a means to show that an employee remained in the course of employment while attending to his or her personal comfort. To completely satisfy the "arising out of and in

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Ct. App. 1999); *Mason v. Lake Dolores Grp., LLC*, 11 Cal. Rptr. 3d 914 (Cal. Ct. App. 2004); *Miedema v Dial Corp.*, 551 N.W.2d 309 (Iowa 1996); *Losinski v. Drs. Corcoran, Barkoff & Stagnone, P.A.*, 636 P.2d 898 (N.M. Ct. App. 1981).

195. See The Workers' Compensation Law, MO. REV. STAT. § 287.020.3 (Supp. 2011). The definition of injury previously stated that "[t]he injury must be incidental to and not independent of the relation of employer and employee." See MO. REV. STAT. § 287.020.3(1) (2000) (amended 2005). One of the former requirements for an injury to arise out of and in the course of employment was, that "[i]t can be seen to have followed as a natural incident of the work." *Id.* § 287.020.3(2)(b).

196. See, e.g., *Jones v. Bendix Corp.*, 407 S.W.2d 650, 652-53 (Mo. App. W.D. 1966).

197. See MO. REV. STAT. § 287.020.3 (Supp. 2011).

198. Worker's Compensation, 2005 Mo. Laws 907.

199. See MO. REV. STAT. § 287.020.10 (Supp. 2011).

200. *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 514 (Mo. 1999) (en banc), *superseded by statute*, MO. REV. STAT. § 287.020.10 (Supp. 2011).

the course of employment” requirement that is necessary to receive workers’ compensation, further proof is required.

*B. “Arising Out of and in the Course of Employment” Requirement*

In *Johme*, the Supreme Court of Missouri provided the lower courts, Commission, and ALJs with further guidance on whether an injury arises out of and in the course of employment.<sup>201</sup> By reinforcing its decision in *Miller* and implicitly revising the *Pile* analysis, the court clarified what a claimant must prove in order to recover under workers’ compensation and illustrated the impact of the 2005 statutory revisions.<sup>202</sup>

Significantly, the court in *Johme* solidified its reasoning in *Miller* concerning the “arising out of and in the course of employment” requirement.<sup>203</sup> These two recent decisions from the state’s highest court will provide strong precedent for future workers’ compensation claims. To satisfy Missouri Revised Statutes section 287.020.3(2), *Miller* and *Johme* instruct that a claimant must show a causal connection between the work activity and the injury.<sup>204</sup> To recover, the claimant must prove the injury was caused by a peculiar risk or an increased risk associated with the employment.<sup>205</sup> The focus should be on the *risk* of the employee’s injury rather than the employee’s work activity.<sup>206</sup>

The court’s focus on risk rather than activity has important implications for the *Pile* analysis.<sup>207</sup> The *Pile* test asserts that where the activity giving rise to the accident is integral to the performance of the worker’s job, the risk

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201. See *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 509-10 (Mo. 2012) (en banc).

202. See generally James B. Kennedy, *The Supreme Court Speaks!*, EVANS DIXON (May 31, 2012), <http://www.evans-dixon.com/article-detail.aspx?article=1023&articlegroup=>.

203. *Id.*; Chris T. Archer, *Workers’ Compensation*, MO. BAR, <http://www.mobar.org/pub3col-courtbulletin.aspx?id=5865> (last visited Feb. 4, 2013).

204. *Johme*, 366 S.W.3d at 510; *Miller v. Mo. Highway & Transp. Comm’n*, 287 S.W.3d 671, 674 (Mo. 2009) (en banc).

205. See, e.g., *Bennett v. Columbia Health Care*, 80 S.W.3d 524, 531 (Mo. App. W.D. 2002), *superseded by statute*, MO. REV. STAT. § 287.020.10 (Supp. 2011). See generally 1 ARTHUR LARSON, LARSON’S WORKERS’ COMPENSATION LAW §§ 3.02–3.03 (2002). A “peculiar risk” means the “risk is particular to the claimant’s occupation.” *Bennett*, 80 S.W.3d at 531. An “increased risk” means the particular “claimant’s employment led to an increase in the risk or hazard which resulted in the injury[.]” *Id.*

206. *Johme*, 366 S.W.3d at 511.

207. While this paragraph discusses the differences between the majority in *Johme* and the *Pile* test, the asserted disagreement is limited only to the stated *Pile* assertion. While the court in *Johme* did not address the structure of *Pile*’s two-step analysis, it is likely a useful tool for assessing the arising out of and in the course of employment requirement under section 287.020.3(2).



of the activity is related to employment and there is no need to address “step two” equal exposure.<sup>208</sup> While *Johme* does not explicitly address *Pile*, the majority’s analysis clearly disagrees with this assertion.<sup>209</sup> For example, the majority opinion states:

[I]t is not enough that an employee’s injury occurs while doing something related to or incidental to the employee’s work; rather, the employee’s injury is only compensable if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in “normal nonemployment life.”<sup>210</sup>

Further evidence of the majority’s disapproval of *Pile* is apparent in the dissenting opinion, which supports and employs the *Pile* analysis.<sup>211</sup>

Combining these changes to the “arising out of and in the course of employment” requirement with the fact that claimants carry the burden of proof in workers’ compensation cases means certain employees will now have a more difficult time recovering for injuries on the job.<sup>212</sup> The burden for employees injured by risks peculiar to their employment will be the same; the employee will simply have to show he or she was injured while engaged in the activity.<sup>213</sup> For all other claimants to establish his or her injury arose out of employment, the claimant must now present evidence as to the risk of the injury and the likelihood of non-employment exposure to that risk. These additional elements of proof, together with the 2005 statutory mandate that judges view evidence impartially, substantially heighten employees’ burden of proof in workers’ compensation claims.

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208. *Pile v. Lake Reg’l Health Sys.*, 321 S.W.3d 463, 467 (Mo. App. S.D. 2010).

209. See Archer, *supra* note 203.

210. *Johme*, 366 S.W.3d at 511.

211. *Id.* at 512 (Teitelman, C.J., dissenting) (“In other words, the principal opinion draws a bright-line distinction between an injury that merely happens while one is working and an injury that is caused by working. This distinction is not convincing when, as in this case, the injury occurs during the performance of a work-related task. The work-related task and the injury are inextricably entwined. The fact that the injury occurred while one is working is, in most cases, the necessary factual predicate for showing that the injury is work-related.”).

212. Kristen Frasch, *Worker’s Coffee-Making Injury Not Compensable*, HUMAN RESOURCE EXECUTIVE ONLINE BLOG (July 12, 2012), <http://blog.hreonline.com/2012/07/12/workers-coffee-making-injury-not-compensable/> (discussing the statement of Merrily Archer of EEO Legal Solutions, who noted a reduction in the number of idiopathic injuries and other health crises covered under workers’ compensation).

213. This is the likely the “hazard or risk [related] to employment” under section 287.020.3(2)(b); in other words, an “occupational risk” as opposed to a “neutral risk.” See The Workers’ Compensation Law, MO. REV. STAT. § 287.020.3(2)(b) (Supp. 2011). An example of this situation might be an injury occurring from the use of rare, toxic chemicals in a science laboratory.

Following *Johme*, the “arising out of and in the course of” requirement also has certain practical implications for employers and employees following a workplace injury.<sup>214</sup> In the investigation process, employers should gather as many details as possible to show the injury did not arise out of the employee’s employment. For example, details such as what the employee was wearing, the condition of the environment, and how the injury occurred will be critical pieces of information. Additionally, both employers and employees should carefully draft accident reports following the injury. The words used to describe the accident may be crucial to the court’s determination of the risk involved. For example, in *Johme*, the employer’s report stating Johme twisted her ankle and fell off her shoe was vital in the court’s holding that the risk did not arise out of and in the course of employment.<sup>215</sup>

### C. Potential Concerns

Although workers’ compensation was created to apply only to injuries “arising out of and in the course of . . . employment,”<sup>216</sup> and the statute does not prohibit common law negligence suits for claims falling outside the rights and remedies provided by the statute,<sup>217</sup> critics remain concerned that the requirements of *Johme* and the 2005 amendments will lead to a destruction of the workers’ compensation system.<sup>218</sup>

One criticism of *Johme* is that it introduces fault back into the workers’ compensation system.<sup>219</sup> At its establishment, the purpose of workers’ compensation was to allow employees to recover for work-related injuries without having to prove fault or face common law defenses such as assumption or risk or contributory negligence.<sup>220</sup> Under *Johme*, the burden to establish a compensable injury is increasingly stringent; an employee is now required to prove causation and present evidence that he or she was exposed to a greater risk of the injury at work than outside of work.<sup>221</sup> In other words, an em-

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214. Christopher D. Vanderbeek, *Missouri Supreme Court Limits What Constitutes an Accidental Injury in Work Comp*, DANNA MCKITRICK (June 14, 2012), <http://www.dannamckitrick.com/articles/2012/06/missouri-supreme-court-limits-what-constitutes-an-accidental-injury-in-work-comp/>; *Mo. Comp. News: Adjusting to Johme*, ASK ARCHER (July 2012), [http://www.askarcher.com/jul\\_2012\\_comp\\_news.pdf](http://www.askarcher.com/jul_2012_comp_news.pdf).

215. *Johme*, 366 S.W.3d at 506.

216. MO. REV. STAT. § 287.120.1 (Supp. 2011).

217. *Id.* § 287.120.2; *Mo. Alliance for Retired Ams. v. Dep’t of Labor & Indus. Relations*, 277 S.W.3d 670, 680 (Mo. 2009) (en banc).

218. *See Yoder*, *supra* note 59, at 1093-94; *Frasch*, *supra* note 212.

219. *Frasch*, *supra* note 212.

220. *Bass v. Nat’l Super Mkts., Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc).

221. *See Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 510 (Mo. 2012) (en banc).

ployee must now prove the *employer* created the risk or an increased risk of injury, as opposed to something or someone else.

This idea appears akin to the pre-workers' compensation common law, which "permitted an injured employee to recover for work-related injuries only if he or she could prove that the accident resulted solely from the employer's negligence."<sup>222</sup> Prior to *Johme*, the court focused on a more neutral standard – whether the employee was engaged in a work-related activity when injured.<sup>223</sup> If the employee was engaged in an activity incidental to employment, the injury was assumed to arise out of and in the course of employment.<sup>224</sup> Following *Johme*, critics may say an employee is required to show the employer failed to provide a reasonable duty of care by creating the risk. Thus, one may argue fault-based analysis re-enters the realm of workplace injuries. For example, an employment litigation practitioner, warns:

If we go down that road, we've compromised a system set up to care for workers without regarding [sic] to fault or principles of negligence. And, what will carriers do with this decision, but increasingly deny claims on this basis and again, muck up a no-fault compensation system with negligence principles? As public policy, this precedent presents a danger to workers (no pun intended).<sup>225</sup>

A second potential critique of *Johme* is that constricting the scope of what satisfies the "arising out of and in the course of employment" requirement significantly limits the number of injuries falling under workers' compensation.<sup>226</sup> By limiting the injuries compensable under the system, employees may attempt to seek common law negligence remedies for these workplace injuries.<sup>227</sup> If successful, these awards could result in substantial

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222. *Bass*, 911 S.W.2d at 619.

223. *See, e.g., Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463, 467 (Mo. App. S.D. 2010).

224. *Id.*; *see also Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 609 (Mo. App. S.D. 1968). *But cf. Billam, supra* at note 192 ("In my opinion, this is a terrible analysis: the definition of 'related' is way too vague to assist anyone = [sic] it in effect would remove the 'arising out of' requirement and deem compensable any situation/accident that would occur 'in the course of' employment, because there would always be an argument that if Employer 'allowed' such things to occur, then by golly these things 'must be 'related' to work.'").

225. *Frasch, supra* note 212.

226. *See generally, Mo. Alliance for Retired Ams. v. Dep't of Labor & Indus. Relations*, 277 S.W.3d 670, 678 (Mo. 2009) (en banc) (arguing the narrowed definition of "injury" under section 287.020.3 excludes a substantial number of employees from workers' compensation).

227. *See id.* at 680 ("It therefore is adjudged, decreed and declared that workers excluded from the act by the narrower definitions of 'accident' and 'injury' have a

litigation costs, large liability payments, and insurance obstacles for employers.<sup>228</sup> The increased availability of a common law remedy undermines the purpose and bargain established by the workers' compensation system, which was to avoid common law negligence suits.<sup>229</sup>

Moving forward, courts and practitioners will increasingly have to address the issue of whether the 2005 amendments and *Johme's* "arising out of and in the course of employment" requirement lead to a destruction of the workers' compensation system in Missouri.

## VI. CONCLUSION

Following *Johme*, employees have a significant burden to establish their injuries arose out of and in the course of employment, entitling them to workers' compensation benefits. Workers in the position of *Johme* can no longer rely on the personal comfort doctrine as a "short-cut" to guarantee recovery. Instead, a claimant must show the injury occurred in the course of employment and the *risk* that led to the injury was work-related (either a peculiar risk or an increased risk).<sup>230</sup>

Future claimants may argue *Johme's* strict statutory interpretation destabilizes the workers' compensation system by introducing fault back into the system and restructuring the employer-employee bargain. Others may contend the *Johme* decision is too "employer friendly." Whether it is necessary to revert back to the prior scope of injuries covered under the workers' compensation statute, however, is likely a matter for the legislative process. The high court's interpretation of the revised workers' compensation statute in *Johme* appears rational and its holding is consistent with the legislative purpose for the amendments.

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right to bring suit under the common law, just as they could and did prior to the initial adoption of the act, because they no longer fall within the exclusivity provision of the act as set out in section 287.120.").

228. See Wil Tomlinson, *Client Alert: A New Hole in Missouri Workers' Compensation Protection*, ARMSTRONG TEASDALE, [http://www.armstrongteasdale.com/Marketing/ClientAlert-Email/CA\\_March-2-09.htm](http://www.armstrongteasdale.com/Marketing/ClientAlert-Email/CA_March-2-09.htm) (last visited Feb. 5, 2013).

229. *Bass v. Nat'l Super Mkts., Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) ("The statutory contract provided a means of compensating the injured worker that, with exceptions, eliminated the common law's concerns with negligence and fault altogether").

230. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 511 (Mo. 2012) (en banc); see 1 LARSON, *supra* note 205, at §§ 3.02-3.03.