

TEMPORARY AWARD

Employee: Glenda Hunter, Injury No. 13-021747
Dependents: N/A
Employer: Benchmark Healthcare of Harrisonville
Additional Party: N/A
Insurer: American Compensation Insurance
Hearing Date: July 19, 2013 Checked by: LGR/cy

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 28, 2013
5. State location where accident occurred or occupational disease was contracted:
Harrisonville, Cass 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: Employee was with co-employee who was assisting her in taking out the

trash and going for a smoke break in the shed on employers parking lot. On the way back into the facility, employee slipped and fell on ice causing injury.

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 lower extremity, back, body as a whole

14. Nature and extent of any permanent disability: N/A – Not at maximum medical improvement (“MMI”)

15. Compensation paid to-date for temporary disability: \$0

16. Value necessary medical aid paid to date by employer/insurer? \$0

17. Value necessary medical aid not furnished by employer/insurer? \$0

18. Employee’s average weekly wages: \$274.56

19. Weekly compensation rate: \$183.04/\$183.04

20. Method wages computation: Stipulation of the parties

21. Amount of compensation payable: N/A

22. Future requirements awarded: Treatment for Ms. Hunter’s low back and right knee injury, including MRI scans of the right knee and lumbar spine, pain management, physical therapy, and possible surgical intervention, and referral to a psychologist/psychiatrist are awarded.

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 19, 2013, the employee and employer/insurer appeared for a temporary hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Ms. Glenda Hunter, appeared in person and with counsel, Jonathan Bortnick. The employer/insurer, American Compensation Insurance, appeared through counsel, Steve Quinn. The parties entered into stipulations and the sole issue in this matter is whether or not claimant's fall in the parking lot of her employer on February 28, 2013, arose out of the course and scope of her employment. For the reasons noted below, I find in the affirmative on the issue.

STIPULATIONS

The parties stipulated that:

1. On or about February 28, 2013 ("the injury date"), Benchmark Healthcare of Harrisonville ("Benchmark") was an employer operating subject to Missouri's Workers' Compensation Law with its liability fully insured by American Compensation Insurance;
2. Ms. Hunter was its employee working subject to the law in Harrisonville, Cass County, Missouri;

3. Ms. Hunter notified Benchmark Health Care of her injury and filed her claim within the time allowed by law;
4. Nature and extent of disability is not an issue for this hearing;
5. Ms. Hunter earned a \$274.56 average weekly wage resulting in a weekly compensation rate of \$183.04 for temporary total disability compensation, and \$183.04 for permanent partial disability compensation.

Testimony at the hearing was provided by Ms. Hunter and co-workers Joe Vansel and Gwen Knibb. The testimony from all the witnesses was consistent with respect to the fact that claimant slipped in the parking lot of her employer's premises on February 28, 2013. What the claimant was doing at the time of the slip and fall is crucial to the determinations of liability in this matter.

Claimant's testified that her designated duties included emptying trash cans and taking trash from room 302 in the main building across the parking lot to the dumpster. The dumpster is located in close proximity to the shed that was built for employees to smoke cigarettes. Employees were allowed to smoke in the shed without clocking out on a scheduled break. Employees clocked out during the day for two 15-minute breaks and one lunch break. Claimant planned to clock out for her lunch break shortly after returning from the smoking shed.

Ms. Hunter testified that she fell as she walked out the door of the facility while carrying trash. Joe Vansel testified that he is a floor tech. On February 28, 2013, he had finished performing floor tech duties and he was putting away his floor machine when he saw Ms. Hunter. The two agreed to take a smoke break. Mr. Vansel testified that his sole purpose in going outside was to have a smoke. Mr. Vansel testified that he did not have any trash to dump, although he was carrying someone else's trash. Ms. Hunter gave Joe Vansel her trash to carry. Testimony was consistent that it was "extremely cold" that day and that the parking lot was on employer's premises and was covered with snow and ice at the time of the slip and fall by claimant. Claimant testified that she informed her supervisors of her injury.

ANALYSIS

Section 287.020.3(2)(b) governs whether an injury arises out of and in the course of employment. The statute states that an injury shall be deemed to arise out of and in the

course of employment only if 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 and normal non-employment life.

The employer/insurer argue that the facts of case are similar in analysis to *Johme v. St. John's Mercy Health Care*, 366 S.W. 3d 504 (Mo. Banc 2012) interpreting 287.020.3(2)(b) where claimant must show a causal connection between the injury at issue and the employer's work activity. The Court in *Johme* stated the case necessitated consideration of whether her risk of injury from turning, twisting her ankle, and falling off her shoe was a risk to which she would have been equally exposed in her normal, non-employment life.

This matter at issue is distinguishable in that Ms. Hunter slipped and fell on her employer's icy parking lot while walking with a co-employee to take out the trash she had collected. For an injury to be deemed to arise out of and in the course of the employment, the claimant's employee must show a causal connection between the injury at issue and the employee's work activity. *Pope v. Gateway to the West Harley Davidson*, ED98108; WL 5207529 (MO App E.D. Oct. 23, 2012). In *Pope*, the Claimant fell down stairs at Employer's business and dislocated and fractured his right ankle. At the time of the fall, Claimant was carrying his motorcycle helmet, which he was required to wear in conjunction with his work duties. The court found that the injury arose out of and was within the course of employment because the claimant was not equally exposed to the risk of walking down stairs while carrying a work-required helmet while outside of work.

The court of appeals in *Kunce v. Junge Baking Co.*, 432 S.W.2d 602 (Mo. App. 1968) involved an employee that was injured when he tripped and fell while returning from an off-premises paid break. The employer allowed its workers to take off-premises breaks and the employees remained "on the clock" during these breaks. The claimant left the premises to buy cigarettes and Christmas tinsel. On the way back, the claimant was walking when he stepped on a "hoop," on a cement runway causing him to fall. The cement runway was on employer's premises but was not a customary or permitted route nor the usual and customary way of going to and from work.

In *Kunce*, the court recognized the law provided that an injury arises "out of" the employment when there is a causal connection between the conditions of the work and the resulting injury, and arises "in the course of" the employment when the accident occurs within a period of the employment at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of the employment, or engaged in doing something "incidental thereto." *Id.* at 609, citing *Lampkin v. Harzfield's*, 407 S.W.2d 984 (Mo. App. 1967). In interpreting what was considered "incidental" to employment, the court affirmed that risks and acts are considered an incident of the employment if they "constitute an inherent and component element of it." *Kunce*, at 609. The court explained this rationale provided the basis for various doctrines of compensability, including the

personal comfort doctrine. *Id.* Human beings in ministering to their personal comfort at work are held to be incidental to their employment under the personal comfort doctrine.

Id. These conclusions follow as the employee is on the employer's premises subject to all

the environmental hazards associated with the employment and to the employer's right to control. Id.

There is no dispute that her employer required Ms. Hunter to take trash from the main building to the dumpster. The employer/insurer's argument in its trial brief is that "...if claimant did have any trash to dump, the credible evidence is that she gave it to Joe to toss at which point her sole reason for the trip outside was to have a smoke." (Employer/Insurer Trial Brief p. 3). I agree with the Employer's determination of the facts in this case. However, the facts of this case demonstrate that Ms. Glenda Hunter was in furtherance of the employers business in taking out the trash. She was performing this duty at the time of her injury regardless of whether or not Joe Vansel was carrying the trash. Mr. Vansel did not have a duty to take out trash as provided in his testimony. Also, the employer required that employees smoke in a designated shed which they provided. The employer further did not require the employee to clock out when taking a smoke break. The employer had ownership and control of the parking lot and placement of the shed. Claimant was exposed to the risk due to the placement of the dumpster and the instructions of her employer to smoke in a designated area which required her to cross an icy lot under their control. She was required to cross the lot to both dispose of the trash in the dumpster and to smoke in the designated area.

Finally, whether or not claimant was injured going to the dumpster or coming back from the smoke break is not material to the analysis. One cannot argue that claimant's trip across a parking lot was in part to make sure that her duty to dispose of the trash was completed. The fact that she smoked a cigarette in the shed by the dumpster does not impact the analysis as she would be required to cross the same parking lot to return to work.

The trip to the dumpster and shed was casually related to Ms. Hunter's job duties and she is entitled to compensation. Accordingly, the employer is hereby order to provide all required benefits and compensation under the Missouri Workers Compensation Law.

Issued by DIVISION OF WORKERS' COMPENSATION
Employee: Glenda Hunter

Injury No. 13-021747

Made by: _____
Lawrence G. Rebman
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 13-021747

Employee: Glenda Hunter
Employer: Benchmark Healthcare of Harrisonville
Insurer: American Compensation Insurance

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, 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 with this supplemental opinion.

Discussion

Affirmative findings vs. a summary of the evidence

Section 287.460.1 RSMo requires the fact-finder in a workers' compensation case to issue the unequivocal affirmative factual findings that are necessary to resolve each of the disputed issues identified by the parties. The courts have provided clear guidance as to the type of award that does not meet the requirements of § 287.460.1:

Here, there are literally pages of testimony summarization. There are also pages of substantial discussion of abstract legal theory. The ALJ certainly diligently summarized all of the evidence as an impartial and uncritical scrivener. No doubt it was a useful reference tool for the ALJ's own use in understanding the facts. But because of the absence of findings (that is, the lack of critical evaluation and the failure to draw pertinent inferences from the evidence), the summaries, with all due respect, are of little value to this court. The summaries cannot substitute for factual findings (along with conclusions of law) in the opinion itself.

Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529, 532 (Mo. App. 2008).

The need for affirmative findings of fact is not merely an academic concern. In *Stegman*, the Court held that the absence of pertinent factual findings worked the effect that it could not resolve the issues the parties had raised on appeal, and instead was constrained to vacate the award and remand the case to the Commission to issue findings of the type contemplated under § 287.460.1. *Id.* at 537. Here, we agree with the ultimate result reached by the administrative law judge, but the award provides only a summary of the evidence as to when employee slipped on ice and what she was doing at the time, and does not provide any affirmative findings resolving these key factual disputes. Accordingly, in order to avoid a result of the type seen in *Stegman*, it is necessary to issue this supplemental opinion to provide the affirmative findings and conclusions required by § 287.460.1.

When did employee slip on ice and what was she doing at the time?

Employee testified that she was carrying a bag of trash in her right hand while crossing employer's icy parking lot on February 28, 2013, when she slipped and suffered an injury to her hip and back. Employee's testimony was not impeached, and we believe it was not credibly rebutted by the evidence advanced by employer.

Employee: Glenda Hunter

- 2 -

Employer provided testimony from Joseph Vansel, who was walking with employee at the time and who testified that he thought employee was carrying a bag of trash, but who also admitted that he provided his signature on Exhibit 2, a document prepared by employer's administrator, Jill Snider. This document indicates that Mr. Vansel, rather than employee, was carrying the trash when employee slipped. Mr. Vansel testified he believed employee was injured returning from a smoke break rather than on the way to dump the trash, but later admitted he wasn't sure.

As Mr. Vansel forthrightly admitted, his memory of what happened on February 28, 2013, is not very clear. We find Mr. Vansel's testimony to be uncertain and confused, and we believe it does not effectively contradict employee's testimony.

Turning to Exhibit 2, we note that this document is dated April 10, 2013, about 6 weeks after the accident on February 28, 2013. The fact that Exhibit 2 was partially redacted does nothing to enhance its probative value. We note that employee's version of what happened is consistent with the detailed history set forth in the April 25, 2013, records from Dr. Parmar.

In light of the foregoing factors, we find employee's testimony the more credible evidence, and derive the following factual findings therefrom.

Employee worked for employer as a housekeeper. Employee's duties for employer on February 28, 2013, required her to clean halls three and four, which in turn involved emptying trash cans and taking out the trash. Employee gathered the trash and took it to Room 302 for consolidation into a larger trash bag. Employee ran into her coworker, Joe Vansel, in Room 302. Mr. Vansel suggested he would walk with employee to take out the trash, and on the way back, the two could smoke a cigarette. Employee agreed.

Employee and Mr. Vansel went outside and started across employer's parking lot, which sloped downhill and was covered with ice. Employee had the bag of trash in her right hand. She slipped two or three times on the ice and grabbed Mr. Vansel's arm with her left hand to keep her balance. When she slipped, employee did not fall all the way to the ground, but felt a pulling sensation in her back and hip, which in the next couple of hours progressed into pain so intense employee was unable to eat her lunch. At that point, employee went and reported her injury to employer and received medical treatment with employer's authorized physicians.

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.

The courts have interpreted the foregoing language to involve a "causal connection" test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012). The *Johme* court held that an employee who fell and suffered injuries while making coffee "failed to meet her burden to show that her injury was compensable because she did not show that it was

Employee: Glenda Hunter

- 3 -

caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life." *Id.* at 512.

Here, employee's injuries resulted from the intersection of at least two risks specific to her employment on February 28, 2013. First, employee was required to traverse an icy downhill surface in order to complete her duties for employer. Second, employee was carrying a large bag of trash in her right hand. There is no evidence on this record that would support a finding that employee was equally exposed to this unique combination of risks in her normal nonemployment life. We conclude that employee's injury arose out of and in the course of her employment.

Given the facts as we have found them and in light of the foregoing analysis, we discern no need to discuss or consider the continued applicability (if any) of the "personal comfort doctrine" under the 2005 amendments to the Missouri Workers' Compensation Law; accordingly, we hereby delete from the award the administrative law judge's analysis and comments on that topic.

Conclusion

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

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The award and decision of Administrative Law Judge Lawrence G. Rebman, issued September 4, 2013, is attached and incorporated by this reference.

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.

Given at Jefferson City, State of Missouri, this 15th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary