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Have Another Round on Me: Missouri Court Awards Workers' Compensation Benefits to Intoxicated Employees

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Have Another Round on Me: Missouri Court Awards Workers' Compensation Benefits to Intoxicated Employees

Smith v. District II A & B[1]

I. INTRODUCTION

The history of the Missouri workers' compensation statute is long and varied. The movement toward a compensation statute began narrowly and slowly, in response to harsh criticism. The Missouri legislature and courts have molded and changed it over the years to fit the needs of Missouri's workers.

This Note examines the broadened application of Missouri's workers' compensation statute under *Smith v. District II A & B*, in which the Missouri Court of Appeals awarded workers' compensation benefits to a worker injured when he drove from a work function while intoxicated. By awarding workers' compensation benefits to cover illegal conduct such as illegally driving while intoxicated, Missouri courts are violating legislative intent, violating the historical purpose of workers' compensation, and potentially hurting the society the legislature sought to unburden when it created a compensation scheme for injured workers.

II. FACTS AND HOLDING

Terry Dale Smith, a resident of Kirkwood, Missouri, in St. Louis County, traveled to Kansas City to conduct business for his employer, District II A and B American Maritime Officers, in his capacity as a union representative.[2] While in Kansas City, Smith was involved in a vehicle/train wreck, when his car skidded off a road and ran into a parked train.[3] Smith spent three days in the hospital and suffered a severe fracture of his right femur, requiring multiple surgeries from trauma suffered in the accident.[4] As a result of the injuries he suffered in the accident, Smith filed a workers' compensation claim against his employer's insurance carrier, Fireman's Fund Insurance Company.[5]

The purpose of Smith's trip to Kansas City was to meet with union members employed by Penske Logistics and persuade them to maintain their

1. 59 S.W.3d 558 (Mo. Ct. App. 2001).
2. *Id.* at 560.
3. *Id.* at 561.
4. *Id.*
5. *Id.*

relationship with Smith's employer.[6] After a full day of meetings, Smith accompanied some of the managers at Penske to the Argosy Casino to continue their discussions.[7] While discussing matters with the Penske managers, Smith drank two Bloody Marys.[8] Smith and a Penske payroll clerk remained at the casino and continued to drink, after the Penske managers left.[9] Smith eventually left the casino, and attempted to drive back to his hotel where he had arranged to stay the night.[10]

As he exited the casino parking lot, Smith mistakenly turned onto an outer road, which he mistook to be a highway access road.[11] While he drove on the outer road, Smith used his cellular phone to check his voice mail messages.[12] When the road curved ninety degrees, Smith skidded off the road and down an embankment, hitting a parked train.[13] The highway patrol accident report estimated Smith's accident occurred at 10:45 p.m.[14] The report indicated "drinking" as a probable contributing circumstance of the accident, and lab results showed Smith's blood alcohol content after the accident was .15%.[15] When a patrolman asked Smith for his name, Smith replied "Dale Earnhardt."[16] Smith was taken by ambulance to the hospital, where his blood alcohol content was again tested, this time resulting in .169% blood alcohol content.[17] Smith pleaded guilty to charges of driving under the influence, and his driving privileges were suspended.[18]

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6. The Penske union members had filed for decertification of District II A and B's union. Smith intended to speak with the union members at Penske regarding the issues that had precipitated the filing of the decertification. *Id.* at 560-61. In an effort to demonstrate his employer's effective representation and to retain his employer's status as the designated union for the Penske union members, Smith hoped to discuss the union members' issues and problems with Penske management in order to resolve any problems and differences between the management and union members. *Id.*

7. *Id.* at 561.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* In Missouri, the legal blood alcohol content limit is 0.08%. MO. REV. STAT. § 302.505.1 (2000 & Supp. 2001).

16. *Smith*, 59 S.W.3d at 561.

17. *Id.*

18. *Id.*

Smith filed a workers' compensation claim against his employer.[19] The administrative law judge ("ALJ") denied the claim, finding that Smith's injuries "did not arise out of and in the course of his employment."[20] The ALJ ruled that Smith was incapable of serving his employer's interests at the time of the accident and, therefore, not entitled to workers' compensation benefits based on the determination that Smith's trial testimony was not credible,[21] the highway patrol accident report, Smith's blood alcohol level, and his guilty plea to the charge of driving under the influence.[22] The Missouri Labor and Industrial Relations Commission ("Commission") reversed the ALJ's ruling and granted Smith workers' compensation benefits for the injuries he suffered in the accident.[23] The Commission determined that the accident was a result of Smith's unfamiliarity with the area, excessive driving speed, and fatigue, rather than a result of his intoxication.[24] The Commission disagreed with the ALJ's finding that Smith's testimony was not credible, and was satisfied with the explanation Smith gave regarding his inconsistent statements.[25]

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19. *Id.*

20. *Id.*

21. The ALJ concluded that Smith's trial testimony was not credible because during Smith's cross-examination, Smith admitted that during his discovery deposition on June 8, 1999, he testified he was unable to remember anything from the time the Penske managers left him at the casino until the time of the accident. *Id.* at 564. Additionally, the ALJ found Smith's testimony regarding losing consciousness after the accident not credible. *Id.* The medical records made by personnel at the hospital the night of the accident indicated that Smith said he never lost consciousness after the accident. *Id.*

22. *Id.*

23. *Id.* at 561.

24. *Id.* at 563. An employee's intoxication does not bar an employee's recovery under workers' compensation unless it was impossible for the employee to physically and mentally engage in employment at the time of the accident. *Id.* (citing Gee v. Bell Pest Control, 795 S.W.2d 532, 536 (Mo. Ct. App. 1990) (holding that it is a question of fact for the Commission whether an employee was able to physically and mentally engage in employment)).

25. *Id.* at 563, 564. Smith testified that he was unprepared for the deposition, and was, therefore, unable to recall the events after the Penske managers left him at the casino. *Id.* at 564. He claimed his memory had improved between the time of the deposition and the trial because he had time to think and remember the specific events of the evening. *Id.* The Commission found Smith's explanation to be credible and stated that it was possible that an individual's memory might improve over time after a traumatic accident, when a person had time to think back on the events. *Id.* The Commission also accepted a physician's testimony explaining that Smith's inconsistent in-court testimony and the statement recorded in the medical record might have been a result of the pain of Smith's injuries. *Id.* Further, pain medication may have contributed to incorrect statements regarding whether he lost consciousness. *Id.*

On appeal to the Missouri Court of Appeals for the Western District of Missouri, Smith's employer argued that Smith was so intoxicated that his mind was a "total blank," leaving him unable to further his employer's business; therefore, the accident did not occur within the course and scope of Smith's employment.[26] Smith's employer claimed the Commission erred when it failed to find as a matter of law that the accident did not arise out of and in the course of Smith's employment; although his job required him to drive a car, at the time of the accident he was illegally driving with a blood alcohol content exceeding the legal limit.[27] Lastly, Smith's employer contended that because Smith deviated from and did not return to the employer's business, the accident was not within the scope or course of his employment.[28] The court did not find sufficient merit in any of the employer's arguments on appeal, and found that there was substantial and competent evidence in the record to support the Commission's findings.[29]

Having found sufficient support in the record for the Commission's ruling, the court determined there was no error in finding that Smith's accident occurred within the course and scope of his employment. The court held that the fact that an employee is intoxicated during an accident does not necessitate a finding that the employee was acting outside the scope and course of his employment and, thus, does not automatically bar recovery under workers' compensation.

III. LEGAL BACKGROUND

A. The Development of Workers' Compensation Law

Near the end of the nineteenth century, state legislatures began considering the need for workers' compensation statutes in response to the increase in work-related industrial accidents and the inadequacies of the tort system in protecting workers injured in such accidents.[30] In theory, traditional tort law negligence claims should have provided compensation to injured workers.[31] Under the tort

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26. *Id.* at 561-62. Additionally, Smith's employer appealed the Commission's rejection of the ALJ's findings regarding the credibility of Smith's testimony. *Id.* at 562.

27. *Id.*

28. *Id.*

29. *Id.* at 563-67. The standard of review for an appellate court in a workers' compensation case allows the court to review only the findings and award of the Commission, not of the ALJ. *Id.* at 562. The court reviews only questions of law, and the findings and award need only be supported by competent and substantial evidence and not be against the weight of the evidence. *Id.*; *see infra* note 105.

30. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 52 (1967).

31. *Id.*

met with growing hostility by both courts and legislatures.[54] Moreover, both courts and employers were anxious to avoid the time and expense that accompanied industrial accident litigation, not to mention the conflicts the current law created in the employer and employee relationship.[55]

The first workers' compensation statutes emerged in response to the injustice the industrial worker suffered when the courts applied common law negligence defenses such as the fellow-servant rule and contributory negligence.[56] The major difference between these statutes and the common law was that the statutes did away with fault and negligence.[57] The statutes created a form of strict liability, requiring an employer to compensate workers for work-related injuries regardless of fault.[58]

As state legislatures began to consider workers' compensation statutes, they found that the costs were no greater under the workers' compensation systems compared with the existing common law system.[59] Many of the states' workers' compensation systems had common characteristics.[60] For instance, many limited an employer's liability beyond compensation for work-related injuries.[61] Most statutes included a simple and inexpensive procedure for settling an injury claim and determining the compensation amount.[62] The compensation amount was typically determined by a preset schedule which limited the amount an injured worker could recover.[63] The award amounts were viewed and measured as compensatory, not punitive, and were intended to compensate the worker's loss of earning power.[64] By limiting awards to the replacement of lost earning power, the legislators intended to discourage false and prolonged claims, while providing adequate replacement income and incentive to employers to implement safety measures.[65] The goal of the workers' compensation statutes was to balance both the workers' and management's interest in accident liability.[66]

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54. Friedman & Ladinsky, *supra* note 30, at 63.

