

AWARD AFTER MANDATE

Injury No.: 07-134522

Employee: Dennis Carver

Employer: Delta Innovative Services, Inc.

Insurer: American Home Assurance Company

Additional Parties: Treasurer of Missouri as Custodian of Second Injury Fund
Midwest Builders' Casualty Mutual Company

Procedural History

On July 22, 2011, the Labor and Industrial Relations Commission (Commission) issued a final award allowing compensation to employee. The Commission's decision included supplemental findings and conclusions on the issues of notice under § 287.420 RSMo and on Midwest Builders' Casualty Mutual Company's request for a credit. Otherwise, the Commission affirmed and adopted the award and decision of the administrative law judge. Among those findings affirmed and adopted by the Commission was a determination that employee's compensation was subject to a 50% reduction pursuant to § 287.120.5 RSMo.

Employee filed an appeal with the Missouri Court of Appeals, Western District, arguing, among other things, that the Commission erred in reducing his award because the record does not contain substantial and competent evidence to support the Commission's findings that employer proved the elements required to justify a reduction under § 287.120.5 RSMo.

In its decision dated September 11, 2012, the Court reversed the Commission's final award allowing compensation to the extent it imposed a 50% reduction on employee's award under § 287.120.5 RSMo. The Court determined that the Commission's findings were insufficient to permit the Court to review employee's sufficiency-of-the-evidence argument. The Court remanded the case to the Commission for the issuance, based on the existing record, of further factual findings concerning whether employer proved that a reduction is justified in this case. By mandate dated October 3, 2012, the Court remanded this matter to the Commission for further proceedings in accordance with the opinion of the Court.

On December 13, 2012, we issued Additional Findings After Mandate. Because neither the Court's mandate nor decision instructed the Commission to make conclusions of law or otherwise finally resolve the issue, and in order to fully and faithfully comply with the Court's mandate and decision, we did not render any conclusions of law or otherwise ultimately resolve the issue whether employee's award is subject to a reduction under § 287.120.5 RSMo. On December 17, 2012, employee filed a Motion to Recall and Modify Mandate, asking the Court to modify its original mandate to instruct the Commission to make legal conclusions consistent with its factual findings and issue an award consistent with those conclusions. On January 29, 2013, the Court denied employee's motion, and issued a supplemental decision making clear that the original mandate and decision carried, by necessary implication, the unspoken direction that the Commission issue a new final award resolving the issue whether employee's award is subject to a reduction under § 287.120.5 RSMo. In its decision, the Court instructed the Commission to promptly issue a final award consistent with the Commission's Additional Findings. The Court did not issue a new mandate, but instead returned the file to the Commission.

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Consistent with the Court's supplemental decision issued January 29, 2013, we issue this Award After Mandate. The Commission's Additional Findings After Mandate, originally issued December 13, 2012, are reproduced immediately below for the benefit and convenience of the parties, followed by conclusions of law, and an order resolving the issue whether employee's award is subject to a reduction under § 287.120.5 RSMo.

Findings of Fact

Reasonable effort to cause employees to follow the rule

On hire, employer required employees to watch a safety video. For the Federal Reserve project (during which employee sustained his injuries), employer also required employees to attend an initial safety orientation and ongoing periodic "toolbox talks." The safety orientation and toolbox talks covered various unspecified safety issues particular to the Federal Reserve project.

The roofing employees who testified on the subject were each aware of the "three-point-contact" rule, which precludes employees from carrying anything up a ladder. As the foreman Jeremy Reno testified, this rule is well known throughout the roofing industry. Although the record lacks evidence of the specific content of the safety video, orientation, or toolbox talks, we believe there is sufficient evidence to find that employer made its employees aware of the existence of the three-point-contact rule. But the record also reveals that employer's employees misunderstood and routinely violated the rule.

For example, the journeyman roofer Christopher Freman appeared to be confused as to the type of actions prohibited by the rule, when he testified, incorrectly, that it was possible to carry something up a ladder while maintaining three points of contact. *Transcript*, page 233-35. Mr. Freman also testified that "nine times out of ten" employees would carry things up a ladder if they were in a hurry to get the job done or if they did not have the proper equipment available. *Transcript*, page 236-37. This evidence corresponds to the testimony from employer's owner, Danny Boyle, who acknowledged employees broke rules like the three-point-contact rule "all the time." *Transcript*, page 1098. Mr. Boyle testified it was sometimes faster to carry items up the ladder, and that if an employee was trying to finish a job or get something done, they might carry something up the ladder as opposed to using the proper equipment. Jeremy Reno testified that violations of the three-point-contact rule were not "out of the ordinary," and that he'd "seen guys do it," although he qualified his testimony somewhat by offering his opinion that such violations would have been out of the ordinary during the Federal Reserve job, which Mr. Reno regarded as particularly safety-oriented.

Given the foregoing evidence, we find that employees routinely violated the three-point-contact rule. We find that employees violated the rule owing to confusion as to its application, as in the case of Mr. Freman, lack of the necessary equipment, or because, as Mr. Boyle acknowledged, it was simply faster to carry items up a ladder when employees were trying to finish a job.

We turn now to the question what steps employer took to address its employees' routine violation of the three-point-contact rule. Jeremy Reno testified, "Yeah, I would say so," when asked whether employees violating the rule would be reprimanded by a foreman, but then qualified his answer when he testified, "I mean, you know, I didn't see anybody, you know, carrying anything up a ladder." *Transcript*, page 104. We find that Mr. Reno

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is not a credible source of information as to the consequences faced by employees who broke the rule.

Ultimately, we find no credible evidence that employer ever counseled, warned, sanctioned, or otherwise took any disciplinary steps against the employees who broke the three-point-contact rule “all the time” or “nine times out of ten.” Accordingly, we find that, although employer took steps to make its employees aware of the three-point-contact rule, employer did not take any steps or make any effort to ensure that the rule was actually followed, despite awareness on the part of its owner, Mr. Boyle, that employees routinely violated the rule.

Causation

We search in vain for evidence to establish the purpose of the three-point-contact rule, and specifically to establish whether employee’s injuries were of the type the rule was designed to prevent. We note that Dr. Drisko included the following statement in a medical report: “I do not think there is any question that carrying a 100 pound bag up the 40 foot ladder was the prevailing factor with regard to his injury and need for subsequent medical treatment.” *Transcript*, page 346. But we find no indication that Dr. Drisko meant that employee’s violation of the three-point-contact rule was the cause of his injuries. Rather, we find that Dr. Drisko was offering a medical causation opinion focused on the narrow question whether it was likely that employee sustained the type of medical condition and disability of which he now complains given the mechanism of injury he identified. Accordingly, we do not find Dr. Drisko’s medical opinion persuasive evidence as to the factual question whether employee’s injuries were the result of his violation of the three-point-contact rule.

It was employer’s burden to establish that a reduction under § 287.120.5 RSMo is warranted in this case. In light of employer’s failure to provide evidence to establish the purpose of the three-point-contact rule or whether employee’s injuries were of the type the rule was designed to prevent, we cannot make an affirmative factual determination that employee’s injury was caused by his failure to obey that rule.

Conclusions of Law

The issue presently before the Commission is governed by § 287.120.5 RSMo, which provides, as follows:

Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

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In its decision dated September 11, 2012, the Court identified the following four elements that must be proven by employer in order to meet its burden of demonstrating employee's award is subject to a reduction under the foregoing provision:

1. employer adopted a reasonable rule for the safety of employees;
2. employee's injury was caused by the failure of employee to obey the safety rule;
3. employee had actual knowledge of the rule; and
4. prior to the injury employer made a reasonable effort to cause employees to obey the rule.

Carver v. Delta Innovative Servs., 379 S.W.3d 865, 869 (Mo. App. 2012).

We have found that employer did not take any steps or make any effort to ensure that the three-point-contact rule was followed, despite awareness by employer's owner that employees routinely violated the rule. We have also determined that employer failed to put forward evidence sufficient to permit us to make an affirmative factual finding that employee's injuries were caused by his failure to obey the safety rule. Given these findings, we conclude that employer failed to satisfy the second and fourth elements set forth above.

We conclude that the terms of § 287.120.5 RSMo do not apply to the facts of this case, and that employee's award is not subject to any reduction under that provision.

Order

Employee's award of compensation is not subject to any reduction under § 287.120.5 RSMo.

In all other respects, the Commission's Final Award Allowing Compensation dated July 22, 2011, remains in full force and effect.

Given at Jefferson City, State of Missouri, this 14th day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

 V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary