

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

Injury No. 03-093088

Employee: Kathy Finnell
Employer: Jackson County, Missouri
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, 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 as modified herein.

We offer this supplemental opinion to correct typographical errors in the administrative law judge's award and to explain in some detail our agreement with the conclusions of the administrative law judge.

Discussion

We correct three clerical errors in the administrative law judge's award. Page one and two of the award pose multiple questions designed to elicit from the administrative law judge a summary of the award. Question 2 asks "Was the injury or occupational disease compensable under Chapter 287?" Question 3 asks "Was there an accident or incident of occupational disease under the Law?" The administrative law judge answered "yes" to Questions 2 and 3. The remainder of the award makes plain the administrative law judge found employee did not sustain a compensable accident or incident of occupational disease and the answer to Questions 2 and 3 should be "no." We modify the answers to Questions 2 and 3 to "No."

In the final paragraph of page seven of the award, the administrative law judge states "As such, I find [employee] did not sustain a compensable accident that arose out of and in the course of her employment on August 21, 2003. [Employee] appears to suffer from disability due to psychological issues, but I do find the conditions are causally related to work or a specific accident such as alleged on August 21, 2003. Other issues considered for the Court's consideration are moot and require no additional discussion." It is clear from the first and third sentences reprinted above that the second sentence should read "[Employee] appears to suffer from disability due to psychological issues, but I do not find

¹ Statutory references are to the Revised Statutes of Missouri 2003 (effective as of August 28, 2003), unless otherwise indicated.

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the conditions are causally related to work or a specific accident such as alleged on August 21, 2003” and we so modify the award.

The administrative law judge notes that employee alleges that she was the victim of an assault and battery with a door, which battery occurred “during normal business hours as the staff and attorneys within a large, urban prosecutor’s office went about their business.” The administrative law judge then expresses her view that “[w]hile a claimant’s own testimony can be sufficient proof of accident, this claimant’s allegations, if accurate, should be supported by an ample amount of corroborating evidence.” The administrative law judge goes on to state, “In examining the records as a whole, therefore, this Court is mindful that a case of this nature should not stand on the single testimony of one witness given the complexity of the issues and theories alleged.” We do not know what the administrative law judge meant when she referred to this matter as “a case of this nature.”

Whatever the administrative law judge’s meaning, we disavow what appears to us an overbroad suggestion that there exists any general rule that cases like the instant case cannot “stand on the single testimony of one witness.” The law is well-settled that a claimant’s testimony alone, *if believed*, constitutes substantial evidence to establish that a claimant sustained an injury arising by accident.² Naturally, corroborating evidence may be necessary to support a claimant’s testimony where the claimant’s ability to objectively perceive or recall events is impaired by medical conditions but there is no universal rule of law that an accident cannot be proven by the testimony of a claimant.

Notwithstanding our disagreement with the administrative law judge’s assertion discussed above, we agree with her overall assessment of the testimonial evidence. More specifically, after comparing the testimony of Mr. Hughes, Ms. Hamilton, Ms. Cervantes, and Ms. Cosby, against employee’s testimony, we find employee’s testimony lacking in persuasive force. Even if we gave weight to her testimony, at best employee’s testimony might support a finding that employee sustained a very minor trauma at work. But there is no evidence of any significant physical injury or any reason to believe, from any objective standpoint, that employee was subject to or had reason to fear any violence or threat of harm.

We offer a final word about the expert opinions regarding the medical causation of employee’s psychological condition. The medical causation opinions of Drs. Logan or Varanka appear to be based on assumptions not supported by the record. Specifically, Dr. Logan’s opinion is founded upon employee’s description that her co-worker raised his hands to employee, screamed at employee, grabbed employee, pushed employee, and shut a door on employee’s arm and torso. Dr. Varanka’s opinion is founded upon employee’s description that employee was pushed and shoved into a door. We do not believe employee’s co-worker pushed/shoved employee, grabbed employee, or closed a door on any part of employee’s body. Consequently, the causation opinions of Drs. Logan and Varanka are insufficient to sustain employee’s burden of proof that the work event caused employee’s current psychological conditions.

² See *Parrott v. HQ, Inc.*, 907 S.W.2d 236, 245 (Mo. App. 1995).

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Dr. Hughes also offered some psychiatric opinions we cannot endorse. But Dr. Hughes is the only of the three psychiatric experts to offer an opinion regarding whether a work altercation during which employee was *not* physically threatened (as we have found the altercation in this case to be) would cause employee's psychological conditions, including post-traumatic stress disorder. Dr. Hughes testified it would not and we accept his opinion in this regard.

Award

We affirm the administrative law judge's award denying compensation in this matter, as supplemented and corrected herein.

We attach the September 2, 2014, award and decision of Administrative Law Judge Lisa Meiners by this reference and we affirm and adopt the administrative law judge's findings, conclusions, award and decision to the extent they are not inconsistent with this award.

Given at Jefferson City, State of Missouri, this 28th day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Kathy Finnell Injury No. 03-093088

Employer: Jackson County, Missouri

Insurer: Self-Insured/Alternative Risk Services

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Hearing: June 24, 2014 Checked by: LM/pd

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 21, 2003
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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? 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: Alleged work place assault and battery
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: allegedly left upper extremity, left ribcage, body as a whole, psyche

- 14. Nature and extent of any permanent disability: None
- 15. Compensation paid to date for temporary disability: \$0.00
- 16. Value necessary medical aid paid to date by employer/insurer? \$0.00
- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$1,000.00+
- 19. Weekly compensation rate: \$662.23/\$347.05
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:	
Medical paid:	\$0.00
Unpaid medical expenses:	\$0.00
Temporary total disability (or temporary partial disability).....	\$0.00
Unpaid temporary total disability from Employer.....	\$0.00
Permanent partial disability benefits from Employer.....	\$0.00
22. Second Injury Liability: N/A	
0 weeks of permanent partial disability from Second Injury Fund.....	\$0.00
Uninsured medical/death benefits.....	\$0.00
Permanent total disability benefits from Second Injury Fund.....	\$0.00
__ weeks differential (__) payable by Second Injury Fund for ____ weeks beginning ____ and thereafter for Claimant's lifetime.....	\$0.00
TOTAL:	\$0.00

- 23. Future requirements awarded: N/A

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Scott Mach, Employee's attorney, for necessary legal services rendered.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Kathy Finnell Injury No. 03-093088

Employer: Jackson County, Missouri

Insurer: Self-Insured/Alternative Risk Services

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Hearing: June 24, 2014 Checked by: LM/pd

Kathy Finnell is a 52-year-old woman who lives in Kansas City, Missouri. She has two daughters and is married; however, she is currently separated and living with her mother.

M. Finnell grew up in Kansas City attending and graduating from Southeast High School in 1980, then on to Williams College with a degree in sociology. After college she worked for Pitney Bowes as a sales representative and then for Honeywell in Washington D.C. In 1988 Ms. Finnell went to law school at Georgetown and graduated with her J.D.

Ms. Finnell returned to the Kansas City area to work at the Public Defender's office for 2 years. She then moved to the Jackson County Prosecutor's Office in 1993 at the warrant desk. In 1996 she briefly went to the Law office of Arthur Bensen as a civil rights plaintiff's attorney where she tried several cases, one in particular ending in a verdict of over \$1 million dollars in her client's favor

She eventually returned to the Jackson County Prosecutor's Office where she was hired to be in the Community Prosecution Unit. While in this position, Ms. Finnell injured her left shoulder while at work, had rotator cuff surgery, and settled that claim for 17.5% to the left shoulder. She only missed work due to this injury while she was treating for it. Otherwise, she was able to work full time and was in good health. In 2003, the Jackson County Prosecutor, Mike Sanders, promoted Ms. Finnell to Chief Trial Assistant in the Drug Unit. In that capacity, she supervised numerous attorneys including Julie Hamilton, Stefan Hughes and David Fry. As a supervisor, Ms. Finnell testified to having difficulties with Ms. Hamilton.

Ms. Finnell was in good health and was able to perform the functions of her job. She did begin having numbness and tingling in her hands and began getting carpal tunnel treatment for her hands. She had surgery on her left hand and it was improving following the surgery but prior to the 8/2003 incident. Ms. Finnell had no mental instability before August of 2003 which was

corroborated by her boss Mike Sanders, (Sanders depo page 31) her husband, her sister and her mother's testimony.

On August 21, 2003, Ms. Finnell discovered that her subordinate, Julie Hamilton, had asked another subordinate, David Fry, to cover a trial for her. Ms. Finnell did not think this distribution of caseload was appropriate and approached Ms. Hamilton to discuss the matter. Ms. Hamilton had worked out this assignment of caseload with her direct supervisor, Stefan Hughes, who was also Ms. Finnell's subordinate.

When Ms. Finnell approached Stefan Hughes to discuss this matter, a disagreement ensued and there are numerous accounts and witnesses with differing tales of how the disagreement concluded.

Ms. Finnell asserts that she was simply trying to discuss her displeasure with Julie Hamilton's decision with Stefan Hughes in Stefan's office when he raised his hand to her, appearing to plan to strike her, yelled at her to "get out of my office" and slammed the door shut on her arm chest and side. She went to the Prosecutor's office and reported the incident. She advised that she had been hurt in the incident. She claims she called her husband, who is a police officer, and went to North Kansas City hospital for treatment. While at the hospital, the police were called to take her report of the assault.

Stefan Hughes asserts that on the date of the incident, Ms. Finnell was yelling at Julie Hamilton and he simply advised Ms. Finnell that she was being inappropriate towards Ms. Hamilton and verbally abusive. Stefan Hughes stated that Ms. Finnell began yelling at him, was "melting down" and was goading him to strike her. Mr. Hughes asserted that he again asked her calmly to lower her voice and then delicately closed and locked the door to remove himself from the confrontation with Ms. Finnell. He stated that neither her hand nor any of her body was ever caught in the door, that he made no gestures towards her and he never raised his voice to her. He testified that she continued to pound on the door after he closed it while yelling explicatives. He did make a statement to police and was never charged with any kind of assault.

Numerous other witnesses were called upon to testify regarding their recollection of the incident. Not one person actually visually witnessed Ms. Finnell being shut in the door by Stefan Hughes. The witnesses' accounts are as follows:

Becky Cervantes, Stefan Hughes' assistant who was seated near the incident, did not witness Stefan Hughes raise his voice and did not see any of Ms. Finnell's body caught in the door. David Kelly, an attorney who was with Stefan Hughes in the office at the time of the incident, did not independently recollect Ms. Finnell being closed in the door but saw Ms. Finnell's hand bandaged sometime after the incident. Georgetta Counce, Ms. Finnell's assistant who sat right outside the door where the incident occurred, did not personally witness Ms.

Finnell being slammed in the door but recalled her being hysterical after the event and heard Ms. Finnell assert that her arm had been caught in the door at the time of the incident. Dawn Parsons, another subordinate attorney of Ms. Finnell's, testified to ongoing tension between Stefan Hughes and Ms. Finnell but did not witness the incident. Sherry Cosby, an assistant who sat near the incident, heard voices raised in the confrontation and stated that Ms. Finnell's hand or arm must have been caught in the door because she could not hear it shut; however, she did not actually see the arm get caught in the door. Julie Hamilton was one foot from the incident and heard Ms. Finnell screaming and yelling profanities, trying to push her way in the door of the office where Stefan Hughes was, and specifically saw the door shut without any of Ms. Finnell's body being caught in the door. Jim Kanatzer, one of Ms. Finnell's bosses, did not witness the incident but did participate in her termination hearing after this incident occurred because of her inability to get cases filed in a timely manner. Mike Sanders, Ms. Finnell's boss, did not witness the incident; however, Ms. Finnell went to his office shortly after the incident where she advised him that Stefan Hughes had hurt her and her right hand was somewhat red. He believed that her hand may have been injured by pounding on the door rather than being caught in the door, and ultimately he did not find Ms. Finnell's account of her injury to be credible after doing his own fact finding and interviews of witnesses. Ultimately, Ms. Finnell was terminated from the Jackson County Prosecutor's Office. (Sanders depo page 42)

After the 8/21/03 incident, Ms. Finnell, her husband, her mother and her sister all testified that she went to the hospital for treatment. She was questioned by the police department about the incident. Ms. Finnell alleges that her hand and side were caught in the door causing injury. Ms. Finnell received carpal tunnel treatment for her right hand after the 8/21/03 incident. She wears braces on her hands almost daily and claims that she cannot use her dominant left hand much since having had it slammed in the door.

She also alleges to suffer from psychological problems (PTSD) subsequent to the altercation. She began being treated by Dr. Varanka shortly after the incident. Dr. Varanka diagnosed her with PTSD. She continues to receive treatment today for her psychological problems. Ms. Finnell and her husband separated after this incident due to her psychological condition and she moved in with her mother. She continued to live with her mother, was withdrawn, had hives, and had panic attacks/tightness in her chest for which she required hospitalization. Ms. Finnell requires medications for the PTSD and also has bladder incontinence due to stress. She required surgery for this condition. She has episodes where she sleeps all day and has crying spells daily. She suffers from forgetfulness, jumpiness and headaches. Ms. Finnell's mother indicated that Ms. Finnell may begin a project but is never able to complete it due to needing to stop and sleep. There are times where she may sleep for 2-3 days in a row.

None of the psychological experts who evaluated Ms. Finnell found that she had any pre-existing psychological disorders or disability. No medical doctor, including Ms. Finnell's own expert, Dr. Stuckmeyer, opined that Ms. Finnell was permanently and totally disabled. Ms. Finnell's psychiatrist, Dr. Varanka, testified that Ms. Finnell had PTSD and significant disability after the work incident. Dr. Logan also testified to significant psychological disability after the work accident. Dr. Hughes testified that there was no disability from either before the alleged work accident or after.

Shortly after her termination, and despite these issues, Ms. Finnell made numerous attempts at employment including running against Mr. Sanders for Jackson County Prosecutor where she attended numerous debates and public forums and was able to effectively and articulately participate in these debates, (Sanders depo page 46-7) did some teaching at the college level, and practiced law as a solo practitioner. By 2007 she discontinued looking for work and began collecting social security disability. She testified that she cannot work full time due to her 8/21/03 injury.

A work place injury allegedly occurring in 2003 would be construed within the provisions of the so-called liberal construction rule as then set forth in §287.800 R.S.Mo. However, a liberal construction of the law does not relieve a claimant from the burden of proof of all essential elements of her claim. Cambron vs. Treasurer of the State of MO as Custodian of the Second Injury Fund, 404 S.W.3d 330 (S.D. 2013); Thorsen vs. Sach's Electric Company, 52 S.W.3d 611 (W.D. Mo. 2001). Even when doubts are to be resolved in favor of the employee, a claim will not be validated when some essential element is lacking. White vs. Henderson Implement Co., 879 S.W.2d 575 (W.D. 1994). Proof of "accident" is considered to be an essential element of a claim. Tangblade vs. Lear Corporation, 58 S.W.3d 662 (W.D. 2001). More specifically, "accident" has been held to be the "first essential" element that must be proven in a Claim for Compensation. McClain vs. The Welsh Co., 748 S.W.2d 720 (E.D. 1988).

This claimant alleges injury in the form of a physical attack. The conduct the claimant attributes to the alleged assailant includes both the purposeful infliction of fear of physical harm and the purposeful causing of physical harm, the same two elements which define "assault" and "battery" under the authority of §455.010 R.S.Mo. Claimant is, in other words, alleging that she was the victim of assault and battery. She is also alleging that this event took place during normal business hours as the staff and attorneys within a large, urban prosecutor's office went about their business. Moreover, she alleges a very specific and unusual type of attack, with a door being used as a weapon. While a claimant's own testimony can be sufficient proof of accident, this claimant's allegations, if accurate, should be supported by an ample amount of corroborating evidence. In examining the record as a whole, therefore, this Court is mindful that a case of this nature should not stand on the single testimony of one witness given the complexity of the issues and theories alleged. At trial, she provided no eye witnesses. It appears

she initiated the deposition of Sherry Cosby who thought perhaps one of claimant's hands might have been caught briefly in the closing door but who unequivocally denied witnessing the type of forceful, crushing event to which claimant attributes her injuries.

Claimant's remaining corroborating evidence is the written witness statement attributed to David Kelly. In light of his trial testimony, however, it appears what the Court actually received an exhibit marked as the statement of David Kelly but whose authorship is disclaimed by the purported author. At trial, he was unable to recall any of the events set forth in the statement. Ultimately, the exhibit represents a document of unknown origin which bears no similarity to the corresponding trial testimony of the reputed source. For that matter, even that statement fails to describe anything approaching an assault by Stephen Hughes.

Furthermore, Claimant's treatment records as to her physical injuries are reflective only of subjective complaints. There is no evidence of acute or objective physical findings which might corroborate the type of trauma she describes. Even Dr. Stuckmeyer admitted his clinical examination could be consistent with no injuries at all. Similarly, both Drs. Logan and Varanka conceded that psychiatric symptoms of depression, anxiety and loss of confidence could all be associated with an individual who has experienced a significant career disappointment such as claimant describes. For that matter, both doctors also testified that in forming their conclusions, they were assuming the employee was functioning well in her job duties at the time of alleged event. Based upon the testimony of Mike Sanders and claimant's own resignation letter which concedes ongoing performance issues, that presumption is clearly invalid. While experts can base their opinions on hypothesized facts, it is a pre-requisite that when an expert is asked to assume that certain facts are true in order to answer a hypothetical question, those facts must be established by the evidence. Hobbs vs. Harken, 969 S.W.2d 318 (W.D. 1998).

In the final analysis, the extent of claimant's corroborating evidence is a defective exhibit and an eye witness whose testimony neither parallels nor verifies claimant's depiction of events. All of the medical findings are non-specific to acute trauma. The Court does not find Claimant's testimony standing alone persuasive. Instead, I find the testimony of Mr. Hughes, Ms. Hamilton, Ms. Cervantes and even Ms. Cosby more persuasive. Moreover, the overall weight of the evidence does not support the conclusion that claimant was the victim of a workplace assault or that she has met her burden of proving her theory of injury by accident. As such, I find Claimant did not sustain a compensable accident that arose out of and in the course of her employment on August 21, 2003. Claimant appears to suffer from disability due to psychological issues, but I do find the conditions are causally related to work or a specific accident such as alleged on August 21, 2003. Other issues considered for the Court's consideration are moot and require no additional discussion.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation