

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

Injury No.: 03-082129

Employee: Jay Downing
Employer: Mud Brothers, Inc.
Insurer: Missouri Employers Mutual Insurance Company
Date of Accident: August 28, 2003
Place and County of Accident: Camden County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 1, 2005, and awards no compensation in the above-captioned case. We issue this supplemental opinion to further explain our reasoning.

One of the factual disputes that was not decided by the administrative law judge was whether the employee's transporting of his own tools necessary to do the job along with employer's tools in his personal vehicle to his home each night was for his own convenience or whether there was a benefit to employer. We find employee transported the tools for his own convenience.

When employee was asked why he took the tools home with him as opposed to taking them to the employer's shop, employee responded:

"That way I don't have to unload and load them up. And I don't have to worry about someone stealing them, or anything like that."

(Tr. 20). He was also asked if he felt that the tools were safer with him than at employer's shop. Claimant responded; "yes, sometimes." (Tr. 20).

Employee's supervisor, David Lenshyn, testified that it was employee's common practice to take the tools home with him at the end of the day since 1998, but he did not do so all of the time. Mr. Lenshyn did not tell employee not to take the tools home with him. The only specific instruction given to employee about the tools was to never leave them at the job site. Mr. Lenshyn stated that the tools would have been safe at the employer's office and that employee had left the tools at the office previously.

Based upon employee's and Mr. Lenshyn's testimony, we find employee transported the tools, both his own and employer's tools, in his personal vehicle to and from his home to employer's office for his own convenience. He was not directed to take the tools home with him by employer.

On the date of the accident, employee was not using his personal vehicle to transport tools from employer's office to the job site. He was directed by employer to drive employer's flat bed truck. When he arrived at the employer's office that morning, he had to unload the tools out of his personal vehicle into employer's truck. Mr. Lenshyn took the air compressor that employee had been transporting out of employee's truck and loaded it onto the truck that Mr. Lenshyn was driving. Mr. Lenshyn transported the air compressor to and from the job site and employer's office. Employee was also instructed that he would have to drive employer's flat bed truck the following day from employer's office to the job site with the tools.

Employee first argues that the mutual benefit doctrine makes his accident compensable. We disagree. The mutual benefit doctrine is applicable when an employee suffers "an injury while engaged in [an] activity for the mutual benefit of

the employer and employee, even if it is the slightest benefit.” *Stockman v. J.C. Industries*, 854 S.W.2d 24, 27 (Mo. App. 1993). However, the benefit cannot be “so nebulous as to be non-existent.” *Palmer v. H.E. Miller Oldsmobile, Inc.*, 731 S.W.2d 389, 393 (Mo. App. 1987). “The ‘concurrent benefit’ principle cannot be applied without limitation. Eventually, the indirect benefit to the employer becomes so tenuous as to be imperceptible.” *Blatter v. Missouri Dept. of Social Services*, 655 S.W.2d 819, 824 (Mo. App. 1983).

The facts before us are similar to those presented in the *Stockman*, 854 S.W.2d 24 case. Mr. Stockman worked for a construction employer and drove his personal vehicle to and from his home to the work sites. He and other employees carpooled from Jefferson City, Missouri to the job site in Lake of the Ozarks State Park. The employer did not reimburse its employees for gas. Mr. Stockman used his personal vehicle on occasion to obtain supplies or transport items for testing in Jefferson City. The accident occurred in October 1989, when Mr. Stockman was driving home with other employees in his vehicle. The accident occurred within the state park, but approximately five miles from the work site. Mr. Stockman did not perform any errands with his personal vehicle for employer on the date of the accident. He did have a saw in his vehicle, but the saw was placed in his vehicle by accident or because the supply trailer was “down a ways.” *Id.* at 25. The court found that transporting the saw did not confer a mutual benefit on the employer because employer did not know that Mr. Stockman was transporting the saw and placing the saw in his personal vehicle was for Mr. Stockman’s convenience. The employer provided a place to store the tools; thus, the employer did not benefit from Mr. Stockman transporting the saw.

Similarly, here, employer received no benefit from employee driving employer’s vehicle to a gas station to get air to fill up the tire on his personal vehicle. Employee had not used his personal vehicle that day to transport tools to the job site and was not going to be using his personal vehicle the following day to transport tools. Employer had a place to store the tools. Employee transported them in his personal vehicle for his own convenience. Employer had no knowledge that employee was using employer’s vehicle to drive to the gas station to put air in Mr. Lenshyn’s personal air compressor, which was not used for work purposes.

We also find the case of *Palmer*, 731 S.W.2d 389 instructive. In that case, Mr. Palmer’s personal vehicle broke down and he parked it on a street behind the employer’s business. After it had been parked there for several days, the service manager and the general sales manager asked Mr. Palmer to move the car because it was an eyesore and a hazard. Mr. Palmer was injured while his vehicle was being repaired so that he could move it. He was not being paid by employer while he was working on his car. The court denied benefits because the injury did not arise out of and in the course of his employment. The court stated that although employer had asked him to move the car and expected him to do so, there was no order to do so. He was off the clock at the time of the injury. The court affirmed the finding of the Commission that any alleged benefit to employer by the removal of Mr. Palmer’s vehicle was “so nebulous as to be non-existent.” *Id.* at 393. “The removal eliminated an eyesore from the area yet there was no evidence the unsightly nature of the car was attributable to [employer].” *Id.*

Employee, here, was also not being paid to drive to the gas station to put air in the air compressor. Employee was also not instructed to fix his personal vehicle by employer. If an injury which occurs while performing an act that was requested by an employer does not confer a benefit to the employer, then the facts of this case are even further removed from the mutual benefit doctrine. Employee’s trip to the gas station was for the purpose of fixing his personal vehicle unbeknownst to employer. Employee’s only thought was to fix his personal vehicle. When he went to the gas station to accomplish this task; i.e., putting air in his tire, it was entirely a personal errand. The employer did not receive any benefit.

Employee also argues that his injury is compensable under the dual purpose doctrine.

“Under the ‘dual purpose’ doctrine, injuries sustained by an employee during a trip to or from work are compensable where the primary purpose of the trip was in furtherance of the employer’s business even though at the same time the employee was serving some purpose of his or her own.” *Williams v. Transpo International, Inc.*, 752 S.W.2d 501, 505 (Mo. App.1988).

It is fundamental that for an accident to be compensable under the dual-purpose doctrine, an employee must be acting not only for his own purpose but for the purpose of his employer when the accident occurs. The doctrine does not apply when an employee deviates from employer’s business so that at the time of the accident he is serving only his own purpose.

Parsons v. Kay’s Home Cooking, Inc., 830 S.W.2d 46, 48 (Mo. App. 1992).

In *Parsons*, benefits were denied under the dual purpose doctrine. Ms. Parsons left the employer's business to go to the bank to convert some money into change to operate the business. She also went to her physician's office to pick up a personal medical kit. Her doctor's office was west of the employer's business. The bank was located one mile east of the employer's business. Ms. Parsons drove to her physician's office before going to the bank. She was on her way to the bank but still west of the employer's business when she was involved in an accident.

The court further stated:

"Where at the time of an accident the servant or agent deviates or departs from the usual or most direct route which he would ordinarily follow in using the car on the owner's business, and goes off on some errand or for some purpose wholly his own, the owner is not liable for injuries inflicted by the servant or agent. But if at [the] time of accident the servant or agent has resumed the owner's business and has returned to the point of departure or to a point where in the performance of his duties he is required to be, and actually returns to his master's business, the owner may be liable." *Manchester Ins. & Indemnity Co. v. Ring*, 589 S.W.2d 350, 355-356 (Mo. App.1979).

Parsons, 830 S.W.2d at 49.

The court determined that Ms. Parsons had deviated from the route to the bank for a personal purpose and was still on the route she had taken for her personal purpose. She had not returned to the route she would have taken from the employer's business to go to the bank. She would not have been in the place of the accident had she not taken the trip for her personal errand.

Similarly, here, employee's purpose in going to the gas station was for a personal errand. Although he was waiting to turn into employer's business, he would not have been in that location at the time of the accident absent his personal errand to get air for his truck tire. Employee had not returned to employer's business when the accident occurred. The fact that employee was driving employer's vehicle at the time of the accident does make this claim fall under the dual purpose doctrine. Employer did not authorize employee's use of the flatbed truck for his personal errand. The dual purpose doctrine does not aid him.

Employee's final argument is the "own-conveyance exception" renders this claim compensable. We disagree.

In *McClain v. The Welsh Co.*, 748 S.W.2d 720 (Mo. App. 1988), the court examined this exception. In that case, Mr. McClain used his personal vehicle to run errands for the employer. The employer reimbursed Mr. McClain for his expenses, paid him overtime, and paid one-half of Mr. McClain's vehicle insurance. Mr. McClain was on his way to work one morning and was involved in an accident. He argued that the use of his personal vehicle in employer's business had become a custom constituting an implied contract. Quoting from Professor Larsen, the court stated:

"The theory behind this rule is in part related to that of the employer-conveyance cases; the obligations of the job reach out beyond the premises, make the vehicle a mandatory part of the employment environment, and compel the employee to submit to the hazards associated with private motor travel which otherwise he would have the option of avoiding. But in addition there is at work the factor of making the journey part of the job, since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's premises." 1 A. Larson, § 17.50.

Id. at 727.

In rejecting the employee's theory of compensability, the court held that an employer's acquiescence in allowing an employee to use his personal vehicle does not necessarily give rise to an implied contract for the use of the employee's vehicle. The fact that the employer paid for one-half of the employee's vehicle insurance did not turn his vehicle into a tool of the employer. Also, the fact that the employer reimbursed him for gas did not make the accident compensable. Mr. McClain was not engaged in an errand in behalf of the employer when he was in the accident in his vehicle. He was not transporting employer's materials to work. And, he was not required to bring his vehicle to work.

Similarly, here, while employee had to get to work someway, he was not required to bring his personal vehicle to work other than because of his personal convenience he carried his and employer's tools in his own vehicle. Employee was not engaged in a specific errand for employer when the accident occurred. He was driving employer's vehicle on a personal errand. Mr. Lenshyn acquiesced in allowing employee to use his personal vehicle to sometimes transport tools to and from home to employer's office or to and from the job sites. However, on the date of the accident,

employee was instructed to drive employer's vehicle to transport the tools to and from the job site. How he got to employer's office and home from the office was employee's responsibility.

In conclusion, at the time the injury occurred, employee was engaged in an activity of a purely personal nature and independent of the employment relationship. The activities of the employee were not anticipated nor expected by the employer, and consequently, were not incidental to the employment. The work of the employee did not create the necessity for the trip, nor was the employee on a specific errand for the employer. Thus, the injury sustained is not compensable.

Because we agree with the administrative law judge that employee's accident did not arise out of and in the course of his employment, we affirm and incorporate the administrative law judge's award and decision as supplemented by this opinion denying benefits.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued March 1, 2005, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of September, 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I believe the decision of the administrative law judge should be reversed and benefits awarded. I find employee's accident arose out of and in the course of his employment under the mutual benefit doctrine.

"[A]n injury sustained outside regular working hours may be compensable in some circumstances, particularly if the employee was at the time engaged in some service for the benefit of the employer in connection with his regular duties." *Mann v. City of Pacific*, 860 S.W.2d 12, 16 (Mo. App. 1993). "Under the mutual benefits doctrine, an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is compensable when some advantage to the employer results from the employee's conduct." *Stockman v. J.C. Indus., Inc.*, 854 S.W.2d 24, 27 (Mo. App. 1993). "For the doctrine to apply, the employee must suffer an injury while engaged in activity for the mutual benefit of the employer and employee, even if it is the slightest benefit." *Id.*

I disagree that employee's trip to the gas station and back was a deviation from his employment or a personal frolic. Employee's personal vehicle was essential to employer's business in order to transport the tools necessary to do the job and in order to secure the tools so that they would not be stolen or get wet. Employee transported employer's air compressor, hoses, scaffolding and air guns in his personal vehicle every day because Mr. Lenshyn asked him to do so. Employee used his own toolbox located in the bed of his truck to secure the tools. A picture of the toolbox is in the record. It is ridiculous to suggest that the toolbox could be moved out of the truck.

On the date of the accident, employer requested that employee bring his personal chainsaw to the job site for employer's

use on the project. Employee stated this was a common practice so that some of the scaffolding boards could be cut to level the scaffolding. When employee drove his personal truck to work that morning, he was transporting tool bags, employer's two nail guns, and his chainsaw. Mr. Lenshyn admitted that employee would put gas in the compressor and pay for the gas out of his own pocket for which Mr. Lenshyn would reimburse him. (Tr. 68). Mr. Lenshyn also admitted that he would give employee money for gas to put in employee's vehicle so that employee could drive to work. (Tr. 87). Employee used his personal vehicle on most occasions to transport his tools and employer's tools to and from the jobsite including the air compressor. (Tr. 84). Mr. Lenshyn admitted the air compressor is a vital piece of equipment for doing employer's business. (Tr. 84).

Mr. Lenshyn admitted that employee transported all of these tools for employer's benefit and it was employee's common practice to take the tools home with him at the end of the workday and return with them to work the following day. (Tr. 85). With regard to the mutual benefit to employee and employer, Mr. Lenshyn testified:

Q. In addition, you required him to have his own tools, the hammer and the cutters, the levels, the knives?

A. Correct.

Q. And you didn't reimburse him for those tools?

A. No.

Q. But those tools were used solely for your benefit at Mud Brothers, correct?

A. His and mine. He could make money and I needed tools – somebody that had tools to work for me.

Q. And you didn't have to pay for those tools?

A. Correct.

Q. And his use of those tools made you money, correct?

A. Correct.

Q. I mean, that was the whole idea, Jay was to be there to make you money?

A. Correct.

Q. All of the tools that Jay transported in his personal vehicle were critical tools for the furtherance of Mud Brothers' business?

A. Yeah.

Q. And all of those tools were transported in his personal truck daily?

A. The majority of the time.

Q. You would agree with me, on the day of this accident that Jay drove his personal truck to Mud Brothers' shop?

A. Yes.

Q. And brought with him a chainsaw?

A. Correct.

....

Q. Okay. And that chainsaw, him using that chainsaw and him using his gas in that chainsaw, benefited Mud Brothers?

A. When he cut the pads out for me, it did benefit me.

Q. And that was something that he brought with him from home on the day of this accident in his personal truck?

A. At that time, they were like his pets. He brought them everywhere with him in his truck.

Q. Okay. But he brought them?

A. Oh, yeah, he did.

Q. It was for your use at the jobsite to help your company?

A. Yeah, he used his chainsaw at my jobsite.

Q. And he brought with him his tools and his tool belt out of his truck to take with him to help your business?

A. Correct.

Q. And he also brought your air guns, the expensive air guns, so they could be used at the jobsite that day?

A. Correct.

Q. And so it was critical for Mud Brothers that Jay transport all this equipment in his truck to your shop that day?

A. If he did not leave it at the shop, it would be critical for him to bring it from his home back to the shop, yes.

(Tr. 87-90).

Additionally, Mr. Lenshyn testified:

Q. It benefited Mud Brothers for Jay to have driven his personal truck to work that morning and brought [sic] the tools with him that were used at the jobsite that day?

A. Me and Jay [sic] both benefited out of that, yes.

(Tr. 94-95).

Mr. Lenshyn stated that the tools were expensive and he did not want them stolen. (Tr. 86). He also admitted that he instructed employee to never leave the tools on the job site. (Tr. 86). Mr. Lenshyn further admitted that he allowed employee to do what he felt was in the best interest of employer and the tools. (Tr. 87).

The evidence persuades me that a major part of employee's duties was to secure and transport the tools, both his own and employer's tools, in his personal vehicle. With a flat tire, employee would not have been able to fully secure the tools by taking them to his residence. Employee had no key to get inside employer's office, so he could not lock the tools inside. Without fixing the tire, employee's only option would have been to leave the tools unattended in his truck at employer's facility. It is clear that while employee was driving to and from the gas station with the goal of filling the tire so he could properly secure the valuable tools as a part of his regular job duties, employee was "engaged in some service for the benefit of the employer in connection with his regular duties." *Mann*, 860 S.W.2d at 16.

Because employee suffered an injury by accident while performing an act for the mutual benefit of the employer and the employee, I find employee's injury is compensable under the mutual benefit doctrine. *Stockman*, 854 S.W.2d at 27.

I would also like to note that employer admitted that it did not pay its employees for traveling to the job sites despite the fact that the employees were transporting tools to the job sites. Employer's practice of failing to pay its employees for travel to job sites is in violation of the Fair Labor Standards Act, specifically 29 CFR 785.38, if employer is subject to that Act. The regulation of which I take administrative notice provides:

Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site

during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. ...

Employee's remedy for the potential violation is not within the Commission's jurisdiction; however, employee should be aware of the potential problem and may wish to pursue this matter further.

Because my fellow Commissioners affirm the denial of benefits, I respectfully dissent.

John J. Hickey, Member