55. Friedman & Ladinsky, *supra* note 30, at 63, 65.

56. 82 AM. JUR. 2d. *Workers' Compensation* § 1, at 27 (1992).

57. *Id.*; Friedman & Ladinsky, *supra* note 30, at 71.

58. 82 AM. JUR. 2d *Workers' Compensation* § 1, at 28 (1992).

59. Friedman & Ladinsky, *supra* note 30, at 70.

60. Friedman & Ladinsky, *supra* note 30, at 71; 82 AM. JUR. 2d. *Workers' Compensation* § 1, at 30 (1992).

61. 82 AM. JUR 2d., *Workers' Compensation* § 1, at 28 (1992).

62. *Id.*

63. *Id.*; Friedman & Ladinsky, *supra* note 30, at 71.

64. 82 AM. JUR. 2d. *Workers' Compensation* § 1, at 28 (1992); Friedman & Ladinsky, *supra* note 30, at 71.

65. LARSON & LARSON, *supra* note 35, § 1.03[4], at 1-9.

66. Friedman & Ladinsky, *supra* note 30, at 72.

Some have suggested that while the primary purpose of workers' compensation statutes was to compensate for work-related injuries or diseases, society has realized much larger benefits than simply a just outcome.[67] Mainly, workers' compensation allocates the burden of supporting injured workers to the consumers of the products produced by the worker's employer, rather than leaving society at large with a destitute person to support.[68] Additionally, one observer has asserted that the consumer is the rightful bearer of the expense, because without the consumers' demand for the product, the injury would never have occurred.[69]

B. The History of Workers' Compensation in Missouri

The evolution of Missouri's workers' compensation statute was similar to workers' compensation statutes in the rest of the country. Prior to the final passage and approval of the workers' compensation statute in 1931, the only recovery available to workers injured in industrial accidents was under a common law tort claim.[70] A Missouri employee's tort claim was subject to the same employer defenses of contributory negligence, assumption of the risk, and the fellow servant rule, that undermined workers' suits in other jurisdictions.[71]

As noted, the Missouri legislature eventually stepped in and enacted a lasting workers' compensation statute[72] when data suggested that between seventy-five and eighty percent of workers who suffered industrial injuries received no compensation.[73] Initially, the legislature had a difficult time passing a workers' compensation statute because many viewed it as a form of socialism.[74] Though the first movement for workers' compensation legislation in Missouri began in 1909, it was not until 1931 that a workers' compensation statute[75] was finally passed, approved in a referendum, and declared constitutional.[76]

As with other laws across the country, the purpose of the Missouri statute was to relieve society of the burden of supporting injured workers and their

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67. LARSON & LARSON, *supra* note 35, § 1.03, at 1-5, 1-6.

68. LARSON & LARSON, *supra* note 35, § 1.03, at 1-5, 1-6.

69. LARSON & LARSON, *supra* note 35, § 1.03, at 1-5, 1-6.

70. LARSON & LARSON, *supra* note 35, § 1.03, at 1-5, 1-6.

71. LARSON & LARSON, *supra* note 35, § 1.03, at 1-5, 1-6.

72. The first workmen's compensation law was R.S. 1929, § 3299. TIMOTHY J. HEINSZ, MISSOURI WORKERS' COMPENSATION: LAW & PRACTICE § 1-1 (1984).

73. *Id.*

74. *Id.*

75. *See id.* The title of the Missouri statute was "The Workmen's Compensation Law," until it was amended in 1980 and retitled "The Workers' Compensation Law." *See* Mo. REV. STAT. § 287.010 (2000).

76. HEINSZ, *supra* note 72, at § 1-1.

families, and place the cost and expense of production-related injuries on the consumer.[77] The statute provided an employee compensation for work-related injuries without requiring a determination of fault or employer negligence.[78] In return for speedy and assured compensation, when an employee's injuries are covered by workers' compensation, the workers' compensation award is the only remedy available to the employee against the employer.[79]

C. *Missouri's Workers' Compensation Statute*

Missouri's current statute makes workers' compensation mandatory for almost all employers and employees,[80] leaving coverage optional only for a narrowly defined class of employers.[81] The Missouri statute provides compensation for the "clearly work related"[82] injury or death of an employee,[83] if the injury arose "out of and in the course of employment."[84] The statute is to be liberally construed in favor of employees so as to give effect to the statute's purposes.[85]

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77. HEINSZ, *supra* note 72, § 1-2; *see* Bethel v. Sunlight Janitor Serv., 551 S.W.2d 616 (Mo. 1977); Alexander v. Pin Oaks Nursing Home, 625 S.W.2d 192 (Mo. Ct. App. 1981).

78. MO. REV. STAT. § 287.120.1 (2000).

79. *Id.* § 287.120.2. The statute also excludes additional remedies to any other party in a suit on behalf of an employee's covered injuries. *Id.* The statute does not prevent a party from filing suit against a third-party tortfeasor or from filing a claim for any accident not covered by workers' compensation. *Id.* § 287.150.

80. *Id.* § 287.060. Before 1974, coverage under Missouri's workers' compensation laws was essentially voluntary. *See* MO. ANN. STAT. § 287.060, Historical & Statutory Notes (West 1993). While there was a presumption of employer acceptance of workers' compensation, an employer could file a notice of rejection of coverage. *Id.*

81. MO. REV. STAT. § 287.090 (2000). Exempt employers include employers such as small businesses, volunteers of tax-exempt organizations, and private households. *Id.*

82. The employee's work must have been a substantial factor in causing the injury to be "clearly work related." *Id.* § 287.020.2.

83. *Id.* § 287.020.3, .4.

84. *Id.* § 287.020.3. Only where it is (1) reasonably apparent that the employee's employment was a substantial factor in the resulting injury, (2) the injury logically follows as a result of work, (3) the employment was a proximate cause of injury, and (4) the injury did not come from an unrelated employment risk, that employee was exposed to equally outside work, does an injury "arise out of and in the course of employment." *Id.* § 287.020.3(2). Forty-three states have adopted the same "arising out of and in the course of employment" language. LARSON & LARSON, *supra* note 35, § 3.01, at 3-3.

85. Missouri Revised Statutes Section 287.800 requires that the workers' compensation provisions be construed liberally in regard of public welfare and that the application of the provisions not be affected by technical errors. MO. REV. STAT. §

Whether an injury arises "out of" and "in the course" of employment, and, thus, is covered by the statute, is a two-part test, and is determined based on the facts of each individual case.[86] The first part of the test, to arise out of employment, indicates a causal connection between the risk and the employment,[87] which requires that the exposure to the injurious hazard be on account of the employment.[88] The employee's work must have been a substantial factor in causing the injury to be "clearly work related."[89] A causal connection may be shown if conditions of the employment contributed to the injury and the injurious acts were incidental to employment performed for the benefit of the employer.[90]

Whether an injury satisfies the second part of the test and arose in the course of employment is determined by the connection between the employment and the injury in regard to the time, place, and circumstances of the injury.[91] The injury must have occurred during a time of employment, at a location where the employee was reasonably located for work purposes, and while the employee was engaged in activities incidental to employment.[92] Generally, when an employee abandons duties connected with her employment, and engages in personal activity, the employer is not liable for any injuries that occur during this time because the injuries do not arise out of and in the course of employment.[93]

287.800 (2000); *see* Williams v. City of Ava, 982 S.W.2d 307 (Mo. Ct. App. 1998); State *ex rel.* Doe Run Co. v. Brown, 918 S.W.2d 303 (Mo. Ct. App. 1996); *see also* cases at MO. ANN. STAT. § 287.800 (West 1993 & 2002 Supp.).

86. JAMES S. RANKIN, JR., MISSOURI WORKERS' COMPENSATION: LAW AND PRACTICE § 6-1 (2d ed. 1997); LARSON & LARSON, *supra* note 35, § 3.02, at 3-4; *see* Abel v. Mike Russell's Standard Serv., 924 S.W.2d 502, 503 (Mo. 1996).

87. LARSON & LARSON, *supra* note 35, § 3.01, at 3-1 through 3-4; RANKIN, *supra* note 86, §§ 6-1, 6-4; *see* Thompson v. Otis Elevator Co., 324 S.W.2d 755, 759 (Mo. Ct. App. 1959) (For an injury to arise "out of the employment," there must be a causal connection between the resulting injury and the conditions under which the work was performed.); Conyers v. Krey Packing Co., 194 S.W.2d 749, 752 (Mo. Ct. App. 1946).

88. RANKIN, *supra* note 86, § 6-4; *see* Hacker v. City of Potosi 351 S.W.2d 760, 762-63 (Mo. 1961) (An injury resulting "out of" employment refers to the origin or cause of the injury.).

89. MO. REV. STAT. § 287.020.2 (2000).

90. RANKIN, *supra* note 86, § 6-4; *see* Winsor v. Lee Johnson Const. Co., 950 S.W.2d 504, 507 (Mo. Ct. App. 1997); Quilty v. Frank's Food Mart, 890 S.W.2d 360, 363 (Mo. Ct. App. 1994).

91. LARSON & LARSON, *supra* note 35, § 3.01 at 3-1 through 3-4; RANKIN, *supra* note 86, §§ 6-1, 6-5; *see Hacker*, 340 S.W.2d 166.

92. MO. REV. STAT. § 287.020.3 (2000); *see* RANKIN, *supra* note 86, § 6-5; *see also* Thompson v. Otis Elevator Co., 324 S.W.2d 755, 758 (Mo. Ct. App. 1959).

93. RANKIN, *supra* note 86, at § 6-5; *see* Jemison v. Superior Auto Mall, 932 S.W.2d 431, 433 (Mo. Ct. App. 1996).

In applying the language of the statute, Missouri courts tend to evaluate whether the injury was in the course of employment based on whose interests, the employer's or the employee's, were being served at the time.[94] Any injuries suffered by the employee while engaged in personal activities do not arise out of and in the course of employment, and, therefore, are not covered by workers' compensation.[95] An employee's deviation must be closely scrutinized to determine the precise moment when the deviation and non-work related activities began and when activities within the course of employment resumed.[96] Once the employee ceases the personal deviation and returns to the employer's business, the deviation is considered over, and the employee is once again covered for any injury arising out of and in the course of employment.[97]

Additionally, injuries suffered while the employee was coming from or going to work generally do not qualify for workers' compensation because commutes are not considered to arise out of and in the course of employment.[98] The Missouri Supreme Court created an exception, however, for workers traveling on employer business away from work premises.[99] A traveling employee on a special errand for an employer is within the course of employment unless he deviates and leaves the course of employment by engaging in personal activities and errands.[100]

If an employee is intoxicated while within the scope of employment and an injury occurs, an employer may be able to use the employee's intoxication as an affirmative defense to deny compensation.[101] Missouri courts have established a standard to determine whether an employee is covered: the employee is still covered unless there is evidence to show that it was impossible for the employee to physically and mentally engage in her employment due to intoxication.[102] To

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94. RANKIN, *supra* note 86, § 6-8; *see* Cook v. St. Mary's Hosp., 939 S.W.2d 934 (Mo. Ct. App. 1997) (nurse awarded compensation for injuries suffered when she was attacked by a wild bird while in client's home serving employer's interest). *But cf. Jemison*, 932 S.W.2d 431 (compensation denied because accident occurred during lunch hour).

95. Miller v. Sleight & Hellmuth Ink Co., 436 S.W.2d 625, 628 (Mo. 1969).

96. B. MICHAEL KORTE, WORKERS' COMPENSATION LAW AND PRACTICE, MISSOURI PRACTICE SERIES, § 2.39 (2000).

97. RANKIN, *supra* note 86, § 6-8; *see Miller*, 436 S.W.2d at 625.

98. Cox v. Tyson Foods, Inc., 920 S.W.2d 534, 535 (Mo. 1996).

99. *Miller*, 436 S.W.2d at 628.

100. *Id.*; *see* KORTE, *supra* note 96, § 2.39.

101. HEINSZ, *supra* note 72, § 7-6. The affirmative defense of intoxication bars an employee's recovery of compensation, if the appropriate threshold is met. *Id.*

102. Gee v. Bell Pest Control, 795 S.W.2d 532, 536 (Mo. Ct. App. 1990).

qualify as physically or mentally unable to engage in employment, the employee's mind must have been a "total blank" as a result of intoxication.[103]

The judicial development and application of Missouri's workers' compensation statute has been long and varied. It is under the guidance of this precedence that the Western District Court of Appeals decided *Smith v. District II A & B.*

IV. INSTANT DECISION

In *Smith v. District II A & B*, the Missouri Court of Appeals for the Western District considered District II A and B's appeal from the Commission's reversal of the ALJ and award of compensation benefits to Smith.[104] On the first point of appeal, the Western District affirmed the Commission's ruling and held that Smith was not so intoxicated that he could not further his employer's business because his mind was not a "total blank."[105] Therefore, the court found that the injuries resulting from the accident did arise out of and in the course of Smith's employment.[106]

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103. *Id.* at 536-37.

104. Smith v. Dist. II A & B, 59 S.W.3d 558, 561 (Mo. Ct. App. 2001). The ALJ initially ruled against Smith, finding that his injuries were not compensable because they did not arise out of and in the course of his employment. *Id.* The Commission, on review, reversed the ALJ and awarded Smith workers' compensation benefits. *Id.*

105. *Id.* The standard for review in a workers' compensation case is set forth in Missouri Revised Statutes Section 287.495.1. The section provides:

> [I]n the absence of fraud, the findings of fact made by the commission within its powers shall be conclusive and binding. The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:
>
> (1) That the commission acted without or in excess of its powers;
>
> (2) That the award was procured by fraud;
>
> (3) That the facts found by the commission do not support the award;
>
> (4) That there was not sufficient competent evidence in the record to warrant the making of the award.

MO. REV. STAT. § 287.495.1 (2000 & Supp. 2001). The reviewing court, in a two-step process, considers the findings and award of the Commission, not the ALJ. Davis v. Research Med. Ctr., 903 S.W.2d 557, 570 (Mo. Ct. App. 1995). The appellate court first reviews the whole record for competent and substantial evidence, in a manner most favorable to the award. *Id.* Then, the court reviews the entire record to determine whether the award is against the weight of evidence, including consideration of unfavorable evidence. *Id.*

106. *Smith*, 59 S.W.3d at 563.

The court relied on *Gee v. Bell Pest Control*,[107] which stated that whether an employee was not able to engage in the furtherance of his employer's business as a result of intoxication is a question of fact for the Commission.[108] The court further stated that under *Gee*, an employee's high blood alcohol content is not a sufficient ground to deny a workers' compensation claim.[109] In order to deny benefits, the court stated, there must be evidence that, at the time of the injury, the employee was so intoxicated his mind was a "total blank" and he was physically and mentally incapable of engaging in his employment.[110] The court of appeals found sufficient evidence in the record to support the Commission's finding that Smith's mind was not a "total blank" as the result of intoxication at the time of his accident.[111] It was, therefore, not impossible for Smith to engage in his employment.[112] The court noted that Smith's fatigue, unfamiliarity with the road, and excessive speed likely contributed to the accident at least as much as the alcohol in his system.[113]

Smith's employer's second point of appeal claimed that Smith was not in the course and scope of his employment because he was required to drive a car in his employment, but that, at the time, he was driving illegally.[114] In response, the court noted that limitations on recovery of workers' compensation benefits are for the legislature, not the court, to decide.[115] As a result, the court held that, until the legislature further limits the recovery of workers' compensation benefits, the court was bound by the standard set in *Gee*.[116] This standard required that an employee be intoxicated to the extent that it was physically and mentally impossible for the employee to engage in his employment before workers' compensation could be denied, and, thus, Smith was not sufficiently intoxicated to deny compensation.[117]

With regard to the employer's last point on appeal, the court concluded that, because the injuries were sustained while traveling for the employer's purposes,

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107. 795 S.W.2d 532 (Mo. Ct. App. 1990).

108. *Smith*, 59 S.W.3d at 563 (relying on *Gee*, 795 S.W.2d at 537).

109. *Id.*

110. *Gee*, 795 S.W.2d at 536-37.

111. *Smith*, 59 S.W.3d at 563, 564-65.

112. *Id.*

113. *Id.* at 563.

114. *Id.* at 565.

115. *Id.* The court acknowledged that the legislature has enacted legislation that bars recovery when an employee violates an employer's posted alcohol policy and the violation is a proximate cause of the injury. *See* MO. REV. STAT. § 287.120.6 (2000).

116. *Smith*, 59 S.W.3d at 565 (citing Gee v. Bell Pest Control, 795 S.W.2d 532, 537 (Mo. Ct. App. 1990)).

117. *Id.*

they were compensable.[118] The court noted that an employee is within the course of employment except when a personal errand or personal social motive causes a departure from the course of employment.[119] Once the employee's personal departure has ended and he returns to the employer's business, any injuries then sustained arise out of and in the course of employment.[120] In the instant case, the court concluded that there was sufficient evidence in the record to establish that, when Smith met and conducted business with the Penske managers at the casino, he was serving his employer's business purpose.[121] Smith deviated from the course of his employment when he remained at the casino drinking, but the deviation ended when he left the casino to return to his hotel.[122] Therefore, the court concluded that at the time of the accident, Smith had returned to his employer's business and the accident occurred within the scope and course of his employment.[123] Thus, Smith was not barred from receiving workers' compensation benefits.

V. COMMENT

The creation of workers' compensation was in response to the perceived unjust treatment of injured workers, and it was originally enacted to protect employees from employer negligence and the bars to recovery established by the common law.[124] After almost seventy-five years of applying the workers' compensation act to relieve society of the burden of supporting injured workers, the Missouri Court of Appeals, in *Smith v. District II A & B*, has expanded workers' compensation to a point that potentially defeats that purpose by actually increasing the cost to Missouri's economy and citizens.[125] The decision also seems incongruous with Missouri's laws against drunk driving.[126] Perhaps in light of the court's decision in *Smith*, and the continued expansion of workers' compensation benefits,[127] there will eventually be a need for statutes to protect employers from employees' negligence.

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118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 566.
122. *Id.*
123. *Id.*
124. *See supra* text accompanying notes 30-79.
125. *See supra* text accompanying notes 72-79.
126. *See supra* note 15; *infra* notes 130-31.
127. *See supra* text accompanying notes 85, 115-16.

A. Incongruity with Missouri's Drunk Driving Statute

Missouri courts have remained consistent in their efforts to protect employees and give effect to legislative purpose by construing the Missouri workers' compensation statute as liberally as possible in favor of employees, when deciding cases involving intoxicated employees.[128] As noted previously, the Missouri courts have held that, to bar an employee from recovery, an employee must be intoxicated to the extent that his mind is a "total blank," and it is impossible for the employee to engage in his employment.[129] Perhaps the "total blank" standard has been appropriate in previous cases, but the court missed an important opportunity to reemphasize the intent of workers' compensation, and to relieve society of a costly burden when it upheld compensation in *Smith v. District II A & B.*

The Missouri legislature has made it clear that driving while intoxicated is an unacceptable risk on society by establishing a rather stringent numerical blood alcohol limit.[130] The legislature has established that a driver arrested with a blood alcohol content of .08% or more shall have his license suspended or revoked.[131] Additionally, the Missouri legislature has also enacted legislation that bars recovery by an employee when he violates a known and posted alcohol policy of the employer, and the violation is a proximate cause of an injury.[132] The Missouri courts have not expanded the meaning of a known and posted alcohol policy to include state laws.[133] Why an employer should be required to post state laws to ensure that an employee is aware of the state law against driving with a blood alcohol content of over .08% does not appear to be discussed in any Missouri cases.

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128. *See* Champion v. J.B. Hunt Transp., Inc. 6 S.W.3d 924, 928 (Mo. Ct. App. 1999); Page v. Green, 686 S.W.2d 528, 530-32 (Mo. Ct. App. 1985).

129. Bridges v. Reliable Chevrolet, Inc., 940 S.W.2d 51, 55 (Mo. Ct. App. 1997); Gee v. Bell Pest Control, 795 S.W.2d 532, 536-37 (Mo. Ct. App. 1990); Swillum v. Empire Gas Transp., Inc., 698 S.W.2d 921, 924-25 (Mo. Ct. App. 1985).

130. *See* MO. REV. STAT. § 302.505.1 (Supp. 2001).

131. *Id.* The legislature's stringent attitude against operating a vehicle while intoxicated is obvious by the repeated amendments to the statute reducing the legally permissible alcohol concentration. An amendment in 1991 reduced the previous legal limit from "thirteen-hundredths" to "ten-hundredths." Act of June 20, 1991, 1991 MO. LAWS 702, 711; *see also* MO. ANN. STAT. § 302.505 (West 2000). The most recent amendment, in 2001, again reduced the legal limit to the current limit of "eight-hundredths." Act of June 12, 2001, 2001 MO. LAWS 416, 423; *see also* MO. ANN. STAT. § 302.505 (West Supp. 2001).

132. MO. REV. STAT. § 287.120.6 (2000).

133. Higgins v. D.W.F. Wholesale Florists, 14 S.W.3d 286, 290 (Mo. Ct. App. 2000).

By allowing Smith to recover workers' compensation benefits for injuries suffered while he was operating his vehicle in violation of state law, the court essentially defeated the legislature's efforts to curb drunk driving and to relieve society of the risks and expense caused by drunk drivers. While a "total blank" standard may be appropriate in other circumstances to avoid overly harsh results and to fulfill the liberal construction mandate,[134] it is not appropriate in a circumstance when the standard used by the courts violates a criminal statute.[135] The courts should recognize the legislature's intent to make driving under the influence an illegal act, and should not allow an employee to engage in illegal conduct and simultaneously recover for injuries suffered as a result. When Smith plead guilty to the offense of driving under the influence, he acknowledged his illegal conduct and, at this point, the employer's liability should have been extinguished.

B. An Insurance Law Argument

Workers' compensation is based upon principles of insurance.[136] As such, it would be appropriate to consider accepted practices in insurance law to determine the appropriate treatment of illegal conduct in determining whether or not to award benefits. In cases where an insured intentionally causes damage to his or her personal property, coverage is appropriately denied.[137] Additionally, courts have consistently held that it violates public policy to provide insurance benefits to cover punitive damages for intentional conduct.[138] To allow an actor who intentionally drives while intoxicated, and is ultimately injured in an accident, to benefit from insurance coverage will not deter bad actions, and, in fact, would create incentives for such actions.[139]

In the same way that insurance law wants to discourage intentional misconduct by creating an exclusion from coverage, so should workers' compensation create coverage exclusions. One of the aims of workers' compensation was to encourage employers to implement safety measures.[140] By the same token, workers' compensation could encourage legal, responsible employee conduct by not rewarding and compensating injuries suffered while an

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134. MO. REV. STAT. § 287.800 (2000); *see supra* note 85 and accompanying text..

135. In *Smith*, the injured employee plead guilty to the charge of driving under the influence and received a suspended license. Smith v. Dist. II A & B, 59 S.W.3d 558, 561 (Mo. Ct. App. 2001).

136. HEINSZ, *supra* note 72, § 1-2.

137. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW, § 63A, at 460 (3d ed. 2002).

138. *Id.* § 65[e], at 574.

139. *Id.* § 63A, at 461.

140. *See supra* text accompanying note 65.

employee is engaged in illegal conduct. Additionally, by creating an exception to coverage in these cases, courts would be reinforcing the legislature's efforts to discourage illegal and dangerous conduct as when it establishes driving with a blood alcohol content of more than .08% as a criminal violation.

Workers' compensation can take another lesson from insurance law regarding the coverage of punitive damages vicariously imposed on an employer as a result of an employee's actions. Insurance law does not cover the punitive damages assessed to an individual bad actor, but any liability imposed on an employer as a result of an employee's bad actions through doctrines of vicarious liability[141] or respondeat superior may be shifted to the employer's insurance.[142] Therefore, it is conceivable that the employer's insurance will be called on to cover the liability resulting from the bad actions of an employee, protecting the bad actor from being held responsible herself for the actions.

By learning from insurance law's example, Missouri courts could easily take a preemptive strike at avoiding a potential injustice that might arise under the current workers' compensation application. Consider a twist on the current case: Smith could have easily run into another vehicle or person, injuring another party, instead of "skidding off the road down an embankment and hit[ting] a parked train."[143] In this situation, Smith's employer would likely have been liable for the action of its agent, Smith, given that the court found he was in the course of his employment at the time of the accident. At this point, the employer would be liable for both the damages to the third party and the workers' compensation claim filed by Smith for his injuries. The possibility that an employer may face liability for both sets of damages, which are only the result of an employee's illegal conduct, would be manifestly unjust and would place an undue burden on the employer.

Unless workers are held personally accountable for their actions, rather than being able to rely on workers' compensation, they will feel free to act in an irresponsible manner and take unnecessary risks as did Smith in this case. In light of the current decision, it is time that the courts and the legislature react to the conflicting interest between protecting employees from the negligence of employers and rewarding them for their own illegal and irresponsible actions. It is time to harmonize the need to protect the employee's interest with the interests of the employer and society at large. The courts should recognize an exception to workers' compensation coverage when an employee engages in illegal conduct of his own volition.

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141. An employer will be insured against punitive damages so long as its own behavior was no worse than negligent, such as in failing to supervise the employee. JERRY, *supra* note 137, § 65[e], at 578.

142. JERRY, *supra* note 137, § 65[e], at 578-79.

143. Smith v. Dist. II A & B, 59 S.W.3d 558, 561 (Mo. Ct. App. 2001).

VI. CONCLUSION

Under the current over-broad application of workers' compensation in *Smith*, Professor Larson's prediction regarding the obvious dangers of employer liability for injuries getting out of hand seems to have come true in Missouri.[144] By holding employers liable for injuries suffered from the illegal conduct of employees, the employers of Missouri face a potentially unfathomable rise in workers' compensation judgments. The extension of workers' compensation to this extreme limit could drive current employers to relocate to different jurisdictions where the workers' compensation laws are more favorable to employers and discourage new business development in Missouri. At the very least, employers will incur increased monitoring costs as they now must more closely scrutinize the activities of their employees because, under the current application, an employee is protected from the consequences of his own irresponsible behavior, while an employer may be liable for the financial costs of these consequences.

Missouri has a chance to return to the purpose under which it originally enacted its workers' compensation statute. Missouri acted to correct the injustices of leaving workers without rights, remedies, or income, and ultimately turning workers out on the streets. Let's not now inflict the same injustices on employers and leave them out in the cold.

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144. *See* LARSON & LARSON, *supra* note 35, § 22.04[1][d], at 22-17.