

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

Injury No.: 04-143300

Employee: Paul Chokota
Employer: Independent Photo Art Supply
Insurer: Continental Western Insurance Company
Date of Accident: December 17, 2004
Place and County of Accident: Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 23, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Rebecca S. Magruder, issued May 23, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Paul Chokota Injury No. 04-143300
Dependents: N/A
Employers: Independent Photo Art Supply
Insurers: Continental Western Insurance Company
Additional Party: N/A
Hearing Date: May 1, 2008 Checked by: RSM/pd

FINDINGS OF FACT AND RULINGS OF LAW

- Are any benefits awarded herein? No.
- 2. Was the injury or occupational disease compensable under Chapter 287? No.
- 3. Was there an accident or incident of occupational disease under the Law? No.
- 4. Date of accident or onset of occupational disease: December 17, 2004.
- 5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- 7. Did employer receive proper notice? N/A
- 8. Did accident or occupational disease arise out of and in the course of the employment? No.
- 9. Was claim for compensation filed within time required by Law? N/A
- 10. Was employer insured by above insurer? N/A
- 11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was involved in a car accident on his way home from a Christmas party.
- 12. Did accident or occupational disease cause death? No. Date of death? N/A
- 13. Part(s) of body injured by accident or occupational disease: N/A
- 14. Nature and extent of any permanent disability: N/A
- 15. Compensation paid to-date for temporary disability: N/A

- 16. Value necessary medical aid paid to date by employer/insurer? N/A
- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: N/A
- 23. Future requirements awarded: N/A

TOTAL: 0

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paul Chokota

Injury No. 04-143300

Dependents: N/A

Employers: Independent Photo Art Supply

Insurers: Continental Western Insurance Company

Additional Party: N/A

Hearing Date: May 1, 2008

Checked by: RSM/pd

At the hearing on May 1, 2008, the parties agreed to try only one issue, that issue being as follows: Whether on or about December 17, 2004, Paul Chokota sustained an injury by accident arising out of and in the course of his employment with Independent Photo Art Supply. The evidence consisted of trial testimony and deposition testimony, numerous documents, a police report, photos and two statements by two separate witnesses given to an insurance company representative.

There is no dispute that the Claimant was badly injured in a one-car accident which occurred on December 17, 2004 shortly before midnight. The driver of the car, Judith Houseman, and Mr. Chokota, the Claimant, were leaving a Christmas party in Lee's Summit, Missouri when Ms. Houseman drove off the road, flipping the car, no more than two or three miles from the party.

I find the Claimant's statement on August 11, 2005 as well as the statement of Michael Fogliani given on October 25, 2005 the most reliable evidence in this case as to what really transpired on the evening of December 17, 2004 as well as the best evidence as to the nature of the business relationship between the Claimant and Independent Photo Art Supply.

Based on that evidence as well as some of the other evidence and testimony in the case, I make the following findings of fact and conclusions of law: I find that Claimant worked in two capacities for Independent Photo Art Supply [hereinafter IPAS]. I find that he worked regular hours at the IPAS store at Southwest Trafficway and Broadway selling and renting photography equipment and answering questions from customers. I also find that he worked for IPAS as a photographer. I find in accordance with the Claimant's testimony that the technology had adversely impacted IPAS's ability to compete in the photography equipment sector of the business. In an attempt to improve the company economically, Mr. Fogliani and Claimant started promoting a photography services division referred to alternatively as "reflections by Paul" and "Reflections Photography." Mr. Fogliani and Claimant hoped to develop a first class photography service division within IPAS to improve the company economically. I make these

findings based on Mr. Fogliani's statement given to the insurance adjuster in October 2005 as well as the trial testimony of Claimant, Mr. Gard and Ms. Houseman.

Although the Employer attempted to challenge the Employer/Employee relationship of the Claimant when the Claimant was performing photographic services, Employer failed in its challenge. I was completely persuaded by the evidence that Claimant's activities which promoted the photography services were beneficial to IPAS and were an integral part of the business IPAS conducted from October 2004 forward.

I find that Judy Houseman had originally asked the Claimant to go to the party on December 17th with her as both a friend/date and to take some photographs at the party. I also find that Judy Houseman wanted to introduce the Claimant to some potential clients and advertisement opportunities for IPAS. The plan to take the photos at the party was scuttled, but Claimant attended the party anyway. I find that on the night of December 17, 2004, Mr. Chokota went to the party for two reasons: (1) to have fun attending a holiday celebration with Judy Houseman, and (2) to promote his Employer's business by making contacts and networking at the home of one of Judy Houseman's high school friends. He was there in large part to make contacts with people who could advance the business purpose of Reflections Photography and therefore of IPAS.

I find that Ms. Houseman had picked the Claimant up at the Employer's location on Southwest Boulevard along with photographs the Claimant had taken of some of her students at a dance studio called Broadway Babies. I make the finding that the Claimant was picked up by Ms. Houseman in downtown Kansas City at his place of employment after he finished his day of work based on Claimant's statement on August 11 as well as on the trial testimony of Michael Fogliani. I find that the photographs that the Claimant had taken of Ms. Houseman's dance students were to be picked by the parents of the students the following morning at Ms. Houseman's dance studio in Raymore, Missouri. I find that from the store location in downtown Kansas City, Ms. Houseman took the Claimant to the Christmas party at the Horsch's house in Lee's Summit, Missouri.

If the Claimant had sustained an injury by accident at the party itself, I would have found the accident compensable based on the mutual benefit doctrine. The accident did not, however, occur while the Claimant was performing acts which benefited his Employer, i.e., making contacts with potential customer/clients and advertisers. The accident happened after the Claimant and Ms. Houseman left the Christmas party.

The Claimant testified at the hearing and at his deposition testimony that he and Ms. Houseman were headed to her studio in Raymore, Missouri to set up a display of the photographs for delivery to the parents the following morning. It was his trial testimony as well as the trial testimony of Ms. Houseman that after setting up the photo display in Raymore that Ms. Houseman would then drive the Claimant back to his home in Grandview and then return to her home back in Raymore.

In his deposition, Mr. Chokota did admit the following:

“QUESTION: So you and Judy after this party were headed to the Belton-Raymore area to the dance studio that Judy owned; correct?”

“ANSWER: Correct.”

“QUESTION: Your goal was to drop off these pictures and put them so when the kids came the next morning, that Judy or her daughter could give them the pictures?”

“ANSWER: Right.

“QUESTION: Wouldn't it have been just as easy for Judy just to take them home and take them with her the next morning? She would be there anyhow?”

“ANSWER: I suppose, but that's what we were going to do.”

Thus, while he agreed in his deposition that it would have been just as easy for Judy to have taken the pictures home and delivered them the next morning, his trial testimony was that whenever he takes pictures it is important for him to set them up in a special presentation. He testified that his presentation and delivery are as important to him as taking the pictures. It's all part of the business.

In his statement taken on August 11, 2005, the Claimant absolutely contradicts his trial testimony and the trial testimony of Judy Houseman regarding where they were headed after they left the Christmas party in Lee's Summit, Missouri. In that statement given to the insurance adjustor, the following conversation took place:

“QUESTION: Okay. All right. And, um, what time was it you left the party?”

“ANSWER: About 11:30.

“QUESTION: Okay. And where you headed to at that point?”

“ANSWER: Back to my house.”

These statements simply cannot be overcome by inconsistent trial and deposition testimony. While I found most of the Claimant's trial testimony credible, I cannot ignore Claimant's unequivocal admission made eight months after the accident that he was headed home after the party. I simply cannot believe the later deposition or trial testimony of Claimant or the trial testimony of Ms. Housman which conflicts with Claimant's statement in August 2005. I cannot

and do not find that Ms. Houseman was taking the Claimant to her studio in Raymore at midnight after a Christmas party in Lee's Summit and then to Grandview to drop Claimant at his home and the back to Raymore to her home. Thus, I believe the benefit that IPAS received as a result of the Claimant going to the party ended when the Claimant was on his way home. The Claimant's injury occurred when he was going home and was not compensable.

As the Employer and Insurer argue in their brief, the mere presence of the photographs in Ms. Houseman's car does not make an otherwise noncompensable claim compensable. If I had believed the testimony of Ms. Houseman and the Claimant that they were headed to her studio to set up the display of photographs, I would have found the claim compensable based on the mutual benefit doctrine. I find, however, that the Claimant fell back into the "coming to and going from work doctrine" once he was headed home from the party. See, e.g., *Cox v. Tyson Foods, Inc.*, 920 SW2d 534.535 (Mo. Banc 1996); *Person v. Scullin Steel Company*, 523 SW2d 801 (Mo. Banc 1975). The mutual benefit doctrine may be applied when an employee is injured while performing an act for the mutual benefit of his Employer and himself. The injury is compensable, no matter how slight the advantage to the Employer. See *Williams v. Service Master*, 907 SW2d 193 (Mo. App. 1995). I do not believe there was any benefit to the Employer once the Claimant left the party and was headed home.

The dual purpose doctrine provides that if an Employee's work necessitates travel, the Employee is in the course of employment, although he may be serving a simultaneous personal purpose. For this doctrine to apply, the journey must have been necessary, even in the absence of a personal purpose. *Hilton v. Pizza Hut*, 892 SW2d 625 (Mo. App. 1994); *Williams v. Service Master*, 907 SW2d 193 (Mo. App. 1995). There was no dual purpose for the Claimant to go home after the party, only one, his own personal purpose. Furthermore, the Employer would not have had to hire someone else to go to the party had Claimant not gone and certainly would not have had to hire someone to take the Claimant home.

The special errand doctrine provides that an accident arises out of and in the course of employment when an Employee is doing something for the Employer at the request of the Employer, albeit after work hours and off the Employer's premises. See, e.g., *Hammack v. Nicholson*, 539 SW2d 788 (Mo. App. 1976). I do not believe or find any credible evidence that Mr. Fogliani had requested Claimant attend the party. While Claimant may have furthered his Employer's business while at the party, he was not there at the request of Mr. Fogliani, his Employer.

I do not believe the facts, as I have found them, qualify for any exception to the "coming to and going from work doctrine" and thus find Claimant's injury by accident on December 17, 2004 did not arise out of and in the course of his employment.

Date: _____

Made by: _____

Rebecca S. Magruder
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeff Buker
Director
Division of Workers' Compensation

If a reviewing Court should find that the Claimant was on a special errand for his Employer which had not ended until he was actually home, then the accident would be compensable.