

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

Injury No.: 04-076205

Employee: Mark H. Frumhoff
Employer: Pasta House Company
Insurer: Secura Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: Alleged April 21, 2004
Place and County of Accident: Alleged St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 24, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 24, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: N/A
Employer: Pasta House Company
Additional Party: N/A
Insurer: Secura Insurance Company
Hearing Date: February 24, 2005

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: JED:tr

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: April 21, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:
Fell on curb injuring his right shoulder.
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 shoulder
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Mark H. Frumhoff Injury No.: 04-076205

17. Value necessary medical aid not furnished by employer/insurer? \$30,047.32
18. Employee's average weekly wages: \$565.00
19. Weekly compensation rate: \$376.67/\$347.05
20. Method wages computation:

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL:

-0-

23. Future requirements awarded: N/A

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to 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 Claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mark H. Frumhoff	Injury No.: 04-076205
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Pasta House Company	Department of Labor and Industrial
Additional Party:	N/A	Relations of Missouri Jefferson City, Missouri
Insurer:	Secura Insurance Company	Checked by: JED:tr

This case involves a disputed trip and fall injury resulting to Claimant with the reported accident date of April 21, 2004. Employer admits Claimant was employed on said date and that any liability was fully self-insured. Both parties are represented by counsel. This matter proceeds pursuant to Hardship Petition.

Issues for Trial

1. accident;
2. whether injury arose "out of" and "in" the course of employment;
3. liability for unpaid medical expenses (stipulated amount);
4. nature and extent of temporary total disability (stipulated amount);

FINDINGS OF FACT

Stipulations

1. The applicable compensation rates are \$376.67 for temporary total disability and \$347.05 for permanent partial disability.
2. The parties stipulated that Employer paid no interim benefits.

Dispositive Evidence

3. Claimant, an assistant manager for Employer, engaged in training management, customer relations, guest services, administrative work, assisting in the kitchen, and checking on customer satisfaction.
4. Claimant described the location of the restaurant and the lot layout including a parking lot in front of and adjacent to the restaurant. Some customers drive up to the curbside to drop off individuals and to pick up very large orders which Claimant may occasionally help carry. Employer does not have curbside service.
5. Claimant stated that, prior to coming in to work on the reported accident date, he discussed by telephone a rendezvous at Employer's restaurant so Claimant could deliver a rented movie videotape entitled "Master and Commander." Claimant stated he asked his brother to order dinner during the prior telephone conversation.
6. At approximately 3:30 p.m., Claimant's brother arrived at the restaurant curbside. Claimant testified he retrieved the movie from his office and went to his brother's car, outside the restaurant. His brother indicated he was unable to come into the restaurant for dinner. Claimant re-entered the restaurant to retrieve the movie and exited again to deliver it to his brother. Claimant estimated he was outside talking to his brother for approximately two to three minutes. As he turned to go back into the restaurant, he tripped on the curb and fell onto his right shoulder.
7. Claimant testified he always encouraged family and friends to come into the restaurant to eat. He estimated that his brother and his family came in to the restaurant one time every two months.
8. Claimant testified that he continued to work following the fall on the sidewalk. He notified the general manager approximately two and a half hours after the fall. The general manager, John DiMartino, instructed Claimant to seek treatment at an emergency room. Claimant left work and went to Barnes Hospital West emergency room. He received conservative treatment and returned to work and completed his shift.
9. Claimant testified he did not miss time from work following the injury. He was relocated to various Pasta House locations in Illinois. He further testified that he was laid off by Employer on July 21, 2004. Thereafter, he worked on a part-time basis as a delivery person for Bandana's Restaurant working approximately 10 hours per week. He also worked on a part-time basis for his father and sister in their real estate business typically hosting open houses on Sundays.

RULINGS OF LAW

Whether the Accident

Arose "out of " and "in" the Course of Employment

The liability of an employer for the payment of workers' compensation benefits is statutory. The basic liability of an employer is created by the following section:

"Every employer...shall be liable, irrespective of negligence, to furnish compensation under the provisions of the this chapter for personal injury or death of an employee *by accident arising out of and in the course of his employment...*" §287.120.1 (emphasis added.)

The courts have construed this language. "Arising out of" and "in the course of" are two separate tests.

Abel v. Mike Russell's Standard Service, 924 S.W.2d 502, 503 (Mo.banc 1996). For an accident to arise “out of” an employment relationship there must be a causal connection between the conditions of the work required to be performed and the resulting injury. For an injury to occur “in” the course of employment the injury must be within the period of employment at a place where the employee may reasonably be fulfilling the duties of employment. (Citing Kloppenborg v. Queen Size Shoes, Inc., 704 S.W.2d 234, 236 (Mo.banc 1986). Shinn v. General Binding Corp., 789 S.W.2d 230, 232 (Mo.App. E.D. 1990).)

The condition of the workplace bears a causal connection to the injury only when the condition is unique to the workplace or is a common condition that is exacerbated by the requirements of the employment. Abel at 504. Here, Claimant did not demonstrate that the parking lot or curbside is unique to Employer’s premises or that any quality thereof represents a necessary feature or condition created by Employer that might be characterized as a requirement of the employment.

Separately, Section 287.020.3(2) RSMo (2000) provides:

- (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 employment is a substantial factor in causing the injury; and
 - (b) It can be seen to have followed as a natural incident of the work; and
 - (c) It can be fairly traced to the employment as a proximate cause; and
 - (d) 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 non-employment life;

Claimant’s injury cannot be called a substantial factor, natural incident, or proximate cause of the employment primarily because there is no suggestion in the record that talking and delivering videotapes is part of the job description given by Claimant on direct examination. Subsection (d), relating to equal exposure outside of employment, cannot be ruled out since the undisputed facts regard unimpeded ambulation over normal surfaces, including curbs, to which the general public is exposed. Thus, Claimant must rely on case law doctrines that sometimes excuse compliance with the statutory language.

Here, the mutual benefit doctrine presents itself. The mutual benefit doctrine holds that “[a]n injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable.” Wamhoff vs. Wagner Electric Corp., 190 S.W.2d 915, 917-919 (Mo. 1945). Blades vs. Commercial Transport, Inc., 30 S.W.3d 827 (Mo. Banc 2000). The test under the mutual benefit doctrine is not whether any conceivable benefit to the employer can be articulated no matter how strained, but whether the act that resulted in the injury is of some substantive benefit to the employer. Blades at 831. The mutual benefit doctrine applies in cases where an employee is injured while engaged in an act that benefits both the employer and the employee, and some advantage to the employer results from the employee’s conduct. Otte vs. Langley’s Lawn Care, Inc., 66 S.W.3d 64, 70 (Mo. App. ED. 2001).^[1]

After giving his brother the movie and speaking with family members in the car, Claimant turned and tripped on the curbside falling and injuring his right shoulder. Claimant argues that inviting his family into the restaurant was a benefit to the employer. The delivery of the movie cannot be said to benefit Employer. Thus, the invitation to dinner itself must be proffered as the benefit to Employer. While this is tenuous at best, when Claimant re-entered and exited the restaurant with the videotape he was clearly engaged in a personal deviation from employment from which no benefit may be inferred.

Claimant testified to facts that suggest the original purpose of this rendezvous was the delivery of the videotape. Assuming, *arguendo*, the dinner suggestion was a measurable benefit to Employer, in hindsight, the mention of dinner may be found to have been a secondary purpose of the rendezvous after considering that the fact that the brother made the rendezvous but, without notice, refused dinner. Moreover, upon the refusal, Claimant re-entered the restaurant to retrieve the movie and returned to his brother’s car parked curbside to deliver the movie. This return trip severs any asserted benefit to Employer. Claimant made an independent trip back into the restaurant and returned curbside which was solely for Claimant’s personal family benefit.

Under the facts of this case, Claimant’s injury at curbside outside the restaurant did not arise out of and in the course

of his employment as an assistant manager for Employer.

Conclusion

Accordingly, on the basis of the competent and substantial evidence contained within the whole record, Claimant's injury did not occur in the course of his employment, and therefore, is not compensable. Claim denied. The remaining issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) As an aside, the somewhat related personal comfort doctrine arguments typically consist of meals, toilet and break-time activity.