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STATUTORY "ACCIDENT" REQUIREMENT FOR MISSOURI WORKERS' COMPENSATION JUDICIALLY REPEALED

*Wolfgeher v. Wagner Cartage Service, Inc.*¹

Under the Missouri Workers' Compensation Law,² an employer is liable for the injury or death of an employee that occurs "by accident arising out of and in the course of . . . employment."³ "Accident" is statutorily defined as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury."⁴ Although this statutory definition has not changed since its original enactment, the judicial interpretation of it has wavered.⁵ Originally, Missouri courts liberally construed the term "accident," allowing compensation for injuries incurred in the usual and routine performance of an employee's duties.⁶ In 1941, the Missouri Supreme Court narrowed the definition, conditioning compensation on a showing of abnormal or unusual strain, or a slip or a fall.⁷ This definition was applied strictly so as to preclude compensation for injuries likely to occur in the course of employment.⁸ As a result, courts were forced to draw

1. 646 S.W.2d 781 (Mo. 1983) (en banc).

2. MO. REV. STAT. §§ 287.010-.810 (1978 & Supp. 1983). Workers' compensation provides cash benefits, medical care, and rehabilitation services for those who suffer work-related injuries and diseases. Generally, an employee will not be eligible unless he has suffered "a personal injury by accident arising out of and in the course of employment." *Report of The National Commission on State Workmens' Compensation Laws*, 10 WORKMAN'S COMP. L. REP. (CCH) ch. 1 (1972) [hereinafter cited as *Report*].

3. MO. REV. STAT. § 287.120.1 (1978).

4. *Id.* § 287.020.2 (Supp. 1983).

5. *Wolfgeher*, 646 S.W.2d at 783. The workers' compensation law was originally enacted in 1925. 1925 Mo. Laws 380. Prior to 1980, chapter 287 was cited as "The Workmens' Compensation Law." The official citation was amended in 1980, presumably to make the law gender-neutral. 1980 Mo. Laws 361.

6. *See, e.g.*, Carr v. Murch Bros. Constr. Co., 223 Mo. App. 788, 792, 21 S.W.2d 897, 899 (1929); Drecksmith v. Universal Carloading & Distrib. Co., 18 S.W.2d 86, 88 (Mo. Ct. App. 1929).

7. *State ex rel. Hussman Ligonier Co.*, 348 Mo. 319, 326, 153 S.W.2d 40, 42 (1941).

8. *See, e.g.*, Palmer v. Kansas City Chiefs Football Club, 621 S.W.2d 350, 353 (Mo. Ct. App. 1981); Principe v. Great Atl. & Pac. Tea Co., 618 S.W.2d 284, 285 (Mo. Ct. App. 1981); Gold v. Sharp, Kidde & Webb, 564 S.W.2d 612, 614 (Mo. Ct. App. 1978).

some rather tenuous distinctions to justify awarding or denying compensation.⁹

In *Wolfgeher v. Wagner Cartage Service, Inc.*,¹⁰ the Missouri Supreme Court eliminated the requirement that there be an unusual or abnormal strain as a condition precedent to recovery. Missouri has joined the vast majority of states¹¹ holding that an injury is compensable so long as it is sufficiently job-related.¹² *Wolfgeher* should make the application of the Workers' Compensation Law more uniform, providing compensation for an employee so long as he can prove his job caused the injury, obviating the need to examine with great detail the employee's past work experiences.

Frank Wolfgeher, the claimant, was employed by Wagner Cartage Service (Wagner) as a truck driver and warehouseman. On March 11, 1977, Wolfgeher and co-worker Pierron were delivering a refrigerator as a normal and usual part of their duties. The men strapped the refrigerator onto a two-wheeled hand truck to facilitate the movement of the refrigerator. To reach the kitchen where the refrigerator was to be installed, it was necessary to walk up a short flight of stairs to a landing, turn, and walk up the remaining stairs. Wolfgeher was walking backwards and grasping the hand truck while Pierron was lifting from below, pushing the refrigerator up the stairs.¹³ When they reached the landing, the men had to turn and lift the refrigerator off the ground. Wolfgeher testified that when they lifted the refrigerator, all its weight came back against him. Either as they were negotiating the turn or just

9. If, for example, an employee was injured by the shifting of the contents of a box, compensation was conditioned upon a showing that the contents of similar boxes did not routinely shift when lifted. *Compare* *Springett v. St. Louis Indep. Packing Co.*, 431 S.W.2d 698, 702 (Mo. Ct. App. 1968) (compensation awarded) *with* *Baker v. Krey Packing Co.*, 398 S.W.2d 185, 190 (Mo. Ct. App. 1965) (compensation denied because "according to the claimant, the weight shifted 'almost every time' he handled one of the boxes").

Where an employee was required to use extra force to loosen a jammed object, the compensability of a resultant injury was held to depend upon the frequency with which the extra effort was required. Thus, in *Hall v. Mid-Continent Mfg. Co.*, 366 S.W.2d 57 (Mo. Ct. App. 1963), compensation was denied where the employee had to remove a stuck aluminum strip from a machine by placing a foot on the machine and pulling with both hands, consequently suffering a hernia. "Her method in attempting to loosen the machine was identical with the method used by her on various other occasions over a period of many months." *Id.* at 63, *questioned in Note, Workmen's Compensation—"Accident" Related to Strain—Missouri Courts Apply Narrow Construction*, 29 Mo. L. Rev. 233, 240 (1964). In *State ex rel. United Transp., Inc. v. Blair*, 352 Mo. 1091, 180 S.W.2d 737 (Mo. 1944) (en banc), however, compensation was awarded an employee who suffered a hernia while changing an automobile tire. The lug nut could not be loosened in the normal manner, but required placing a foot on the "pipe" [presumably the wrench]. "Complainant testified that he had changed many tires before that and did not customarily put his foot on the pipe." *Id.* at 1094, 180 S.W.2d at 738.

10. 646 S.W.2d 781 (Mo. 1983) (en banc).

11. See 1B A. LARSON, WORKMEN'S COMPENSATION LAW §§ 38.10-.30 (1982).

12. Job-relatedness is an issue in and of itself. The injury must still arise "out of and in the course of . . . employment." MO. REV. STAT. § 287.120.1 (1978).

13. 646 S.W.2d at 782.

as they had completed the turn and began going up the remaining steps, Wolfgeher felt a sharp pain in his back. At no time, however, did Wolfgeher slip, fall or lose his grip on the hand truck, nor did the refrigerator shift on the hand truck as it was lifted.¹⁴

The Missouri Labor and Industrial Relations Commission (Commission) granted Wolfgeher's claim for compensation.¹⁵ The Commission found that the necessity of lifting the refrigerator to negotiate the turn¹⁶ placed Wolfgeher in an awkward position, subjecting him to an unusual or abnormal strain.¹⁷ Wagner appealed the award to the circuit court, which affirmed the Commission's decision.¹⁸ On appeal, the Missouri Court of Appeals stated that under existing law, it would be compelled to reverse the award.¹⁹ Rather than decide the case, however, the court transferred it to the Missouri Supreme Court to reexamine the law regarding the concept of "accident."²⁰ The supreme court affirmed the judgment of the circuit court,²¹ holding that Wolfgeher did suffer an "accident" within the meaning of section 287.020.2.²²

In interpreting the statutory definition of "accident," courts have been troubled by what constitutes the "unexpected or unforeseen event" required for a compensable injury. Earlier cases held that the event could be the injury itself.²³ Therefore, an employee injured in the normal and usual course of his

14. *Id.*

15. Final Award Allowing Compensation, Injury No. AS-16452 (Labor & Indus. Relations Comm'n, Nov. 19, 1980), *aff'd*, No. CV80-27171 (Cir. Ct. Jackson County Sept. 8, 1981), *aff'd*, 646 S.W.2d 781 (Mo. 1983) (en banc).

16. 646 S.W.2d at 782. The Commission was apparently relying on the testimony of Wolfgeher as to the differences between the delivery in question and those he normally encountered in the course of his duties. Respondent's Brief at 6, Wolfgeher v. Wagner Cartage Serv., No. 33,103 (Mo. Ct. App. June 23, 1982).

17. *Award, supra* note 15, at 3.

18. 646 S.W.2d at 782.

19. Wolfgeher v. Wagner Cartage Serv., Inc., No. 33,103, slip op. at 9 (Mo. Ct. App. June 23, 1982).

20. *Id.* at 13.

21. 646 S.W.2d at 785.

22. MO. REV. STAT. (Supp. 1983).

23. *See, e.g.,* Downey v. Kansas City Gas Co., 338 Mo. 803, 815, 92 S.W.2d 580, 586 (1936) (claimant's contracting of conjunctivitis as a result of gradually getting soot in his eyes while cutting holes in chimneys was "an unexpected and unforeseen event, bearing in mind that the 'event' referred to in the statute may be a result rather than a cause"); Rinehart v. F.M. Stamper Co., 227 Mo. App. 653, 657, 55 S.W.2d 729, 732 (1932) ("The word accident as used in the statute is given the character of an event which is not limited to any single incident or circumstance . . . [and] includes all of the steps or connected incidents from the first cause to the final result."); Lovell v. Williams Bros., Inc., 50 S.W.2d 710, 711 (Mo. Ct. App. 1932) (claimant's hand was injured by several days of digging a ditch using a dull spade); Brewer v. Ash Grove Lime & Portland Cement Co, 223 Mo. App. 983, 988, 25 S.W.2d 1086, 1088 (1930) (where employee was electrocuted by machinery, "the 'event' was the death"); Carr v. Murch Bros. Constr. Co., 223 Mo. App. 788, 792, 21 S.W.2d 897, 899 (1929) ("The 'unexpected or unforeseen event' . . . includes an unexpected or unforeseen event (result) ensuing from a usual and intentional act or movement of the claimant

duties was entitled to compensation, since the injury would logically be unexpected or unforeseen when the employee had previously performed those same duties without incurring injury. In 1941, the Missouri Supreme Court revised the accident definition in *State ex rel. Hussman Ligonier Co. v. Hughes*.²⁴ The claimant in *Hussman* suffered a coronary while carrying a five-gallon bucket of water, weighing about forty-five pounds. He had apparently lifted equivalent weights often in the course of his duties as a carpenter.²⁵ The court denied the claim, stating that the injury itself did not constitute the "event" or "accident."²⁶ Until *Wolfgeher*, Missouri courts applied *Hussman* in a variety of factual situations, but the legal principle employed remained constant: an injury is not an accident in and of itself, but the result of an accident.²⁷ To recover on the basis that an "abnormal or unusual strain" caused the accident, the worker was required to show that: his unusual duties were performed in an unusual manner; the work performed was not the employee's usual task; or

done in the ordinary course of his employment."); *Guilod v. Kansas City Power & Light Co.*, 224 Mo. App. 382, 388, 18 S.W.2d 97, 100 (1929) (employee lifted 100-lb. coil of wire in the usual and customary manner, received hernia).

24. 348 Mo. 319, 153 S.W.2d 40 (1941).

25. *Id.* at 323, 153 S.W.2d at 41.

26. *Id.* at 326, 153 S.W.2d at 42. The decision was premised on *Joyce v. Luse-Stevenson Co.*, 346 Mo. 58, 139 S.W.2d 918 (1940), and *DeLille v. Holton-Seelye Co.*, 334 Mo. 464, 66 S.W.2d 834 (1933), where the court denied compensation to the survivors of employees whose deaths were either hastened or directly caused by the employment. In *DeLille*, the employee suffered a ruptured heart vessel while sawing lumber in his usual duties as a carpenter. The employee had a pre-existing heart condition, such that "death was liable to occur at any time." 334 Mo. at 467, 66 S.W.2d at 835. The court held that the employee's death stemmed from natural causes (a diseased heart), and was not compensable according to the law then in effect, which proscribed compensation for "death due to natural causes occurring while the workman is at work." MO. REV. STAT. § 3305 (1929).

In *Joyce*, the employee died of pneumonia contracted while waterproofing a damp basement. The court denied compensation to his survivors, distinguishing other cases where death induced by pneumonia was deemed compensable on the basis that pneumonia in those cases resulted from either a sudden exposure to cold, e.g., *Rinehart v. F.M. Stamper Co.*, 227 Mo. App. 653, 55 S.W.2d 729 (1932), or an injury of some other nature which weakened the body such that conditions were conducive to the onset of pneumonia, e.g., *Tanner v. Aluminum Castings Co.*, 210 Mich. 366, 178 N.W.69 (1920). According to the court, the disease in *Joyce* resulted from "exposure in the ordinary course of the employee's work." 346 Mo. at 64, 139 S.W.2d at 920. The *Hussman* court seized on the language in *Joyce* to justify its contraction of circumstances under which *any* injury may be compensated: "The event which constitutes an accident is thus clearly a happening or occurrence in part at least external to the body itself. The physiological changes which may result in the workmen's own body are consequences of the accidental event." *Hussman*, 348 Mo. at 325, 153 S.W.2d at 42 (quoting *Joyce*, 346 Mo. at 63, 139 S.W.2d at 920).

27. See *Gold v. Sharp, Kidde & Webb*, 564 S.W.2d 612, 614 (Mo. Ct. App. 1978); *Herring v. Safeway Stores*, 499 S.W.2d 538, 540 (Mo. Ct. App. 1973); *Errante v. Fisher Body Div.*, 374 S.W.2d 521, 523 (Mo. Ct. App. 1964); *Palmer v. Knapp-Monarch Co.*, 247 S.W.2d 341, 344 (Mo. Ct. App. 1952); *Kendrick v. Sheffield Steel Corp.*, 166 S.W.2d 590, 593 (Mo. Ct. App. 1942).

some other unexpected source of strain produced the injury.²⁸ In addition, a worker could be compensated for injuries received in the usual course of employment if the injury was preceded by a slip or fall.²⁹

The simplicity of the "job-related" standard is perhaps the most attractive result of *Wolfgeher*. Compared to the complexity of the accident requirement, an award premised upon a causal connection between the work performed and the injury sustained should be easier to determine, and thus reduce litigation of workers' compensation claims.³⁰

The majority in *Wolfgeher* criticized the accident requirement on the grounds that while ordinary injuries must be preceded by an accident to be compensable, there is no such requirement for an occupational disease.³¹ The Court deemed it "inconsistent and inequitable to deny compensation for [an] injury, but to allow compensation for an occupational disease or illness"³² when no accident occurred.³³

28. *Palmer v. Kansas City Chiefs Football Club*, 621 S.W.2d 350 (Mo. Ct. App. 1981). Palmer was injured when thrown off balance while executing a trap block in a professional football game. The court of appeals reversed an award, finding that: being thrown off balance was a customary occupational event and therefore did not form the basis for a claim that an accident occurred through the unusual performance of his usual duties; injury is a normal incident of professional football, and therefore, Palmer's injury could not have been unexpected or unforeseen as required by MO. REV. STAT. § 287.020.2 (Supp. 1983). For an excellent criticism of *Palmer*, see 1B A. LARSON, *supra* note 10, at 8-10 (Supp. 1983).

29. A slip or fall fits neatly within what is commonly perceived as an "accident." There was no requirement, however, that an accident be preceded by a slip or fall. *Crow v. Missouri Implement Tractor Co.*, 307 S.W.2d 401, 405 (Mo. 1957) (en banc). *Crow* overruled several decisions which had held that absent a slip or fall, an abnormal strain could not be classified as an accident. *Crow v. Missouri Implement Tractor Co.*, 301 S.W.2d 423, 426 (Mo. Ct. App. 1957); *Howard v. St. Louis Indep. Packing Co.*, 260 S.W.2d 844, 845 (Mo. Ct. App. 1953); *Palmer v. Knapp-Monarch Co.*, 247 S.W.2d 341, 344 (Mo. Ct. App. 1952); *Kendrick v. Sheffield Steel Corp.*, 166 S.W.2d 590, 593 (Mo. Ct. App. 1942). These decisions appear to have been grounded in the requirement that the event constituting the accident be "a happening or occurrence in part at least external to the body itself." *Joyce v. Luse-Stevenson Co.*, 346 Mo. 58, 63, 139 S.W.2d 918, 920 (Mo. 1940). An abnormal strain unaccompanied by some mishap was deemed solely internal to the body, and therefore not compensable.

30. See *Domrese & Graham, Workmen's Compensation in Missouri*, 19 ST. LOUIS U.L.J. 1 (1974). Although claims for compensation have been rejected for failure to meet the accident requirement in less than one percent of all cases, the majority of cases which were not settled by the division of workmen's compensation and required litigation focused on a denial of compensation on the grounds that there was no "accident" preceding the employee's injury. *Id.* at 6.

31. 646 S.W.2d at 785; see MO. REV. STAT. § 287.067 (Supp. 1983).

32. 646 S.W.2d at 785.

33. In at least one case, *Collins v. Neevel Luggage Mfg. Co.*, 481 S.W.2d 548 (Mo. Ct. App. 1972), the employee succeeded in having an injury that was induced by repeated flexing of her hands classified as an occupational disease, thereby circumventing the accident requirement which would have likely barred her claim had she asserted it as stemming from an ordinary industrial injury. The court stated that a disease is occupational if it naturally follows from exposure to an occupational risk (a

Wolfgeher advances the policy behind shifting the burden of compensating work-related injuries from the employee to industry.³⁴ Workers' compensation law is to "be liberally construed with a view to the public welfare."³⁵ The law is supposed to extend its benefits to the largest possible class, with any doubts as to the right to compensation to be resolved in favor of the injured employee.³⁶ Pre-*Wolfgeher* decisions denying compensation are inconsistent with these objectives. The underlying theory of workers' compensation is that industry, and ultimately the consuming public, should bear the burden for injuries sustained in the course of performing labor which contributes to the economic progress of society.³⁷ If the employee is rendered incapable of working by reason of his injuries, he and his family will likely become dependent upon society. A system that does not shift losses stemming from work-related injuries to the employer is probably not fulfilling its functions.

Dissenting in *Wolfgeher*, Judge Welliver outlined one disadvantage to such a broad, policy-based reading of the workers' compensation law.³⁸ He stated that the increased employer costs associated with the majority's ap-

peculiar risk or hazard which inheres in the work conditions), where the exposure is greater or different than that faced by the general public. *Id.* at 552. This view would seem to permit recovery for injuries sustained gradually while performing normal duties, even where the injury results from a trauma or series of traumas, *e.g.*, repeated lifting or jarring, rather than the systematic inhalation or absorption of harmful fumes or chemicals into one's body, circumstances which lead to what is traditionally considered to be an occupational disease. *See, e.g.*, *Skinner v. Dawson Metal Prod.*, 575 S.W.2d 935, 943 (Mo. Ct. App. 1978); *Gaddis v. Rudy Patrick Seed Div.*, 485 S.W.2d 636, 639 (Mo. Ct. App. 1972).

The inconsistency alleged by the Supreme Court in *Wolfgeher* may have a reasonable explanation. To require an occupational disease to be caused by an accident would defeat nearly *all* claims for compensation stemming from an occupational disease. A disease is rarely caused by "an unexpected or unforeseen event happening suddenly and violently," MO. REV. STAT. § 287.020.2 (Supp. 1983), but by a gradual process. It would usually be impossible to show that an occupational disease was caused by an accident. Industrial injuries are frequently the result of accidents, even under the pre-*Wolfgeher* construction of that term.

34. 646 S.W.2d at 783 (citing *Alexander v. Pin Oaks Nursing Home*, 625 S.W.2d 192, 193 (Mo. Ct. App. 1981)). *See generally Report, supra* note 2, ch. 1 (the objectives of workers' compensation).

35. MO. REV. STAT. § 287.800 (1978). *See generally* Howard, *Judicial Review of Findings and Awards of the Missouri Workmen's Compensation Commission 78-95 (1933)* (unpublished manuscript available in University of Missouri-Columbia Law School Library) (attitude of Missouri courts in construing workers' compensation law).

36. 646 S.W.2d at 783 (citing *Greer v. Department of Liquor Control*, 592 S.W.2d 188, 193 (Mo. Ct. App. 1979)).

37. *Smith v. Home Building Contractors*, 363 S.W.2d 11, 14 (Mo. Ct. App. 1962). The National Commission on State Workmen's Compensation Laws has recommended the elimination of the "accident" requirement, reasoning that it is an undesirable bar to compensation for injuries that are "clearly work-related." *Report, supra* note 2, at R2.1.

38. 646 S.W.2d at 786 (Welliver, J., dissenting).

proach will discourage industry from locating in Missouri.³⁹ This argument is not compelling enough to overcome the public policy promoted by the *Wolfgeher* decision. Workers' compensation laws are designed to protect the individual worker, even if this protection is at the expense of the general public, because in the long run, society benefits from an expansive application of these laws.⁴⁰

The most troubling aspect of *Wolfgeher* is the extent to which it usurps the function of the legislature. The Workers' Compensation Law is essentially a creation of the legislature, providing an employee with an exclusive remedy so long as an employment relationship exists and the injury arises out of and in the course of employment.⁴¹ The legislature intended the law to be a substitute for, not a supplement to common-law remedies.⁴² Realizing this, the Missouri courts had been reluctant to effect any substantial changes in interpretation that might be taken as an unwarranted judicial interference. In light of recent legislative activity, or the lack thereof, respecting the accident requirement, *Wolfgeher* represents such an interference.

The Workmens' Compensation Law underwent major revisions during the 1974 session of the General Assembly.⁴³ The original bill included a provision to repeal the accident requirement.⁴⁴ The bill was opposed, however, by business interests within the state, and after considerable debate the accident re-

39. *Id.* This argument is speculative at best. The effect on employer locations must be figured in terms of increased insurance premiums, since most employers insure against compensation awards. Compared to their counterparts in other states, Missouri employers pay low rates. Measured in average weekly adjusted manual rates, in 1978 Missouri employers paid less than employers in 42 states. Elson & Burton, *Worker's Compensation Insurance: Recent Trends in Employer Costs*, MONTHLY LAB. REV., Mar. 1981, at 45, 47. These figures hardly support the conclusion that rates are already "oppressive." 646 S.W.2d at 786 (Welliver, J., dissenting). Statistically, it would be virtually impossible to measure the effects of a change in the scope of the law on employer locations. If there is a correlation, it has not deterred the legislature from generally expanding the scope of the workers' compensation laws. See Tinsley, *Workers' Compensation in 1980: Summary of Major Enactments*, MONTHLY LAB. REV., Mar. 1981, at 51, 55.

40. 646 S.W.2d at 786.

[W]hen the individual health, safety and welfare are sacrificed or neglected, the state must suffer. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. . . . [L]aws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they probably may be regarded as coming within the category of police regulation.

6 W. SCHNEIDER, WORKMENS COMPENSATION TEXT 6 (1941) (quoting Val Blatz Brewing Co. v. Gerard, 201 Wis. 474, 478-79, 230 N.W. 622, 624 (1930)).

41. MO. REV. STAT. § 287.120 (1978).

42. See Sheen v. DiBella, 395 S.W.2d 296, 298 (Mo. Ct. App. 1965).

43. H.C.S.S.S.B. 417, 77th Gen. Assembly, 2d Reg. Sess., 1974-75 Mo. Laws 853-65.

44. S.B. 417, 77th Gen. Assembly, 2d Reg. Sess. (1974).

quirement was left untouched.⁴⁵

Since 1974, there have been several unsuccessful attempts to either eliminate the accident requirement of section 287.120.1 or modify the definition of accident contained in section 287.020.2. All have either died in committee or emerged from committee with a "do pass" recommendation, but never reached the floor for a vote.⁴⁶

The consideration and subsequent rejection of any attempt to change the accident requirement supports the inference that the legislature approved prior judicial constructions of the law. It may be presumed that the legislature was aware of the prevailing interpretation given section 287.020.2 when it decided to retain the statute as found in 1974 and subsequent years.⁴⁷ It would therefore appear that the Court overstepped its authority in broadening the law to allow compensation for virtually any injury sustained in the course and scope of one's employment.

It may be argued that the Court was simply providing an interpretation or construction⁴⁸ of an ambiguous statute.⁴⁹ By allowing compensation any-

45. See Domrese & Graham, *supra* note 30, at 1. The paucity of Missouri legislative history makes it difficult to ascertain precisely the rationale employed. The economic concerns voiced by Judge Welliver in *Wolfgeher*, 646 S.W.2d at 786 (Welliver, J., dissenting), played a major role in the debate. In any event, the attempt to repeal the accident requirement received a great deal of legislative attention. An analysis of the Senate and House Journals from the 1974 sessions reveals that the full House adopted an amendment to H.C.S.S.S.S.B. 417 which would have deleted the phrase "by accident" from § 287.120.1, so that an employer would have been liable to furnish compensation "for personal injury or death of the employee arising out of and in the course of his employment." II House Journal, 77th Gen. Assembly 1541-42 (1974). The Senate did not concur, so the bill was sent to conference. The conferees recommended that H.C.S.S.S.S.B. 417, as amended, be adopted as passed by the House, with the exception of two amendments. One related to employer's liability for occupational diseases. The other was the amendment removing the accident requirement from § 287.120.1. *Id.* at 1608-10. The accident requirement was thus left intact, with the final version of the bill passing the House and Senate. Governor Bond signed the bill on May 28, 1974.

46. See H.B. 1421, 78th Gen. Assembly, Reg. Sess. (1976). The purpose of this bill was to remove the accident requirement from the Workmen's Compensation Law. The House Committee on Workmen's Compensation recommended that the bill pass, but the bill was never considered on its merits by the full House, a motion to make the bill a special order of business having failed 69-58. The purpose of S.B. 406, 78th Gen. Assembly, 1st Reg. Sess. (1977) was to modify the definition of "accident." The bill, which died in the Senate Committee on Labor and Management Relations, S.B. 943, 79th Gen. Assembly, 2d Reg. Sess. (1978), would have prescribed that "accident" would include all injuries sustained within the scope of employment. The bill died in the Senate Committee on Workmen's Compensation and Employment Security. Other bills pertaining to Workers' Compensation have been introduced since 1978, but it is not clear whether any attempted to abrogate the accident requirement.

47. *Gross v. Merchants-Produce Bank*, 390 S.W.2d 591, 597 (Mo. Ct. App. 1965).

48. The majority in *Wolfgeher* also spoke in terms of "construction" through the opinion.

49. Although § 287.020.2 may be ambiguous in that the "unexpected or unforeseen event" required for an accident could be construed to mean the injury itself, this

time the injury is "job-related," however, the court has repealed the accident requirement. Theoretically, the judiciary is forbidden to usurp legislative functions, or under the guise of liberal construction, rewrite lawfully enacted statutes.⁵⁰ While the purposes and policies of the Workers' Compensation Law are likely served by *Wolfgeher*,⁵¹ "judicial deference to the underlying purpose may be bought at too high a price. . . . An interpretation that requires the judge to depart too far from the words of a statute introduces an intolerable uncertainty into the meaning of the statute. . . ."⁵²

This uncertainty is engendered in the decisions appearing after *Wolfgeher*.⁵³ Although sections 287.020.2 and 287.120.1 are explicit as to the requirements of a compensable injury, it has become evident that the concept of "accident" no longer has a place in Missouri workers' compensation law. Although lip service is paid to the accident requirement in *Wolfgeher*⁵⁴ and subsequent decisions,⁵⁵ the job-related standard of *Wolfgeher* is now the law.

For example, *Wynn v. Navajo Freight Lines, Inc.*⁵⁶ involved a truck driver who suffered a heart attack while making his usual run on what was described as "a particularly hot day."⁵⁷ Despite evidence that the claimant was not in good shape, did not take good care of himself, and had a pre-existing heart condition, the court held that his heart attack was sufficiently job-related⁵⁸ to

interpretation becomes strained when viewed in conjunction with § 287.120.1, which sets out the conditions under which an employer is liable. Interpreting "accident" to mean "injury," § 287.120.1 would read as follows: "Every employer subject to the provisions of this chapter shall be liable . . . to furnish compensation . . . for personal injury or death of the employee by *injury* arising out of and in the course of his employment. . . ."

The debate over the judicial role in construing workers' compensation laws is not new. It was most visible in discussions concerning the legitimacy of Supreme Court decisions construing the Federal Employers Liability Act, 45 U.S.C. § 51 (1982). For a discussion of the propriety of the Court's role in broadly construing the Act to allow employee recovery, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 32-35 (1982).

50. See *Brant v. Brant*, 273 S.W.2d 723, 736 (Mo. Ct. App. 1954); MO. CONST. art. 2, § 1. *But cf.* *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 583, 83 N.W.2d 614, 615 (1957) (broadening judicial constructions of "accident" justified in that a court "has inherent power to purge itself of its own errors").

51. 646 S.W.2d at 785.

52. Coffman, *Essay on Statutory Interpretation*, 9 MEM. ST. U.L. REV. 57, 83 (1978).

53. *Wynn v. Navajo Freight Lines, Inc.*, 654 S.W.2d 87, 89 (Mo. 1983) (en banc); *Matthews v. Roadway Express, Inc.*, 660 S.W.2d 768, 771 (Mo. Ct. App. 1983); *Davis v. Butler Mfg. Co.*, 659 S.W.2d 523, 524 (Mo. Ct. App. 1983); *Kinney v. City of St. Louis*, 654 S.W.2d 342 (Mo. Ct. App. 1983).

54. 646 S.W.2d at 783.

55. See, e.g., *Matthews*, 660 S.W.2d at 771; *Kinney*, 654 S.W.2d at 343.

56. 654 S.W.2d 87 (Mo. 1983) (en banc).

57. *Id.* at 88 n.1.

58. The Court based its finding of job-relatedness on the statement of the admin-

support an award of compensation.⁵⁹

In *Kinney v. City of St. Louis*,⁶⁰ the claimant sought benefits for the death of her husband, who fell while getting a drink of water at his place of employment. Death was caused by a hematoma in the subarachnoid space adjacent to both the right and left temporal areas of the brain. Compensation turned on whether the hematoma resulted from an idiopathic weakness, in which case compensation would be denied, or from a trauma (the fall or the resulting skull fracture), in which case compensation would be granted "if the trauma were a rational consequence of a hazard to which decedent's employment exposed him."⁶¹ Because the claimant could not prove that the hematoma was *clearly* job-related,⁶² compensation was denied.⁶³

The claimant in *Davis v. Butler Manufacturing Co.*⁶⁴ was awarded compensation for a back injury sustained while lifting doors onto a table about three feet high.⁶⁵ The court of appeals reversed the Commission,⁶⁶ which had denied the claim because the event that constituted the alleged accident did

istrative law judge that driving the truck on the day in question was an "efficient, exciting, superinducing, concurring, or contributing cause of death." *Id.* at 89. The administrative law judge had originally denied the claim for failure to prove an accident or unusual strain as required prior to *Wolfsgeher*. *Id.* at 88.

59. *Id.* at 89-90. The *Wolfsgeher* job-related standard places the focus in workers' compensation cases on the issue of causation. Because of the difficulty in establishing causation in heart attack cases, where the stress that induces the injury may come from any number of sources, the dissenters in *Wynn* advocated a special test for heart attack cases. *Id.* at 90; see 1B A. LARSON, *supra* note 10, § 38.83, at 7-233. Larson's test requires a two-step analysis. First, it must be determined whether the employee had a pre-existing heart condition or disease. If not, then compensation would generally be granted so long as the exertion was job-related and was the medical cause of the heart attack. If the employee had a history of heart problems, then the stress alleged to be the cause of the heart attack must be compared with the stress encountered by the average person. If the exertion exceeds that encountered in everyday life, then the heart attack was legally caused by the employment. For example, a person who lifts 200-lb. weights as part of his usual employment would be compensated for a resulting heart attack, since the exertion was greater than that normally undertaken in any person's nonemployment life. But a person who suffers a heart attack while engaged in the routine lifting of 20-lb. weights while on the job may or may not be entitled to compensation, depending on whether he has a history of heart trouble. If he does not, compensation would be allowed since the exertion was job-related and could be medically proven to have caused the heart attack. If the employee *does* have a pre-existing heart condition, however, compensation would probably be denied, since the lifting of 20-lb. objects is a routine part of most person's lives. *Id.* at 7-238.

The Missouri Supreme Court explicitly rejected Larson's test, or any other test for heart attack cases. *Wynn*, 654 S.W.2d at 90. The Court chose to maintain uniformity by applying the "job-related" test of *Wolfsgeher*.

60. 654 S.W.2d 342 (Mo. Ct. App. 1983).

61. *Id.* at 342-43.

62. *Id.* at 344; see 646 S.W.2d at 785.

63. *Kinney*, 654 S.W.2d at 342.

64. 659 S.W.2d 523 (Mo. Ct. App. 1983).

65. *Id.* at 523.

66. *Id.* at 525.

not produce at the time objective symptoms of an injury, one element of the pre-*Wolfgeher* accident requirement.⁶⁷ Applying the *Wolfgeher* standard, the court found that the claimant's injury was job-related.⁶⁸

In *Matthews v. Roadway Express, Inc.*,⁶⁹ the claimant was loading large drums, with the aid of a dolly, into a trailer when he suddenly became nauseous. Not wanting to get sick inside the trailer, he stepped onto the adjacent loading dock. Apparently dizzy, he fell off the dock onto the ground about four feet below. As a result of the fall, he suffered injuries, including substantial hearing loss, for which he sought compensation.⁷⁰ Because the claimant never contended that his employment caused his dizziness and no other explanation for the dizziness was offered,⁷¹ his claim was denied.⁷²

The full impact of *Wolfgeher* is illustrated in *Wynn v. Navajo Freight Lines, Inc.*⁷³ In *Wynn*, the employee was performing his usual duties when stricken by a heart attack. Although he was driving his empty trailer on a hot day,⁷⁴ it would be difficult to classify this condition as so out of the ordinary such that an "unusual or abnormal strain" resulted.⁷⁵

It is doubtful that compensation would have been awarded in either the *Kinney* or *Matthews* case, regardless of the outcome in *Wolfgeher*. Even if the claimants in those cases had been able to prove an "accident," they would still have been forced to show that the death and injury arose "out of" the employment,⁷⁶ and that there was a causal connection between the conditions under which the work was required to be performed and the resulting injury.⁷⁷ Because the claimants did not sustain their burdens of proving that the death and injury arose out of employment,⁷⁸ their claims would have failed.

According to the court in *Davis*, there was no dispute that the claimant's

67. *Id.*

68. *Id.* Despite this finding, the Court remanded the case to the Commission to determine whether there was a causal connection between the injury and the claimant's disability. *Id.* It is difficult to ascertain exactly what was meant by this mandate. Perhaps the court did not believe that the injury caused *Davis* to be unable to work for as long as she claimed, apparently about five months. *Id.* at 524.

69. 660 S.W.2d 768 (Mo. Ct. App. 1983).

70. *Id.* at 769-70.

71. *Id.* at 770. *Matthews'* claim was also denied by the administrative law judge and the Commission on the grounds that he failed to show that an accident precipitated the fall or that special hazards connected with employment made compensable an otherwise uncompensable idiopathic fall. *Id.*

72. *Id.* at 772.

73. 654 S.W.2d 87 (Mo. 1983) (en banc).

74. *Id.* at 88 n.1. Apparently, driving an empty trailer produces a bumpier, jarring ride. According to the claimant, the ride was "beating him to death." *Id.*

75. This was the theory upon which *Wynn's* widow originally brought her claim. It was rejected by the administrative law judge, the circuit court, and the court of appeals. Only the Commission accepted this theory of "accident." *Id.* at 88.

76. MO. REV. STAT. § 287.120.1 (Supp. 1983).

77. *Morgan v. Duncan*, 361 Mo. 683, 686-87, 236 S.W.2d 281, 283 (1951).

78. *Francis v. Sam Miller Motors*, 282 S.W.2d 5, 12 (Mo. 1955).

injury was brought by lifting and flipping doors.⁷⁹ The employer denied that this crucial issue was undisputed,⁸⁰ however, contending that if this were so, the claimant's injury would have been compensable both before and after *Wolfgeher*.⁸¹ Assuming that the claimant's injury was caused by her employment, she would likely have been denied compensation but for *Wolfgeher*,⁸² regardless of causation. The employee did not begin experiencing pain until one to three hours after she arrived home from work on the day in question.⁸³ Because the event which brought on the injury did not "at the time" produce "objective symptoms of an injury,"⁸⁴ the pre-*Wolfgeher* accident requirement would not have been met.⁸⁵

Until the supreme court addresses the contradictions between *Wolfgeher* and sections 287.020.2 and 287.120.1, or until the legislature acts on this matter,⁸⁶ an injury arising out of and in the course of employment is compensable so long as it can be shown that the employment caused the injury. If a causal connection is required between the conditions under which work is performed and a resulting injury to show that the injury arose "out of" the employment,

79. 659 S.W.2d at 525.

80. Suggestions In Support Of Motion For Rehearing Or, In The Alternative, Application To Transfer To Supreme Court Of Missouri at 1, *Davis v. Butler Mfg. Co.*, No. 34,024 (Mo. Ct. App. Aug. 2, 1983).

81. *Id.* The claimant in *Davis* was normally an unload operator in Butler's paint department. At the time she allegedly suffered her injury, she was on loan from her department to one assembling metal doors. 659 S.W.2d at 524. This is clearly one circumstance under which an "abnormal or unusual strain" could be found.

82. *Davis'* claim was originally denied by the administrative law judge and the Commission for failure to establish that an accident caused her injury. *Id.* at 523.

83. *Id.* at 524.

84. MO. REV. STAT. § 287.020.2 (1978).

85. Although the employer had stated that the injury would have been compensable if causation were shown, *see* text accompanying note 81 *supra*, it also raised the failure to meet the statutory requirements for a compensable injury as grounds for denying compensation. Motion For Rehearing Or, In The Alternative, Application To Transfer To Supreme Court Of Missouri at 1, *Davis*. It appears that the employer was attempting to force the court to address the tension which exists between §§ 287.020.2, .120.1, and the holding in *Wolfgeher*. The court of appeals would not consider this issue, however, and overruled the employer's motion for rehearing and denied its application for transfer on September 27, 1983. Application For Transfer Of Cause From the Missouri Court of Appeals (Western District) To The Supreme Court Of Missouri at 1, *Davis v. Butler Mfg. Co.*, No. 65,439 (Mo.) filed Oct. 11, 1983.

Davis would have been an ideal case for the Supreme Court to decide; the case would have given the court an opportunity to define the bounds of *Wolfgeher*. It was obvious in *Davis* that at least one element of the accident requirement was missing. The Court would have been forced to reconcile the *Wolfgeher* job-related standard with the result in *Davis*, where the *statutory* requirement of a compensable injury was clearly not met. As stated by the employer, "[a]s long as the legislature keeps the word 'accident' as requirement for compensation, it must be given some meaning." *Suggestions, supra* note 80 at 5.

86. *Cf.* 1978 Mo. Laws 983 (codified at MO. REV. STAT. § 537.060 (1978) (legislature overruled *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977) (en banc), which abrogated common law of sovereign immunity).

it would be splitting hairs to require a different standard for determining whether an injury is job-related. In other words, the compensability of an injury under *Wolfgeher* turns on whether it arises "out of" the employment, and cases construing that term will determine the compensability of injuries after *Wolfgeher*.

As for the accident requirement, statements that a compensable injury must be preceded by an accident⁸⁷ are probably nothing more than an attempt to at least give mention to a concept that, though still found in the statutes of Missouri, no longer has life.

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87. "The fact of an injury having occurred does not, taken alone, constitute an accident within the meaning of the statute. . . . To establish a right to compensation, employee must prove both an accident and an injury, i.e., the unexpected event and the resultant trauma." *Wolfgeher*, 646 S.W.2d at 783. This statement is likely to cause as much confusion as the holding of *Wolfgeher* itself. Employers and insurers will cite this dictum to show that despite *Wolfgeher*, there is still an accident requirement. Nevertheless, the *Wolfgeher* holding cuts against this argument. The court in *Matthews*, 660 S.W.2d 768 (Mo. Ct. App. 1983), cited the above-quoted passage as authority for the proposition that the accident requirement still exists. In *Kinney*, 654 S.W.2d at 343, the court spoke of the claimant's failure to prove that her husband's death was accidental. In both of these cases however, it was just as likely that the injury and death stemmed from natural causes, which are the antithesis of "accident" as it is commonly understood.

Courts may continue to require an "accident" before an injury is compensable, and demand that the injury result from external forces rather than a condition peculiar to the individual. This does nothing more than require the claimant to show that the injury was job-related. Despite the dictum of *Wolfgeher*, there is no longer an accident requirement as envisioned by § 287.020.2.