

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

Injury No. 11-058168

Employee: Bryan Hedrick
Employer: Big O Tires
Insurer: Missouri Employers Mutual Insurance Co.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, heard the parties' arguments, 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 with this supplemental opinion.

Discussion

Scope of the disputed issues

At the hearing before the administrative law judge, the parties agreed that the administrative law judge need only determine two issues: (1) accident; and (2) causation of the injuries alleged. The parties additionally stipulated that if employee prevailed on these two issues, he was entitled to an agreed amount of compensation for permanent partial disability, disfigurement, temporary total disability, and past medical expenses.

However, in her award, the administrative law judge interposed an additional issue that the parties did not specifically identify— whether employee's injuries arose out of and in the course of the employment—and ultimately denied employee's claim based upon a conclusion that employee failed to meet his burden of proof under § 287.020.3(2) RSMo. On appeal, employee has not objected to the administrative law judge's delving into this additional issue; instead, both parties have devoted their briefs and arguments to the dispute whether employee's injuries arose out of and in the course of employment.

It may be the case that by disputing "causation" generally (as opposed to "medical causation" specifically, which is governed by its own statutory test under § 287.020.3(1) RSMo) the parties meant to implicate § 287.020.3(2), which some courts have characterized as setting forth a "causal connection" test. See *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510 (May 29, 2012). Given these circumstances, and because the parties appear in any event to have been prepared, at the hearing, to advance evidence relevant to the issue whether employee's injuries arose out of and in the course of employment, we conclude the issue is properly before us. For this reason, we decline to consider whether the administrative law judge exceeded her authority in reaching an issue the parties did not specifically identify on the record as in dispute.

We would caution that, in the future, parties would be better served by ensuring that the record contains a complete, accurate, and precise statement of the particular issues in dispute. This is because the administrative law judge and this Commission are duty-bound to give effect to the parties' stipulations with regard to the scope of the issues in

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dispute, see, e.g., *Hutson v. Treasurer of Mo.*, 365 S.W.3d 269 (Mo. App. 2012), *Boyer v. National Express Co., Inc.*, 49 S.W.3d 700 (Mo. App. 2001), and *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991).

Injury arising out of and in the course of employment

Section 287.020.3(2) RSMo provides as follows:

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.

We agree with the administrative law judge's conclusion that employee's injuries did not arise out of and in the course of the employment. The mere presence of dangerous materials on the jobsite, combined with the fact that coworkers occasionally engaged in mild horseplay that did not involve those dangerous materials, is, in our view, insufficient to show that employee's injuries came from a hazard or risk related to the employment, or one to which workers were unequally exposed outside of and unrelated to the employment in normal nonemployment life.

Simply stated, the risk or hazard from which employee's injuries came was employee's own voluntary choice to engage in a spontaneous, unprecedented, and potentially deadly act when he lit a can of industrial adhesive on fire. This risk or hazard is as "unrelated" to employee's employment for employer as was the risk or hazard of the *Johme* employee's ankle twisting/falling off her sandal. See *Johme*, 366 S.W.3d at 511. That is to say: the risk bears almost no relation to the employment whatsoever. Any employee can choose to mishandle or misuse dangerous materials in such a way as to introduce new risks and hazards into the workplace; but this choice, standing alone, is insufficient to implicate workers' compensation liability for consequent injuries sustained by such an employee.

Employee asks us to accept as mere "horseplay" his action of lighting the can of adhesive on fire, but we are not persuaded. Employee's action went far beyond the rather mild practical jokes described by other witnesses, such as greasing a doorknob or blowing compressed air under a door. Indeed, employee expressly denied he had ever participated in any horseplay that he would consider to be dangerous; on the other hand, he readily admitted that lighting a can of adhesive on fire was unquestionably dangerous. *Transcript*, page 28.

We additionally wish to make clear that our decision herein should not be read as precluding workers' compensation liability on the part of employer for coworkers who are injured by other employees' dangerous acts. Here, the record reveals that Steve Milazzo, who was innocently performing his job duties when employee lit the can of adhesive in

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Mr. Milazzo's hand on fire, suffered very severe injuries. From Mr. Milazzo's perspective, we can easily conclude that his injuries resulted from a risk or hazard that was directly related to his employment: the risk of working alongside an individual who would on July 28, 2011, choose without warning to engage in an unprovoked, unexplained, and exceedingly dangerous act. We additionally note that the language of Chapter 287 as construed by the Missouri courts has long compensated employees injured in neutral or unexplained assaults at the workplace; it would appear that Mr. Milazzo's case may fall within such parameters. See, e.g., § 287.120.1 RSMo and *Flowers v. City of Campbell*, 384 S.W.3d 305 (Mo. App. 2012).

Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued November 20, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 22nd day of June 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Bryan Hedrick

DISSENTING OPINION

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 administrative law judge's award should be reversed.

Employee worked in employer's tire shop as a general mechanic. It is uncontested that the management at the tire shop permitted an atmosphere of continual horseplay and goofing off. For example, employees would grease doorknobs making them difficult to turn, snap grease rags at each other, and deliver startling blasts of compressed air underneath the bathroom door, among other such japes and tomfoolery. Despite the fact that employer's workplace housed many dangerous tools and materials, including a number of flammable substances and sources of open flame, employer's management permitted employees to continually horse around in potentially dangerous ways. As a result, I find that the atmosphere of horseplay became a fundamental condition of employee's work for employer.

On July 28, 2011, employee activated his personal lighter near a jar of adhesive held by a coworker, Steve Milazzo. At first this produced only mild sparks and flame, but suddenly the entire jar of adhesive exploded, causing both employee and Mr. Milazzo to suffer severe injuries. The only available evidence suggests that employee's activating his lighter near the can of adhesive was done in jest/horseplay—Mr. Milazzo testified that employee was smiling and laughing at the time. There is no evidence to suggest that employee had any evil intent; instead, it appears to me that employee was surprised when the entire jar caught fire, and that he meant merely to startle Mr. Milazzo. In other words, employee was simply participating in the atmosphere of continual horseplay that had become fundamental to employer's workplace culture.

Injury arising out of and in the course of employment

Section 287.020.3(2) RSMo provides as follows:

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.

It goes without saying that the accident of July 28, 2011, caused employee's claimed injuries; I conclude therefore that paragraph (a) above is satisfied. Turning to paragraph (b), I must consider whether employee's injuries did 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. I am convinced that they did not, because his injuries came from a hazard or risk that was directly *related* to

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his employment for employer: an atmosphere of continual and potentially dangerous horseplay.

In *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the Missouri Court of Appeals, Southern District, held that:

[T]he application of [§ 287.020.3(2)(b)] involves a two-step analysis. The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

Id. at 467.

I acknowledge that in the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012), the Supreme Court of Missouri focused on the unequal exposure requirement (or second step of the test set forth above), but I do not read the *Johme* decision to diminish the precedential value of *Pile*, for several reasons. First, and most importantly, our Supreme Court could have simply overruled *Pile* in the *Johme* decision if it had wished to do so, but it did not. That our highest court declined to overrule a decision which the Missouri Court of Appeals, Eastern District, discussed in its decision ordering a transfer, see *Johme v. St. John's Mercy Healthcare*, ED96497 (Oct. 25, 2011), and upon which the Commission relied in its award, implies that the Court saw some wisdom in the *Pile* approach, and wished to leave that precedent undisturbed.

Second, the *Johme* court did not purport to shift the analysis away from the first-step *Pile* question whether a risk is related or unrelated to employment, but rather exhorted us to take better care in identifying the actual risk at issue: the Commission had considered the *Johme* employee's activity of making coffee as the risk that caused her injuries, and analyzed whether making coffee was "related" to her work, but the Court defined the relevant risk as "turning and twisting her ankle and falling off her shoe." *Id.* at 508, 511. Having appropriately defined the risk, the Court proceeded to the unequal exposure analysis, as there was no need to discuss the first-step *Pile* question whether the employee's turning and twisting her ankle was integral to her work as a billing representative: it clearly was not.

In contrast, here we have a risk source—a continual atmosphere of potentially dangerous horseplay in employer's workplace—that was unquestionably related to employee's work for employer. Again, as I have noted, it is uncontested that potentially dangerous horseplay was rampant at the tire shop. Although employee's act of using a lighter near the can of adhesive was arguably more dangerous than any of the prior acts of horseplay

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described by the witnesses, I am not convinced that this distinction can defeat the claim when the risk source is appropriately defined.

The Commission majority emphasizes employee's choice to engage in potentially dangerous horseplay, ignoring that considerations of fault have no place in the Missouri Workers' Compensation Law. In fact, our courts have expressly declared that such considerations are irrelevant in horseplay cases. See *Pullum v. Hudson Foods*, 871 S.W.2d 94 (Mo. App. 1994). In *Pullum*, an employee who worked in a similar atmosphere of continual horseplay was severely injured while attempting to irritate another employee by throwing ice at her. *Id.* at 96. The employer argued that it should not have to pay workers' compensation benefits because the employee acted negligently and foolishly in choosing to engage in dangerous horseplay. *Id.* at 97. The court rejected the argument as follows: "[t]hat a person's participation at horseplay which led to their injury was both foolish and negligent is beside the point since fault is not a factor under the Workers' Compensation Act." *Id.* at 98.

The same considerations apply here. Did employee act foolishly and negligently? Did he do something he should not have done? It is easy for us now to answer these questions in the affirmative. But these questions, legally speaking, have no bearing on our analysis under § 287.020.3(2). Instead, we must confine our inquiry to the question whether the complained-of injuries are sufficiently related to the risks and hazards involved in working for employer. I find no support in either the statutes or the case law for the majority's theory that because employee chose to engage in horseplay that was arguably more dangerous than that which had taken place before, he thereby broke the causal connection between the risk or hazard of engaging in horseplay and his consequent injuries.

In sum, I find that the risk source of employee's injury was directly *related* to his work for employer; as a result, I conclude that employee's injury did 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." § 287.020.3(2)(b)(emphasis added). I conclude, therefore, that his injuries are compensable. I would enter an award allowing employee's permanent partial and temporary total disability benefits, compensation for disfigurement, as well as his past and future medical expenses.

Because the majority has determined otherwise, I must respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Bryan Hedrick

Injury No. 11-058168

Dependents: N/A

Employer: Big O Tires

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

Insurer: Missouri Employers Mutual Insurance Co.

Hearing Date: October 5, 2015

Checked by: HDF/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 – July 28, 2011.
5. State location where accident occurred or occupational disease was contracted: Camden Co., Mo.
6. Was above employee in the employ of above employer at the time of the 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:
See Award.
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: burns to body.
14. Nature and extent of any permanent disability: none awarded.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$118.22.
17. Value necessary medical aid not furnished by employer/insurer? None.

- 18. Employee's average weekly wages: \$467.54.
- 19. Weekly compensation rate: \$311.69.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer/insurer: None.

None.

- 22. Future requirements awarded: None.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Bryan Hedrick

Injury No. 11-058168

Dependents: N/A

Employer: Big O Tires

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

Insurer: Missouri Employers Mutual Insurance Co.

Hearing Date: October 5, 2015

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on October 9, 2015. Memoranda were submitted by October 16, 2015.

The parties stipulated that on or about July 28, 2011, the claimant, Bryan Hedrick, Jr., was in the employment of Big O Tires. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by Missouri Employers' Mutual Insurance Company. The employer had notice of the injury; a claim for compensation was timely filed. The claimant's average weekly wage was \$467.54, resulting in a compensation rate of \$311.69. No temporary disability benefits have been paid. Medical aid has been provided in the amount of \$118.22.

The issues to be resolved by hearing include 1) the occurrence of an accident, and 2) the causation of the injuries alleged.

The parties stipulated that, in the event the claimant is successful in proving the issues to be determined set forth in the preceding paragraph, then the employer/insurer would be liable for permanent partial disability to 45% of the body, 30 weeks of disfigurement, temporary total disability benefits from July 29, 2011, through January 1, 2012, and medical bills totaling \$261,172.69.

FACTS

The claimant, Bryan Hedrick, testified that on July 28, 2011, he was employed by Big O Tires in Camdenton, Missouri. Mr. Hedrick described his work as a general mechanic as including tire repair, installing new tires, and oil changes. Mr. Hedrick suffered severe burns that day while at Big O Tires. Mr. Hedrick testified that he has no recollection of what happened that day and that he woke up in a hospital in Springfield, Missouri, after being heavily sedated, in pain and restrained. Mr. Hedrick said that he had been in a coma for some time. Mr. Hedrick testified that he was on a lot of heavy pain medication while in the hospital.

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Mr. Hedrick testified that he had participated in horseplay on the job at Big O Tires and gave examples of squirting people with a washer hose and snapping a rag. Other Big O Tires employees, according to Mr. Hedrick, had engaged in horseplay such as using compressed air to create a dust cloud.

Mr. Hedrick testified that flammable materials were used and stored at Big O Tires. Mr. Hedrick also said that there are occasions where one would set a bead on a tire by applying heat from a lighted source.

Mr. Hedrick testified that while he engaged in horseplay while working at Big O Tires he would never engage in dangerous behavior and that lighting a can of adhesive would be dangerous. Mr. Hedrick said that lighting a can of glue held in a co-worker's hand would not be part of any task accomplished at Big O Tires. Mr. Hedrick admitted that if a heat source were used to set a bead on a tire the can of glue would first be returned to its storage area.

Kyle Uchtman testified that he is currently the manager of a Big O Tires shop and that he has worked in both the Osage Beach and Camdenton locations. Mr. Uchtman testified that he is familiar with horseplay at Big O Tires, such as greasing a door knob, making it difficult to turn, or blasting air; Mr. Uchtman said that he has never seen horseplay at Big O Tires that carried a risk of injury. Mr. Uchtman said that he has used a flame to set a bead on a tire and that safety methods are utilized, including the removal of flammable materials, ascertaining accessibility to a fire extinguisher, and clearing the area of people to a safe distance from the process of using a flame to set the tire bead. Mr. Uchtman said that he has never used a lighter to set a bead on a tire.

Steve Milazzo testified that he used to work at Big O Tires and that he is the former co-worker with Mr. Hedrick. On July 28, 2011, Mr. Milazzo was patching a tire at Big O Tires using the brush affixed to the cap of a can of glue to apply adhesive to the tire and holding the open can of glue in his other hand when Mr. Hedrick came toward him smiling and laughing as he lit the can of glue with a lighter; Mr. Milazzo testified that the glue started spitting on his hands and sleeves and was exploding when he dropped it, causing a huge explosion and flame resulting in burns to Mr. Milazzo's hands, right forearm, the right side of his backside and his lower back. Mr. Milazzo also suffered leg injuries when he tripped trying to extinguish the fire from his body. Mr. Milazzo had extensive medical treatment for his burn injuries and was not able to work for six months. Mr. Milazzo said that he had not asked Mr. Hedrick to assist him before Mr. Hedrick ignited the can of glue and that there was no reason for Mr. Hedrick to have a lighter close to the adhesive product. Mr. Milazzo did not carry a lighter and was not using a cutting torch or ether at the time of the accident. Mr. Milazzo testified that he had seen horseplay at Big O Tires and specifically described the greasing of the door knob, the towel snapping and the air blown under the bathroom door.

Benny Pruitt testified that he was the manager of the Big O Tires store in Camdenton where Mr. Hedrick's injuries occurred and that he is now a Big O Tires shop manager in St. Robert. Mr. Pruitt testified that he recalls July 28, 2011, although he did not actually witness the incident leading to Mr. Hedrick's injuries. Mr. Pruitt was familiar with the use of a lighter to patch a tire but had never seen Steve Milazzo use this tire patching method. Moreover, if this method of tire

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patching with a lighter were used, the can of adhesive would be put away first. Mr. Pruitt said that there was no legitimate reason to light a can of adhesive on fire at Big O Tires. Cutting torches and ether would not be used to patch a tire, according to Mr. Pruitt. Mr. Pruitt said that he understood that there might be verbal joking among employees at Big O Tires as well as greasing a doorknob to make it difficult to use or putting something "ignorant" in another employee's toolbox.

Scott Watson testified that he is the human resources and safety director at Big O Tires and that he works out of the Columbia office rather than in a Big O Tires retail location. Mr. Watson testified that Big O Tires has safety standards in place, including practices to avoid fire risks. Mr. Watson testified that horseplay is forbidden at Big O Tires.

APPLICABLE LAW

RSMo Section 287.020.2. 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. An injury is not compensable because work was a triggering or precipitating factor.

RSMo Section 287.020.3.

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in

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this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

The Missouri Supreme Court, analyzing Section 287.120.3, RSMo., held that in order for an injury to arise out of and in the course and scope of employment, there must be a causal connection between a work activity and the injury, other than that the injury occurred at work. *Johme v. St. John's Mercy Health Care*, 366 S.W.3d 504, 513 (Mo. banc 2012).

AWARD

The claimant, Bryan Hedrick, has failed to sustain his burden of proof that he was injured as the result of a compensable accident under Missouri's workers' compensation law. An accident is defined as producing a compensable injury, and an injury is compensable when it arises out of and in the course of employment. Mr. Hedrick has failed to demonstrate a causal connection between the duties of his employment at Big O Tires and intentionally lighting a can of glue held in a co-worker's hand on fire with a lighter. Mr. Hedrick himself testified that there was no function of his employment at Big O Tires that involved setting a can of glue on fire. Mr. Hedrick admitted that lighting a can of glue on fire is dangerous and that he would not do anything dangerous, yet that is exactly what Mr. Hedrick did do. Mr. Hedrick relies on the argument that horseplay was a permitted activity at Big O Tires and that lighting a can of glue on fire is horseplay. It is apparent that among the employees at Big O Tires there was some silly behavior, including greasing door knobs, blowing air at an employee in the bathroom, snapping a rag in an employee's direction and placing inappropriate objects in a co-worker's toolbox and that managerial staff was aware that this silliness was occurring. None of this behavior comes anywhere close to the danger of intentionally lighting highly-flammable material while it is in a co-worker's hand. Thus, Mr. Hedrick's claim for compensation is denied.

All other issues raised for resolution are herewith rendered moot.

Made by _____
/s/Hannelore D. Fischer 11-20-15
Administrative Law Judge
Division of Workers' Compensation