

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

Injury No.: 06-002720

Employee: Andre Hammonds
Employer: Columbia Mall Car Wash
Insurer: General Casualty Company of Illinois
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 13, 2009, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued March 13, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of September 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Andre Hammonds

SEPARATE OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I must affirm the denial of compensation by the administrative law judge but for a much simpler reason.

In short, this case is not compensable under the Missouri Workers' Compensation Law (Law) because, although employee slipped on ice and snapped his right ankle, employee did not sustain an "accident" as that term is defined in the Law. Under the Law as it existed before August 28, 2005, "accident" meant roughly the same thing in workers' compensation as it did in laymen's terms: "An unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Remarkably, under the strange language that is the Workers' Compensation Law as amended in 2005, employee's slip and fall does not meet the definition of "accident."

In the 2005 amendments, the legislature narrowed the class of incidents that qualify as an "accident" for workers' compensation purposes by limiting the class to incidents that occur during a single work shift.¹ The legislature also abrogated all cases interpreting the meaning of accident. Section 287.020 provides, in relevant part:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift...

10. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Section 287.800 requires that we strictly construe the Law.

"[A] strict construction of a statute presumes nothing that is not expressed." 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly

¹ It is unclear why the legislature chose to upset the traditional concept of "accident" by adding the single work shift limitation to the definition of accident rather than making it an element of "in the course of employment." Since the inception of the Missouri Workers' Compensation Law, the timing of an injury has been relevant to the issue of whether the injury arose in the course of employment.

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come within the scope of the language used. 82 C.J.S. Statutes § 376 (1999). Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008). The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions. 3 SUTHERLAND STATUTORY CONSTRUCTION § 58:2 (6th ed. 2008).

Allcorn v. Tap Enters., 277 S.W.3d 823, 828 (Mo. App. 2009).

Employee's slip on the ice was clearly a specific, unexpected, traumatic event identifiable by time and place of occurrence. The resulting fall and impact immediately produced objective symptoms of an injury. But did the fall occur during "a single work shift?" "Work shift" is not defined in the Law. I look to the dictionary for a definition.

The phrase "work shift" does not appear in my Webster's Dictionary.² The word "shift" appears. "Shift" means, "a group of people who work or occupy themselves in turn with other groups: a change of one group of people (as workers or students) for another in regular alternation: a scheduled period of work or duty in a department working on shifts." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2095 (2002).

Using this definition, a work shift is "a scheduled period of work or duty." It is clear employee's slip on the ice occurred before his scheduled period of work. Naturally, then, the accident did not occur during employee's scheduled period of work. Employee has failed to prove he sustained an "accident" as that term is defined in the Workers' Compensation Law. We must deny compensation because the Law only provides compensation for injuries by accident. § 287.120.1 RSMo.

Employee is not without a remedy. Because employee did not sustain an injury by accident as that term is defined by the Law, employer is not protected by the exclusive remedy of workers' compensation. It seems claimant is free to seek redress for his personal injuries through the courts. See *Mo. Alliance for Retired Ams. v. DOL & Indus. Rels., Div. of Worker's Comp.*, 277 S.W.3d 670 (Mo. 2009). It is for the courts to decide if employer was negligent when employer allowed ice to form on its property resulting in injury to employee or if employer is otherwise legally liable to employee for his injuries.

For the above reasons, I join in the decision of the majority to deny compensation in this matter.

John J. Hickey, Member

² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

AWARD

Employee: Andre Hammonds

Injury No. 06-002720

Dependents:

Employer: Columbia Mall Car Wash

Additional Party: Second Injury Fund

Additional Party: MO Dept. of Social Services

Insurer: General Casualty Company of Illinois

Hearing Date: February 9, 2009

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: RJD/cs

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: Alleged to be January 14, 2006.
5. State location where accident occurred or occupational disease was contracted: Alleged to be Columbia, Boone 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:
Employee was not working when alleged accident occurred.
12. Did accident or occupational disease cause death? N/A Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: N/A.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? None.

- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: Not determined.
- 19. Weekly compensation rate: Not determined.
- 20. Method wages computation: Not computed.

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None.
- 22. Second Injury Fund liability: None.
- 23. Future requirements awarded: None.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Andre Hammonds

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Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Columbia Mall Car Wash

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

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Checked by: RJD/cs

ISSUES DECIDED

The evidentiary hearing in this case was held on February 9, 2009 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on March 2, 2009. The hearing was held to determine the following issues:

1. Whether Claimant sustained an accident arising out of and in the course of his employment with the Columbia Mall Carwash on or about January 14, 2006;
2. Claimant's average weekly wage and compensation rates;
3. Whether Employer and Insurer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
4. Whether Employer and Insurer shall be ordered to pay medical bills heretofore incurred by Claimant;
5. The nature and extent of Claimant's permanent partial disability, if any;
6. Whether Employer and Insurer shall be ordered to provide Claimant with future medical benefits pursuant to Section 287.140, RSMo; and
7. A determination of the rights, if any, of the Department of Social Services pursuant to Section 287.266, RSMo.

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STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;
3. That the Claim for Compensation was filed within the time allowed by the applicable statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;
5. That Employer-Insurer paid no benefits under the Missouri Workers' Compensation Law;
6. That the notice requirement of Section 287.420 is not a bar to Claimant's claim; and
7. That General Casualty Company of Illinois fully insured Columbia Mall Carwash for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Andre Hammonds, as well as the deposition testimony of Andre Hammonds; the testimony of Robert "Rob" Hamilton, Employer's general manager; a written statement of Rob Hamilton; employee scheduling information; time records for Claimant; wage information for Claimant; photographs; curriculum vitae and narrative report of Dr. Garth Russell; medical records and medical bills.

DISCUSSION

The facts of this case are fairly simple. Claimant worked at Columbia Mall Carwash as a detailer. Claimant began working for Employer on Thursday, November 3, 2005. Starting the week of November 7, 2005, Claimant was put on a weekly schedule with all the other employees. Claimant would be scheduled for as many as seven days in a week or as few as five days in a week. Claimant's scheduled starting time would vary. Occasionally, on rainy or "slow" days Claimant (as well as other employees) would be called and told not to come into work, or to come into work at a later time than originally scheduled. Occasionally, Claimant or

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other employees would be called to come in earlier than originally scheduled. Often, Claimant and other employees would be asked to “clock out” for breakfast on a slow morning. Similarly, Claimant and other employees would often be asked to take a longer (unpaid) lunch than normal on a slow day.

On Saturday January 14, 2006, Claimant was scheduled to start work at 10:00 A.M. Claimant arrived early (at approximately 9:00 A.M.) Claimant testified that he was “standing around the detailing department, waiting to clock in”. At approximately 9:35 or 9:40 A.M. (while still waiting to clock in), Claimant decided to exit the building to talk to his friend and co-worker, Brandon, who was working outside the building. Claimant exited through one of the garage doors, when he slipped on ice that had formed in the area where the water from the detail department drains. Claimant fell on the ice and his right leg severely twisted and “snapped”. Claimant had broken his right ankle, which required an open reduction and internal fixation. Shortly thereafter, Claimant was taken to a convenience clinic by one of Employer’s supervisory personnel.

Claimant acknowledges that he was not “on the clock” at the time of the accident, and Claimant acknowledges that he had performed no work for Employer on January 14, 2006. Claimant argues, nevertheless, that this accident arose out of the employment and was sustained in the course of the employment. Claimant essentially invokes the “mutual benefit doctrine”, asserting that Claimant’s presence on Employer’s premises at the time of the accident was beneficial to Employer. According to Claimant, the primary reason that his presence was beneficial to Employer was that he was almost always early to work (as he did not drive and had to rely on a ride with his friend and co-worker, Brandon) and that Employer often asked him to clock in and start work earlier than his scheduled time. Claimant testified that he was asked by Employer to start work early “six out of seven work days”. Another reason that Claimant asserts that his presence was beneficial to Employer was that he (and other employees who arrived prior to their scheduled start times) would often fold towels that came out of the dryer while they were waiting to clock in. (As noted above, Claimant testified that he did not fold towels on the morning of January 14, 2006, nor perform any other work for Employer.)

Rob Hamilton, Employer’s general manager, testified that employees were discouraged from coming in early. Hamilton did not want customers to see inactive employees, and this was communicated to employees. Hamilton testified that employees were asked to leave the premises until their scheduled start time, or remain in the break room where they could not be seen by customers. Hamilton testified that Claimant usually went to the mall when he came in early.

Hamilton also testified that employees did not fold towels when they were off the clock, as they wanted to be paid for any work they performed, and Hamilton did not want “off the clock” employees in the view of customers.

Most significantly, Hamilton testified that it would have been extremely unlikely for Claimant to be asked to clock in early, and that he (Hamilton) was unaware of *any* days that Claimant was asked to clock in early. At the evidentiary hearing, Hamilton produced records for the week of the accident (Exhibits 1 and 2, both admitted into evidence) which showed that Claimant was scheduled to work at 9:00 A.M. on Monday and clocked in at 8:59, did not work

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on Tuesday, was not scheduled and did not work on Wednesday, was scheduled at 9:00 A.M. on Thursday and clocked in at 9:00, and was scheduled to start at 8:00 A.M. on Friday and clocked in at 11:59 A.M. Hamilton was also asked if he could produce similar records for the period of Claimant's employment prior to the injury, and Hamilton said he could do so. These records were produced a few days after the hearing, and the parties stipulated to their admission in the record.

Those additional records show that on Claimant's first scheduled week of employment (Nov. 7-13, 2005), Claimant was scheduled for five days, beginning at 9:00 A.M. each day, and that Claimant clocked in at 8:57 one day, 8:59 two days and 9:00 two days. For the week of November 14-20, Claimant clocked in twenty minutes early one day, one minute early one day, on the scheduled time one day, and 32 minutes and 42 minutes late on the other two days. The week of November 21-27 shows Claimant working four days; on one day Claimant started 1:01 prior to his scheduled time, and on the other three days Claimant started at or after his scheduled time. The week of November 28 – December 4, Claimant worked four days, clocking in one minute early twice and one minute late twice. The week of December 5-11, Claimant worked four days clocking in one minute early once, one minute late twice and "on-time" once. The week of December 12-18, Claimant worked six days, clocking in two minutes early once, "on-time" twice, one minute late once, three minutes late twice and 1:01 late twice. The week of December 19-24, Claimant worked six days, clocking in one minute early once, and either "on-time" or a minute or two late on the other five days. The week of December 26-31, Claimant worked five days, clocking in one minute early once, "on-time" once, one minute late twice and 45 minutes late once. The week of January 2-8, Claimant started 2:56 early one day, one minute early one day, "on-time" once, seven minutes late once, and 1:59 late once.

I note that Rob Hamilton was a very credible witness, and there is absolutely no reason to question the validity or accuracy of the scheduling records and the time records. The scheduling records and time records do not reflect any pattern whatsoever of Claimant being asked to "clock in" early, and certainly not "six out of seven work days" as Claimant would have me believe. The records are consistent with Hamilton's testimony.

Therefore, it is apparent that Claimant's primary contention – that his presence at the workplace on January 14, 2006 was beneficial to Employer because Employer usually wanted Claimant to "start work early" – simply is not borne out by the evidence. This calls into question Claimant's truthfulness on other issues, particularly on the issue of whether Claimant sometimes folded towels while he was waiting to clock in (i.e., the other alleged "benefit" to Employer of Claimant's presence). As Hamilton testified that Claimant and other employees did not fold towels while not on the clock (and that they were, in fact, instructed not to be present in the work areas of the building while not on the clock), and as Hamilton was a very credible witness, I must find that Claimant did not fold towels while waiting to clock in. Thus, Claimant's suggestion that the "mutual benefit" doctrine is applicable simply has no evidentiary basis.

Claimant has the burden of proof on the issues of whether this accident "arose out of" his employment and whether the accident was sustained "in the course of" his employment. Claimant has not sustained his burden of proof on that issue. Therefore, the issues of average weekly wage, compensation rate, TTD, permanent disability and medical benefits are all moot.

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The claim of the department of social services under Section 287.266 is likewise moot, as it requires “a compensable injury, occupational disease or disability”.

FINDINGS OF FACT

In addition to those facts to which the parties stipulated, I find the following facts:

1. Claimant, Andre Hammonds, fell on ice on Employer’s premises in Columbia, Boone County, Missouri, on Saturday, January 14, 2006, at approximately 9:40 AM, resulting in a fractured right ankle;
2. Claimant’s work shift was scheduled to begin at 10:00 AM on January 14, 2006;
3. Claimant had not yet “clocked in” to work on January 14, 2006;
4. Claimant had performed no work for Employer on January 14, 2006;
5. There was no pattern or history of Employer asking Claimant to start work before his assigned start time;
6. There was no pattern or history of Claimant or other employees folding towels prior to the beginning of a work shift; and
7. There was no benefit to Employer of Claimant’s presence at Employer’s place of business at and before the time of Claimant’s fall.

RULINGS OF LAW

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. There was no benefit to Employer of Claimant’s presence at Employer’s place of business on January 14, 2006;
2. The “mutual benefit doctrine” does not apply to this case;
3. Claimant did not sustain an accident arising out of and in the course of his employment on January 14, 2006;
4. Employer and Insurer owe no benefits to Claimant;
5. The claim of the department of social services under Section 287.266 is denied, as it requires “a compensable injury, occupational disease or disability”, and Claimant’s alleged injury is not “compensable”; and
6. Claimant’s claim against the Second Injury Fund must be denied as there was not a compensable accident.

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ORDER

Claimant's claim against Employer-Insurer is denied in full. Claimant's claim against the Second Injury Fund is denied in full. The claim of the department of social services under Section 287.266 is denied in full.

Date: March 13, 2009

Made by /s/Robert J. Dierkes
ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Peter Lyskowski
Peter Lyskowski, Acting Director
Division of Workers' Compensation