

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 05-097036

Employee: Michael Drey
Employer: Kurzweil Livestock Company
Insurer: Commerce Industry & Insurance Company
Date of Accident: September 16, 2005
Place and County of Accident: Hwy 2, Cass County, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence, read the briefs, heard oral argument and considered the entire record. Pursuant to §286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 27, 2007, by issuing a separate opinion allowing compensation in the above-captioned case.

I. Issue

The dispositive issue is whether or not employee sustained injury due to an accident arising out of and in the course of employment. The injury occurred September 16, 2005, consequently, the Workers' Compensation Law as amended in 2005 governs the instant case.

II. Facts

The facts were accurately recounted in the award issued by the administrative law judge. Repetition of the facts in the instant award is done so for special emphasis supporting the Commission's conclusions.

The facts which the Commission believes deserve special emphasis are as follows:

On September 16, 2005, Mr. Drey had discussed with Dennis and Tom Kurzweil attending a high school football game in Archie, Missouri that night at seven o'clock. Tom Kurzweil's son would play in the band at half time. Mr. Drey asked Tom Kurzweil to save him a seat.

Mr. Drey followed his regular routine during the rest of the day. He showered in at the main farm around 6:30 a.m. He spent most of the day until 4:00 p.m. working with the sows. He showered out of the main barn at about 4:30 p.m. and then packed a cooler with medicines and drove his motorcycle from the Kurzweil farm to the Lyle Quick farm to check on the new sows. It was approximately seventy-five degrees outside that day.

Mr. Drey spent about forty-five minutes to an hour at the Quick farm checking new sows and administering medications and vaccinations. He then loaded up the remaining medications in a small cooler and headed back the Kurzweil Farm to put the medicines back into cool storage and make one last check of the exterior

of the main sow barn. Then he intended to go home and shower and go to the football game in time for the half-time show.

On the way back to the farm, Mr. Drey was rounding the first curve of an s-turn when he saw two large dogs in the road. Mr. Drey swerved onto a gravel road to avoid the dogs. Mr. Drey's motorcycle went approximately 200-yards before he crashed. He laid on the gravel road unconscious for approximately an hour before a passerby discovered him.

III. Findings of Facts and Conclusions of Law

The construction of the phrase "arising out of and in the course of employment" historically has been broken in half, resulting in a two-prong test, with the "arising out of" portion construed to refer to causal origin, and the "course of employment" portion to the time, place and circumstances of the accident in relation to the employment. The substantive provisions of §287.120.1 were not changed or amended by the 2005 enactment of the General Assembly.

Pursuant to this statute, proof of a compensable injury requires not only establishing that it occurred at a particular place, and at a particular time (the "in the course of" component) the injury must also be causally connected to some risk or hazard of the job (the "arising out of employment" component).

The first prong, "arising out of", is primarily concerned with causal connection. Historically, at a minimum, our courts have required a showing that the employee's injury was caused or due to a risk of employment. Missouri cases have uniformly held that an accident and resultant injury "arise out of" the employment when there is a causal connection between the conditions under which the work was required to be performed and the resulting injury. The injury "arises out of" the employment so long as the injury was a rational consequence of a hazard connected with the employment.

Employee's injury occurred when he was returning to the Kurzweil farm after administering medications to the new sows at the Quick farm. Employee performed this task three to four times each week. Employee had to provide his own transportation when traveling between the farms. Thus, it is clear that employee's injury arose out of his employment.

The second prong of the above mentioned two-prong test is whether the injury arose "in the course of" employment. Employee's injury occurred within the period of employment at a place where the employee could reasonably be expected and while engaged in the furtherance of the employer's business.

Therefore, the Commission finds and concludes that employee's injury arose out of and in the course of his employment.

IV. Conclusion

In conclusion, employee has sustained his burden of proof to show that his injury was due to an accident arising out of and in the course of his employment. Accordingly, the award and decision of Administrative Law Judge Carl Mueller, issued December 27, 2007, awarding employee benefits is affirmed. The administrative law judge's award is attached hereto, but his reasoning regarding the application of the mutual benefit doctrine is not adopted by the Commission.

Given at Jefferson City, State of Missouri, this 11th day of July 2008.

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Michael Drey Injury No: 05-097036
Dependents: N/A
Employer: Kurzweil Livestock Company
Additional Party: N/A
Insurer: Commerce Industry & Insurance Company
Hearing Date: December 3, 2007
Briefs Filed: December 18, 2007 Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 16, 2005
5. State location where accident occurred or occupational disease was contracted: Hwy 2, Cass 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? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes

Dependents: N/A
Employer: Kurzweil Livestock Company
Additional Party: N/A
Insurer: Commerce Industry & Insurance Company
Hearing Date: December 3, 2007
Briefs Filed: December 18, 2007

Checked by: RCM/rm

On December 3, 2007, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Michael Drey, appeared in person and with counsel, Keith Yarwood. The employer appeared through Christopher McCurdy. The Second Injury Fund was not a party to the case. The primary issue the parties requested the Division to determine was whether or not Mr. Drey was in the course and scope of his employment when he was injured on September 16, 2005. For reasons noted below, I find that Mr. Drey was in the course and scope of his employment when he was injured on September 16, 2005.

STIPULATIONS

The parties stipulated that:

- On or about September 16, 2005, Kurzweil Livestock was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by AIG Insurance Company;
- Mr. Drey was its employee working subject to the law in Cass County, Missouri;
- Mr. Drey notified Kurzweil Livestock of his alleged injury and filed his claim within the time allowed by law; and
- Kurzweil did not provide any medical care.

ISSUES

The parties requested the Division to determine:

- Whether Mr. Drey sustained an accident arising out of and in the course of employment?

Whether Kurzweil Livestock Company must reimburse the employee for medical expenses totaling \$29,284.00?

- Whether Kurzweil Livestock Company must reimburse to Mr. Drey the cost of this proceeding for defending the claim without reasonable ground pursuant to §287.560?

FINDINGS OF FACT

Mr. Drey testified on his own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- A - Map
- B - Letter dated June 26, 2006 from Yarwood to Kurzweil
- C - Rating report and Medical Records
- D - Deposition, Tom Kurzweil, August 18, 2006
- E - Deposition, Dennis Kurzweil, August 18, 2006

Employers Thomas Kurzweil and Dennis Kurzweil testified on behalf of Kurzweil Livestock and presented the following exhibits, all of which were admitted into evidence without objection:

- 1 - Medical Chart Note, KC Bone & Joint, October 17, 2005
- 2 - Medical Report, Terrence Pratt, MD, May 31, 2007
- 3 - Speech-Language/Cognition Evaluation, August 31, 2007
- 4 - Medical Report Addendum, Terrence Pratt, MD, October 15, 2007

Based on the above exhibits and the testimony of Mr. Drey and Thomas and Dennis Kurzweil, I make the following findings: Mr. Drey is a single, 54-year old male, who lives in Gardner, Kansas. He is a high school graduate with extensive specialized training in animal husbandry including basic veterinary medicine and hog psychology.

Mr. Drey was reared on a farm in Iowa and worked on corporate farms most of his adult life, including working for such large corporate farm companies such as Seaboard and PIC. As part of his profession as a corporate farm manager, he undertook continuing education to learn how to increase the number of successful births on the farms where he worked. He learned how temperature variances could cause stress and miscarriages in sows. He also learned basic veterinary medicine, how to limit the introduction of disease into healthy herds, the importance of regulating temperatures in sow barns to relieve stress and even hog psychology. He is three (3) credit hours shy of a Bachelors degree. Mr. Drey began working for Kurzweil Livestock in the spring of 2003.

The Kurzweil brothers, Thomas, James and Dennis, hired Mr. Drey through Great Plains management to transform their family run hog farm into a large corporate-style sow farm. The Kurzweils turned over the day to day management duties of the operation of the sow farm to Mr. Drey and focused their efforts on the grain production part of their farm. They expected him to be on call 24-hours a day, seven days a week and held him responsible for the all

of the successes and failures of the sow operation.

As part of the transformation into a more professional sow operation, the Kurzweils installed showers at the main barn for employees to use before entering the barn for the day and again before leaving the barn for the day. There was a barrier inside the barn that divided the area where un-showered workers could enter before crossing the barrier and showering, changing cloths and interacting with the sows. There was a refrigerator that stored medicines for the livestock in the area where workers entered. Mr. Drey required all employees to shower in and out of the barn each day to prevent the spread of disease.

The Kurzweils also installed a system of computer controlled cooling cells, ventilation curtains and fans to maintain a constant sixty-five degree temperature for the sows. Too much variance in the temperature could result in increased miscarriages among the sows. The ventilation curtains were made of canvass and were designed to raise and lower in order to maintain an optimum temperature for the sows.

Finally, the Kurzweils rented a second barn about thirty minutes away from their farm where Mr. Drey would isolate new sows for thirty to sixty days before introducing them to the general population. The isolation barn prevented the new sows from introducing disease into the Kurzweils general sow population - and thereby decreased the chances of miscarriages or death. The Kurzweils paid the owner of the isolation barn, Lyle Quick, to take care of the daily needs of the sows in the isolation barn. However, they expected Mr. Drey to monitor the isolation barn to make sure the sows were properly cared for. The isolation barn did not have shower facilities.

As manager of Kurzweil Livestock, Mr. Drey was responsible for overseeing the care of 2,500 sows on the two farms and making sure the ventilation curtains, cooling cells and fans were working properly. He took care of sick sows. He hired and participated in the hiring of employees, purchased and ordered supplies, made payroll, administered medications to the sows, and managed the flow of the sows. Mr. Drey visited the isolation barn three to four times a week to monitor the care of the isolated sows and administered medication if needed.

Mr. Drey's daily routine included starting his day at approximately 6:30 a.m. and showering in. As part of the process of showing in he would change into clothes that were washed and stored in the sow barn. He then would work with approximately four other men he supervised until 4:00 p.m. or 4:30 p.m. taking care of the sows on the main farm. At the end of the day he would shower out and change back into his regular clothes. Then, three or four times per week, Mr. Drey would pack up medications stored in the barn outside of the shower area and drive thirty minutes to the isolation barn to check on the rest of the herd. He would then return to the main farm, return the unused medications to cold storage and check the barn from the outside to make sure the cooling system was operating correctly and the computer-operated augers had shut off.

Every action Mr. Drey took from the regular feeding of the sows, to the regulation of the temperature in the barn, to the administering of shots and the isolation of new sows, was designed to decrease stress in the herd and increase the number of live births.

The operation of the ventilation curtains was critical in the heating and cooling the sows. Mr. Drey would often check them from the outside the barn after he had showered out for the day to make sure none had become stuck and identify and address any other problems that may occur in the operation. If he was able to fix problems from the outside he would do so. If he was unable to fix the problems, he would contact one of the Kurzweils. Dennis Kurzweil confirmed that Mr. Drey would work beyond the regular hours required to operate the sow farm.

The Kurzweils paid Mr. Drey \$42,000.00 a year and provided him a house rent free on their property approximately a half-mile from the main Kurzweil Livestock barn. Mr. Drey and the Kurzweils would often socialize after hours. Tom Kurzweil would have Mr. Drey over to his house for dinner on a regular basis and would even advise him on which women to date. Mr. Drey testified that the Kurzweils treated him like a member of the family. The Kurzweils never complained to Mr. Drey about his work.

On September 16, 2005 Mr. Drey had discussed with Dennis and Tom Kurzweil attending a high school football game in Archie, Missouri that night at seven o'clock. Tom Kurzweils son would play in the band at half time.

Mr. Drey asked Tom Kurzweil to save him a seat.

Mr. Drey followed his regular routine during the rest of the day. He showered into the main farm at around 6:30 a.m. He spent most of the day until 4:00 p.m. working with the sows. He showered out of the main barn at about 4:30 p.m. and then packed up a cooler with medicines and drove his motorcycle from the Kurzweil farm to the Lyle Quick farm to check on the new sows. It was approximately seventy-five degrees outside that day.

Mr. Drey spent about forty-five minutes to an hour at the Quick Farm checking the new sows and administering medications and vaccinations. He then loaded up the remaining medications in a small cooler and headed back to the Kurzweil Farm to put the medicines back into cool storage and make one last check of the exterior of the main sow barn. Then he intended to go home and shower and go to the football game in time for the half-time show.

On the way back to the farm, Mr. Drey was rounding the first curve of an s-turn when he saw two large dogs in the road. Mr. Drey swerved onto a gravel road to avoid the dogs. Mr. Drey's motorcycle went approximately 200-yards before he crashed. He laid on the gravel road unconscious for approximately an hour before a passerby discovered him. An ambulance took Mr. Drey to Research Medical Center where he remained in a coma for three days. He suffered several fractured ribs, a concussion and a broken collar bone. By the time Mr. Drey was released from the hospital he had incurred \$29,284.00 in medical expenses. About two months later the workers' compensation insurer notified Mr. Drey that it was denying his workers' compensation claim stating that it did not believe that he had suffered his injuries while in the course and scope of his employment.

RULINGS OF LAW

Missouri's Workers' Compensation Law provides, in pertinent part, that:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment . . .

Mo.Rev.Stat §287.120.1

Simply put, "arising out of" means whether the conditions of employment caused or contributed to cause the accident. Selden v. Texas County Memorial Hospital, 916 S.W.2d 402, 403-404 (Mo.App. S.D. 1996). "In the course of employment" refers to the time, place and circumstances of the injury. The particular facts of each case will determine whether the injury is compensable. Wamhjoft v. Wagner Electric Corporation, 354 S.W.2d 915, 916 (Mo. Banc, 1945).

Both the Kursweils and Mr. Drey testified that Mr. Drey was responsible for the well being of the sows under his care. He was charged with preventing and addressing any and all problems that could arise in the Kurzweil Livestock operation. They deferred to his expertise in running the large scale sow operation and they held him responsible for the operation's successes and failures. They expected him to oversee the daily operations of the main barn on the Kurzweil farm and to monitor operations at the isolation barn located on the Lyle Quick farm some thirty minutes away.

On Friday, September 16, 2005, Mr. Drey showered out at the main barn between 4:00 p.m. and 4:30pm. Then, as was his custom, he took some medications for the livestock out of the refrigerator, placed them in a cooler and took them over to the isolation barn. He spent about forty-five minutes to an hour administering medications and checking over the sows at the isolation barn. He then loaded the remaining medications back in to the cooler and headed back to the main barn on the Kurzweil farm to return the medications to the refrigerator and check to make sure the cooling cells, fans and ventilation curtains were working properly and that the augers had shut off. After that, he planned to shower at his home and head to the game.

On the way back to the main farm, Mr. Drey came across two large dogs in the road just after a blind turn. He swerved his motorcycle onto a gravel road before losing control and crashing.

I find that Mr. Drey's accident and resulting injuries did arise out of the course and scope of his employment with Kurzweil Livestock. The only reason Mr. Drey was on the road at that time was because he was traveling from the isolation barn back to the main barn to return the medicines and check on the operation of the ventilation system. The evidence clearly showed that the ideal temperature for sows is sixty-five degrees and the temperature that day was about ten degrees warmer outside. The Kurzweils expected Mr. Drey to maintain the temperature in the main barn as close to 65 degrees as possible to decrease the chances that the sows would miscarry. I found Mr. Drey's testimony about his plans for the evening credible. While the Kurzweils stated that they did not "feel" that Mr. Drey planned to return to the main barn and check on operations before heading to the football game, they admitted that they did not monitor Mr. Drey's work and did not expect him to report all of his actions to them.

Even if the Kurzweils did not expect Mr. Drey to vaccinate the sows in the isolation barn or expect him to make sure the main barn cooling system was operating correctly and the augers were off, they benefited from Mr. Drey's dedication to both their operation and sows. By their own testimony, they placed him on a salary and expected him to be on call 24 hours a day, seven days a week. They held him accountable for both the successes and failures and they expected him to do his job without reporting every action to them. While Mr. Drey was only a manager, he prided himself on caring for the Kurzweil operation as if it were his own farm. He did so to the mutual benefit of himself and the Kurzweils.

Under the "mutual benefit 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. 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 benefits. Cruzan v. City of Paris, 922 S.W. 2d 473 (MO App. E.D. 1996). Mr. Drey suffered his injuries while performing important duties in the care and maintenance of the Kurzweil Livestock operation. Clearly his actions benefited the Kurzweils far more than they benefited Mr. Drey.

Therefore, I find that Mr. Drey was injured in the course and scope of his employment on September 16, 2005 and did suffer compensable injuries under Missouri's Workers' Compensation law. I further find that Mr. Drey did suffer a 15% permanent partial disability to the body as a whole and award him \$21,904.80 for such disability – as stipulated to by the parties.

As a result of his dedication to his job, Mr. Drey suffered several broken ribs, a broken collar bone and a severe concussion that left him in a coma for three days. I find Dr. Zimmerman's testimony that the treatment Research Medical Center provided beginning on September 16, 2005 was reasonable and necessitated by Mr. Drey's work related accident of September 16, 2005. The un-contradicted evidence is that the Research Medical Center bills remain unpaid and Mr. Drey is personally responsible for paying them. Therefore, I award Mr. Drey an additional amount of \$29,284.00 for unpaid medical bills.

However, I do not find that Kurzweil's denial of Mr. Drey's claim was unreasonable. Mr. Drey admitted that, due to the nature of his head injury he had very little memory of the accident. Thus, the Kurzweils' questions about the circumstances of whether Mr. Drey's accident occurred while he was performing his job is understandable. Therefore, I deny his requests for costs.

Thus the compensation due Mr. Drey is the \$21,904.80 for permanent partial disability stipulated to by the parties, together with \$29,284.00 in medical expenses for a \$51,188.80 total award. Mr. Drey's attorney requested a fee equal to twenty-four percent (24%) of all amounts awarded. I find that such request is fair and reasonable and order a lien attach to this award for \$12,285.31 until paid in full pursuant to Mo.Rev.Stat. §287.260.1.

Date: _____

Made by: _____

Carl Mueller
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation