

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

Injury No. 12-046083

Employee: James Cotter
Employer: Nitelines USA, Inc.
Insurer: Amerisure Mutual Insurance Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Administrative law judge's analysis

On page 6 of her award, the administrative law judge concluded that "[employee] did not sustain an accident while in the course and scope of his employment," based on the following propositions: (1) employee did not suffer an "accident" because his fall was not during a "single work shift" for purposes of § 287.020.2 RSMo because employee was on his way home when the injury occurred; (2) the extension of premises doctrine is inapplicable in this case because § 287.020.5 RSMo reveals a legislative intent to eliminate compensability of all injuries that occur while going to and coming from work; and (3) the risk or hazard that resulted in employee's injury was that of "descending steps," and was one to which employee was equally exposed in his normal, nonemployment life. We must respectfully disclaim these propositions.

With respect to the first, we do not construe the words "single work shift" so narrowly. As the Commission has previously held, and as indicated in *Henry v. Precision Apparatus, Inc.*, 309 S.W.3d 341, 342 (Mo. App. 2010), an employee does not necessarily have to be "on the clock" to sustain an accident. See *Curtis Leible*, Injury No. 06-094098 (LIRC, March 5, 2010), affirmed without opinion by *Leible v. TG Mo. Corp.*, 331 S.W.3d 732 (Mo. App. 2011). See also the more recent case of *Scholastic, Inc. v. Viley*, No. WD77546 (Oct. 28, 2014), wherein the court upheld an award of benefits to an employee who fell while traversing his employer's parking lot at the end of the day.

Second, we cannot endorse the administrative law judge's broad conclusion that the 2005 amendments reveal a legislative intention to eliminate compensability of all injuries that occur while going to and coming from work. To the contrary, the legislature in 2005 deleted previous language in § 287.020.5 RSMo declaring the Missouri Workers' Compensation Law did not cover workers "except while engaged in or about the premises where their duties are being performed," with the result that there is no longer any requirement that injuries occur on an employer's premises to be compensable. In *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299 (Mo. App. 2009), the court held that injuries sustained in an off-premises motor vehicle accident were compensable, and that the *Reneau* doctrine remains viable after the 2005 amendments to the extent not specifically abrogated in § 287.020.5. With respect to the extension of premises doctrine, we have held that the

Employee: James Cotter

- 2 -

2005 legislative amendments to § 287.020.5 did not totally abrogate the doctrine, because the plain language of that section abrogates the doctrine only “to the extent it extends liability for accidents that occur on property not owned or controlled by the employer.” In the *Viley* case mentioned above, the court applied the extension of premises doctrine in a case arising under the 2005 amendments.

We acknowledge that the particular circumstances of this case, with employee working as a temporary or loaned employee on a premises other than that of his immediate employer, would render any application of the extension of premises doctrine more complicated, but it would appear that the *Reneau* doctrine, as stated by the court in *Harness*, may be available to such employees to prove that they are in the course of their employment:

This exception, known as the *Reneau* doctrine, is generally interpreted to mean that *an employee whose work entails travel away from the employer's primary premises is held to be in the course of employment during the trip, except when on a distinct personal errand.*

Harness v. Southern Copyroll, Inc., 291 S.W.3d 299, 305 (Mo. App. 2009)(emphasis added).

In any event, it is clear that certain injuries occurring while going to and coming from work remain compensable under the 2005 amendments, and that an injury need not be sustained on an employer's premises to be compensable.

Finally, we would not find that the risk or hazard that resulted in employee's injuries was that of merely “descending steps” in general. Rather, as the court instructed in the *Viley* case, we would analyze the risk or hazard involved in descending the *particular* steps located at the premises where employee worked, including any defects or dangerous conditions.

Employee failed to meet his burden of proving he suffered an accident

Having provided all of the foregoing clarifications, however, we ultimately affirm the administrative law judge's award denying benefits in this case, because we are not persuaded that employee has met his burden of proving he suffered any identifiable trauma at work.

Employee testified that he fell down the stairs owing to inadequate lighting when leaving after his work shift on April 29, 2012, which ran from 4:00 p.m. to midnight. Employee initially testified that he was quite certain that he fell on April 29, 2012, but when confronted on cross-examination with the timesheet he filled out for the relevant period, employee agreed that it appeared that he did not work the 4:00 p.m. to midnight shift on April 29, 2012, but instead worked from 8:00 a.m. to 4:00 p.m. on April 29, 2012. Employee agreed that it was not dark at 4:00 p.m. The timesheet suggests (and we so find) that from April 16 to April 30, 2012, all of employee's shifts ended at 4:00 p.m.

Turning to the earliest medical treatment records, we find no mention of a workplace fall, on a stairway or otherwise. Rather, the May 9, 2012, record from St. Mary's Health Center suggests employee's left foot and ankle swelling and pain started 1 week ago “after having tight clothing around ankle,” that “[t]he injury mechanism is unknown

Employee: James Cotter

- 3 -

(possibly related to compression garments)” and that “[h]is pain began shortly after he removed these garments 1 week ago and noticed a red ‘ring’ around his ankle.” *Transcript*, pages 194-95. The May 17, 2012, record from Dr. Tracy Reed suggests employee’s left ankle pain and swelling “has existed for several days and began suddenly.” *Transcript*, page 67.

We note the approximate one week lag time reflected in the May 9, 2012, St. Mary’s treatment record from the onset of pain and employee’s first seeking treatment for this condition. We note also that the only real explanation provided for this gap comes from the testimony of employer’s medical expert, Dr. John Krause, who opined that employee likely suffered a non-work-related stress fracture, and that complaints of pain from such an injury would come on suddenly.

Considered individually, employee’s failure to identify the specific date of his claimed injury or the absence in the contemporaneous treatment records of a history of a work accident would not necessarily be fatal to employee’s claim. But when we consider all of these circumstances together, we are unable without speculation to make factual findings that would support a conclusion that employee suffered any identifiable “accident” as defined in § 287.020.2. We believe the legislature’s requirement that an accident be shown to have taken place during a “single work shift” means, at minimum, that an employee provide evidence sufficient to support factual findings as to what happened and when. Here, there is considerable ambiguity regarding what happened, and a near total absence of any evidence to permit us to determine, with any reasonable degree of specificity, when employee suffered his left ankle fracture.

For these reasons, we conclude that employee has failed to meet his burden of proving he suffered an accident, and deny employee’s claim.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued August 13, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this ____ 30th ____ day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: James Cotter

Injury No.: 12-046083

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Nitelines USA, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: n/a

Insurer: Amerisure Mutual

Hearing Date: May 27, 2014

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. 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: alleged April 29, 2012
5. State location where accident occurred or occupational disease was contracted: alleged St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
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? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant fractured his left lower extremity when he fell on steps leading to a parking lot after work.
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: left lower extremity
14. Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: James Cotter

Injury No.: 12-046083

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$418.13
- 19. Weekly compensation rate: \$278.75/\$425.19
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

weeks of permanent partial disability from Employer

None

22. Second Injury Fund liability: No

TOTAL:

NONE

23. Future requirements awarded: n/a

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Cotter

Injury No.: 12-046083

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Nitelines USA, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: n/a

Insurer: Amerisure Mutual

Checked by: KMH

A hearing was held on the above captioned matter May 27, 2014. James Cotter (Claimant) was represented by attorney Ron Caimi. Nitelines USA (Employer) was represented by attorney Dennis Lassa.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

Claimant alleges he was injured in the course and scope of his employment April 29, 2012. Employer denies liability.

STIPULATIONS

The parties stipulated to the following:

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the alleged date of injury.
2. Employer's liability was fully insured by Amerisure Mutual.
3. Employer had notice of the alleged injury and a Claim for Compensation was timely filed.
4. Claimant's average weekly wage was \$418.13. His rates for TTD and PPD are \$278.75 and \$425.19 respectively.
5. Employer has paid no benefits to date.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Accident
2. Arising out of and in the course of employment
3. Medical causation

4. Liability for past medical expenses of \$2,993.50
5. PPD

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 73 year-old male who worked for Employer and its predecessor from 2001 until his retirement approximately one year ago. Employer contracts with the Veterans' Administration Hospital to provide workers and technicians. Claimant was placed at the VA Hospital in St. Louis in 2001, and worked there until his retirement. Claimant was an X-ray Technician and testified he was working the 4 pm through midnight shift on the date of his injury.
2. The VA Hospital provided parking in a lot behind the building, and this is where Claimant parked. Nitelines USA does not own or maintain the parking lot or area where Claimant fell. There are two flights of stairs from the parking lot leading up to the back entrance of the hospital.
3. On April 29, 2012, Claimant completed his shift and exited the hospital around midnight. He walked down the long walkway and then descended the staircase to the parking lot. He was walking normally, was not in a hurry, was no longer working, and was not carrying anything. When he got to the last few steps, he misjudged the number of steps, and fell. He testified he fell because the last two steps seemed to blend together due to poor lighting. The steps were not wet, there was no snow or ice on the steps, and there was no obstruction or defect that caused him to fall. Claimant developed a sharp pain in his left ankle, but was able to walk to the car and drive home. He elevated his foot when he got home, and the pain was not too bad.
4. Claimant did not go to the doctor right away because the pain was tolerable. Claimant testified he woke up one morning and his left leg was so swollen that he could not walk on it. He went to the Emergency Room at St. Mary's on May 9, 2012. He had no new injuries to his leg between the date of injury and the date he went to the Emergency Room. Claimant testified he told the doctors at St. Mary's that he fell in the VA parking lot about a week ago and the pain was now so bad that he needed treatment.
5. The records from St. Mary's indicate Claimant had pain and swelling in his left foot and ankle for a week, and the pain started after having tight clothing around his ankle. The records also state the incident occurred more than a week ago, and the injury mechanism is unknown, possibly related to compression garments. His pain began shortly after he removed these garments about a week ago and noticed a red ring around his ankle.

6. The doctor ordered x-rays and an ultrasound to rule out a blood clot. Both of these were negative. The doctor gave Claimant some medications and told him to follow up with a podiatrist.
7. Claimant's internist referred him to Dr. Reed. Claimant complained to Dr. Reed of swelling and severe pain in his left foot and ankle. Claimant testified he told Dr. Reed he had fallen and injured his ankle. Dr. Reed's records indicate Claimant's condition existed for several days and began suddenly. Dr. Reed ordered an MRI, which showed a fractured fibular shaft, and gave Claimant an aircast foam walker to immobilize and stabilize his ankle.
8. Claimant initially did not report the injury to Employer. Once he realized his ankle was broken, he told his supervisor, Charles Williams. Mr. Williams works for the VA, and advised Claimant to contact Employer.
9. Over the next several months, Dr. Reed ordered a bone stimulator and two more MRIs to evaluate the fracture. In January 2013, Dr. Reed released Claimant at MMI.
10. Claimant testified he continued to work while wearing the aircast, and his supervisor restricted his hours. No doctor took him off work as a result of this injury.
11. Claimant continues to have pain. It is not constant, but occurs with certain activities. He has steps to get into his house, and sometimes climbing the steps hurts his ankle. He has pain if his ankle is in an awkward position. He can't walk very far or he has pain, so he only walks a few blocks at a time. He can't dance anymore. He has sharp pain occasionally, but most of the time his pain is a dull sensation that lets him know to stop doing what he was doing.
12. Claimant identified the records of his treatment from St. Mary's and Dr. Reed. His insurance paid the \$2,940.50 bill to St. Mary's, and he paid the bill to Dr. Reed.
13. Claimant's expert, Dr. Berkin, reviewed the records, examined Claimant, and issued a report in April 2013. He opined Claimant fell at work when his shoe caught on a step and he lost his balance. The fall was the prevailing factor in causing an ankle sprain and fibular fracture. He opined Claimant had 45% permanent partial disability of his ankle.
14. Employer's expert, Dr. Krause, reviewed the records, examined Claimant, and issued a report in June 2013. His report indicates Claimant fell because he caught the bottom of his shoe on a step. Dr. Krause opined Claimant's fracture was related to the fall. The fracture healed, and Claimant had 0% permanent partial disability. Dr. Krause reviewed the treatment records, and opined Claimant's multiple MRIs were not reasonable or necessary to treat the fibula fracture.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant did not sustain an accident while in the course and scope of his employment.

Chapter 287.020.2 (RSMo 2005) defines an accident to be an “unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.”

While there are some inconsistencies as to the date of injury and the reason Claimant fell, I believe he fell descending the steps to the parking lot outside the VA hospital after he completed his shift. This is an unexpected traumatic event, but it did not occur during a single work shift. He had completed his work shift and was on his way home when the injury occurred.

Claimant argues Employer placed Claimant at these premises, and his fall in a parking lot owned or controlled by the employer to whom Claimant was assigned is compensable because the abrogation of the extension of premises doctrine in Section 287.020.5 was not intended to apply to temporary or employment agency workers who are placed at the premises of a different employer. I do not agree. Reading this section in its entirety reveals a legislative intent to eliminate compensability of all injuries that occur while going to and coming from work.

In addition, in order to be compensable, Claimant’s fall must arise out of and in the course of his employment. Chapter 287.020.3(2) provides an injury arises out of and in the course of employment only if the accident is the prevailing factor in causing the injury, and the injury “does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.”

Claimant fell on the steps leading to the parking lot. He was not performing any work activity when he fell. There was nothing defective about the steps. There was no snow, ice, or water on the steps causing him to fall. Claimant testified he fell because he misjudged the number of steps due to poor lighting. Claimant also told the medical experts he fell because he tripped when his shoe caught on a step and he lost his balance. The history in the treating records does not mention a fall at work at all. There is insufficient evidence for me to conclude Claimant fell due to poor lighting. There was nothing about his employment or the premises that caused his fall. Claimant had steps leading into and out of his home. The risk involved in the fall at the VA, descending steps, was one to which he was equally exposed in his normal, non-employment life, and was not a risk incidental to his employment. His fall was not the result of a hazard or risk incidental to his employment, and is not compensable.

CONCLUSION

Claimant has failed to establish he sustained a compensable accident on or about April 29, 2012. As a result of this ruling, all remaining issues are moot.

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation