Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 09-015564

Employee: Grant Freeman

Employer: Lilmonsta, LLC/Jackson Hewitt Tax Service

Insurer: State Farm Fire & Casualty

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, heard the parties' arguments, reviewed the evidence and considered the whole record, we find that the award of the administrative law judge allowing 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 by this supplemental opinion.

We offer this supplemental opinion to provide additional rationale to support our conclusion that employee's injury arose out of an in the course of his employment.

Employee fell and broke his arm a few blocks from employer's office while pursuing an intruder. During employee's regular evening shift at employer's office, an intruder entered employer's business looking for cash. After determining the business had no cash on hand, the intruder grabbed items from employee's coat and ran out the door. Employer's business had a sign in the window depicting a hand holding cash. We find it likely that it was employer's advertisement of available cash that induced the intruder to enter employer's office.

To show that his injury arose out of and in the course of employment, employee has to show that the accident was the prevailing factor in causing his injury and that his injury came from a hazard or risk related to his employment. See § 287.020.3(2) RSMo. The parties do not dispute that employee's fall caused his broken arm. The determination of this claim turns upon whether employee's injury came from a hazard or risk related to his employment. We find that it did.

Employer argues that at the time of the fall, employee was not fulfilling his work duties. Employer further argues that "[t]he moment that [employee] left Jackson Hewitt's premises, he embarked upon a personal mission unrelated to his employment that was not in furtherance of his employer's interests." Employer argues that since the intruder had only employee's personal property, employee's pursuit of the intruder was a purely personal mission. Employer urges us to find that since employee was not performing a work duty at the time of the fall and since employee was on a purely personal mission at the time of the fall, the risk of sustaining the broken arm was not a risk related to employee's employment.

The introduction of the intruder into employee's workplace created an emergency. In emergencies, workers are seldom engaged in fulfilling the regular work duties for which they are employed. For example, seldom is a worker's regular job duty to hand over

employer's property to a thief, but that is often what is required during a robbery. And it is unlikely that the activity of handing over an employer's property to a robber will further employer's business interests.

The emergency of being robbed arose out of and in the course of employee's employment. Employee's risk of encountering the emergency was clearly related to his employment. We believe employee's risk of falling while responding to the emergency was also related to the employment so long as his response to the emergency was reasonable in kind and scope.[1]

Employee's pursuit was designed to recover his property. Employee's pursuit was brief and ended when the intruder dropped the last item of employee's property. The pursuit covered a small distance. Employee's pursuit did not violate any explicit prohibition found in employer's policies. We find in this case that employee's response of briefly chasing the intruder in the hopes of recovering his property was reasonable in kind and scope. The risk of employee falling while responding to the robbery was related to the employment. Employee's injury arose out of and in the course of his employment as described by § 287.020.3(2).

We affirm and adopt the award of the administrative law judge, as supplemented herein. We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The July 1, 2011, award and decision of Administrative Law Judge Paula McKeon is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED
James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

[1] See, LARSON'S WORKERS' COMPENSATION LAW, § 28.01.

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 Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

By giving chase to the intruder, employee acted contrary to employer's policy to not put himself in danger. He also violated employer's policy directing that if there is a disturbance, employee should not try to stop it. Once employee engaged in the chase contrary to employer's prohibition, he removed himself from the course of his employment. Further, employee's job duties did not require him to run so his employment certainly never exposed him to the risk of falling while running.

The risk of employee falling while running was not related to his employment. Employee's injury did not arise out of and in the course of his employment. See § 287.020.3(2) RSMo.

I would reverse the award of the administrative law judge. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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James Avery, Member

FINAL AWARD

Employee: Grant Freeman Injury No. 09-015564

Dependents: N/A

Employer: Lilmonsta, LLC

Insurer: State Farm Fire & Casualty

Additional Party: N/A

Healthcare Provider: St. Luke's Hospital

Hearing Date: June 8, 2011 Checked by: PAM/lh

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: February 26, 2009.

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? Yes.

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: Freeman broke his arm while pursuing an armed robber in the course and scope of his employment with Jackson Hewitt Tax Service.

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: Right upper extremity.

14. Nature and extent of any permanent disability: 20 percent permanent partial disability.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? None.

17. Value necessary medical aid not furnished by employer/insurer? $5,321.75.

18. Employee's average weekly wages: $599.90.

19. Weekly compensation rate: $399.95.

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Past medical expenses: ……	$ 5,321.75
7.57 weeks of past temporary total disability benefits (7.57 x $399.95) or ……	$ 3,027.62
40 weeks of permanent partial disability benefits (40 x $399.95) or……	$15,998.00
TOTAL:	$24,347.37

22. Second Injury Fund liability: N/A

23. Future requirements awarded: None.

Said payments to begin as of the date of the award 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 25 percent a lien in favor of Leah Burkhead, Attorney at Law, for reasonable and necessary attorney's fees pursuant to Mo.Rev.Stat. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Grant Freeman Injury No. 09-015564

Dependents: N/A

Employer: Lilmonsta, LLC

Insurer: State Farm Fire & Casualty

Additional Party: N/A

Healthcare Provider: St. Luke's Hospital

Hearing Date: June 8, 2011 Checked by: PAM/lh

FINDINGS OF FACT AND RULINGS OF LAW

On June 8, 2011, the parties appeared for a final hearing. The Employee, Grant Freeman, appeared with counsel, Leah Burkhead. The Employer, Lilmonsta, LLC, (Steven Lyddon) appeared with their attorney, Denise Tomasic. Healthcare Provider, St. Luke's Hospital, appeared by attorney, Alan Gallas, and submitted its bills into evidence and was excused from the rest of the hearing.

STIPULATIONS

At the hearing, the parties entered into the following stipulations:

1) That on February 26, 2009, Claimant was an employee of Jackson Hewitt Tax Service;
2) That the accident occurred in Kansas City, Jackson County, Missouri;
3) That Employer received timely notice of the accident;
4) That Claimant filed a timely Claim for Compensation;
5) That Lilmonsta, LLC, was fully insured by State Farm Insurance Company on the date of accident;
6) That Claimant's average weekly wage was $599.90 and his compensation rate for temporary total and permanent partial disability was $399.95;
7) That medical bills submitted through the medical fee dispute and Claimant's Exhibit 1 were reasonable and related to Freeman's February 26, 2009 injury.

ISSUES

The issues to be resolved by this hearing are as follows:

1) Whether Grant Freeman sustained an accident arising out of and in the course of his employment on February 26, 2009;
2) Whether Grant Freeman is entitled to past medical expenses of $5,321.75;

3) Whether Grant Freeman is entitled to past temporary total disability from March 5, 2009 to April 27, 2009;
4) Whether Grant Freeman sustained permanent partial disability as a result of his February 26, 2009 injury.

EVIDENCE

Clamant offered the following exhibits which were received without objection:

Exhibit A – Medical itemization, 9/4/09
Exhibit B – Dr. Poppa reports
Exhibit C – August 11, 2009 deposition of Tricia Lyddon

Employer offered the following exhibits which were received without objection:

Exhibit 1 – Employee Handbook
Exhibit 2 – Personnel Manual Employee Acknowledgment
Exhibit 3 – Jackson Hewitt Tax Service Employment Agreement
Exhibit 4 – Jackson Hewitt Tax Service Employee Availability
Exhibit 5 – Aerial Map
Exhibit 6 – K.C. Missouri Police Department Incident Report
Exhibit 7 – MilitaryRecords

Healthcare Provider offered the following exhibits which were received without objection:

MFD Exhibit 1 – 2/26/09 admission and medical records
MFD Exhibit 2 – 2/26/09 invoice
MFD Exhibit 3 – 3/4/09 admission and medical records
MFD Exhibit 4 – 3/4/09 invoice
MFD Exhibit 5 – Denial letter
MFD Exhibit 6 – Application for Direct Payment
MFD Exhibit 7 – Acknowledgment for Direct Payment
MFD Exhibit 8 – Notice of Hearing

FINDINGS OF FACT AND RULINGS OF LAW

On February 26, 2009, Grant Freeman was performing tax preparation services alone at Jackson Hewitt Tax Service, 3355 Main Street, Kansas City, Missouri, when an armed robber entered the business. The assailant was wearing all black, including a ski mask and was armed with a box cutter. The assailant demanded money and Freeman told the robber there was no cash on premises. He opened a cash box at the back of the office which contained only one dollar. Freeman then showed the contents of his wallet which did not contain cash. The assailant demanded car keys. Freeman did not have a car. The assailant then reached in Freeman's jacket which was hanging over his desk and took his keys, cell phone and flash drive and ran from the business. Freeman chased the assailant and yelled for him to return the stolen items. At some point the assailant threw the keys back into the office area. Freeman continued to pursue the assailant out the door and around an adjacent parking lot. The assailant then dropped Freeman's cell phone. Freeman slipped and fell as he was trying to pick up his cell phone. The flash drive was subsequently found in a desk drawer at Jackson Hewitt.

Freeman reported the robbery to his employer and police. Freeman then sought medical treatment for a broken arm. Freeman had emergency medical treatment from St. Luke's Hospital and

follow-up care with orthopedic Dr. Shriwise. Freeman was placed on modified duty from March 5, 2009 until April 27, 2009, with conservative treatment. Freeman was released from medical care June 8, 2009.

Freeman was terminated from his employment with Jackson Hewitt on March 5, 2009.

Freeman incurred medical expenses from Dr. Shriwise and St. Luke's Hospital totaling $5,321.75. St. Luke's Hospital filed an Application for Direct Payment totaling $4,650.75.

Freeman was evaluated and rated by Dr. Poppa on May 17, 2010. Dr. Poppa opined the billings of St. Luke's and Dr. Shriwise were reasonable, appropriate and necessary to cure and relieve the effects of Freeman's injury of February 26, 2009. Dr. Poppa opined Freeman sustained 20 percent permanent partial disability at the 200-week level of his right upper extremity and that Freeman was unable to work from March 5, 2009 to April 27, 2009, due to the fracture and immobilization of his right arm.

Tricia Lyddon, supervisor at Jackson Hewitt, and Steven Lyddon, owner of Jackson Hewitt and husband of Tricia Lyydon, testified on behalf of the employer.

No benefits have been paid since the employer denies accident due in part to the fact that Freeman was in pursuit of stolen objects that were personal in nature. The Employer further asserts that vague guidance in the Jackson Hewitt handbook would suggest that Freeman should be prohibited from pursuing an assailant under these circumstances. Neither of these support a denial of Freeman's workers' compensation benefits.

Section 287.120 provides that an "employer…shall be liable, irrespective of negligence, to furnish compensation under the provisions of the [Workers' Compensation Law] for personal injury… of the employee by accident **arising out of and in the course of the employee's employment**[.]" Section 287.120.1 (emphasis added).

Section 287.020.3 states:

> (2) An injury shall be deemed to **arise out of and in the course of the employment** only if:
> (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
> (b) It 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.

In this case the issue is whether the hazard is related or unrelated to the employment. Freeman's accident is clearly related to the employment. Freeman was the victim of an armed robbery in the employer's place of business. He was not involved in anything other than work when the assailant created the hazard. Despite the fact that the assailant took items which belonged to Freeman and not the employer directly does not negate the clear nexus between the employment and the injury. The intruder was there to rob the business. It was undoubtedly a disappointment that there was nothing of significant value to steal. However, the work nexus is clear. Freeman was injured because of his exposure at work. In other words, had Freeman not been at work he would not have been robbed.

After hearing testimony and reviewing the evidence in this case, I find on February 26, 2009, Grant Freeman sustained an accident arising out of and in the course of his employment with Jackson Hewitt Tax Service, which resulted in a right upper extremity fracture.

Freeman claims past medical expenses totaling $5,321.75 of which $4,650.75 was requested by St. Luke's Hospital in its Application for Direct Payment. Dr. Poppa opined that the medical treatment was necessary to cure and relieve Freeman of the effects of his February 26, 2009 injury. I find these medical expenses as set forth in Claimant's Exhibit 1 are reasonable and necessary and such amount is awarded to Freeman. The Application for Direct Payment (MFD #09-00056) is denied on the basis the medical services in dispute were unauthorized by the employer or insurer.

Freeman claims past temporary total disability benefits from March 5, 2009 to April 27, 2009, or 7.57 weeks. Dr. Poppa opined that Freeman was temporarily and totally disabled for that period of time. Freeman testified he was unable to work because of his arm cast. I find Freeman entitled to past temporary total disability benefits from March 5, 2009 to April 27, 2009 or 7.57 weeks at $399.95 per week or $3,027.62.

Freeman seeks an award of permanent partial disability. Dr. Poppa assigned Freeman 20 percent permanent partial disability at the 200-week level. Freeman testified that he has residual stiffness, achiness, and pain with lifting weights. Based on Freeman's testimony and Dr. Poppa's uncontroverted medical opinion, I find Freeman sustained 20 percent permanent partial disability at the 200-week level referable to his right upper extremity. Freeman is entitled to an award of compensation of 40 weeks at $399.95 or $15,998.00.

This award of compensation is subject to an attorney's lien of 25 percent in favor of Leah Burkhead for necessary legal services provided.

Made by: _____

Paula McKeon
Chief Administrative Law Judge
Division of Workers' Compensation