

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 08-069091

Employee: Sandy Johme
Employer: St. John's Mercy Medical Center
Insurer: Self c/o Sisters of Mercy Health System

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, heard the parties' oral arguments, and we have considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of Administrative Law Judge Cornelius T. Lane dated April 16, 2010. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The administrative law judge heard this matter to consider whether employee sustained an injury by accident arising out of and in the course of her employment.

The administrative law judge found that employee was not performing her duties at the time of her fall at work and that she would have been exposed to the same hazard or risk in her normal nonemployment life. Compensation was denied. Employee filed a timely Application for Review with the Commission.

Therefore, the issue before the Commission is whether employee sustained an injury by accident arising out of and in the course of her employment.

Findings of Fact

Employee works for employer as a patient billing representative. Her job duties consist primarily of computer/desk work. Employee testified that she does billing work for the doctors at St. John's and that she just sits at a computer and types in charges and denials and "things like that."

Employee works on one of three floors reserved for employer's employees. Each of employer's floors in the building includes a kitchen-type area in the center of the floor. The kitchen is equipped with refrigerators, microwaves, and commercial coffee makers, which are provided by employer for use by all employees. The kitchen area is U-shaped, with the coffee makers on the counter in one corner of the "U."

On June 23, 2008, at approximately 10:00 a.m., employee left her desk, which is approximately 30 steps away from the kitchen area, to obtain a refill on her cup of coffee. Employee took the last cup of coffee from the pot. It was customary in the office for the person that takes the last cup of coffee to make another pot. Employer

¹ Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

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provided pre-measured bags of grounds and filters for the employees. Employee testified that she was not required to clock out before getting coffee from the kitchen.

As employee finished making the new pot of coffee, she turned and twisted her right ankle, which caused her right foot to slip off of her sandal, and she fell onto her right side and then onto her back. Employee was alone in the kitchen when she fell. She used the counter to pull herself up. Employee was leaning against the counter when a co-worker eventually came into the kitchen. An ambulance was called for employee and she was taken to the hospital and treated for a broken pelvis.

Nora Faucett, employee's supervisor, filled out a "Co-worker Injury Report," which was admitted into the record as Exhibit G. Ms. Faucett stated in said report that she had been called into the kitchen to assist with employee by another co-worker. Ms. Faucett indicated that employee gave her a contemporaneous history at 10:05 a.m. on June 23, 2008. Ms. Faucett stated that employee told her that she had been making coffee in the kitchen, turned to throw away the used grounds in the trash, twisted her ankle, fell off her shoe, and then fell backwards, landing on the floor. Ms. Faucett stated that employee and other coworkers told her there was nothing on the floor that caused her to fall. The floor was not wet and there was not any trash on the floor.

Employee testified that coffee is made all day long in the office. Employee also testified that she does not make coffee at home because she is not home during the day. Employee further testified that she does not make coffee at home on the weekends when she is home. Employee stated that she has a coffee maker at home, but that it is "put away."

Discussion

In the earliest days of our workers' compensation law the phrase "arising out of and in the course of" was not defined. When deciding the cases under the new law, Missouri courts turned to the law of states with more mature workers' compensation laws to see how the phrase was interpreted in those states.

The consensus of authority is to the effect that an injury to an employee arises "in the course of" his employment, when it occurs within the period of his employment, at a place where he might reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in the performance of some task incidental thereto. Necessarily, the converse of the rule must also apply, so that, where, at the time his injury is received, the employee is engaged in a voluntary act, not known to, or accepted by, his employer, and outside of the duties for which he is employed, the injury cannot be said to have been received in the course of his employment.

Likewise it is commonly held that an injury may be said to arise "out of" the employment, when it is reasonably apparent, upon a consideration of all the facts and circumstances, that a causal connection exists between the conditions under which the employee's work is required to be done, and the resulting injury. In other words, an injury arises out of the employment if it is a natural and reasonable incident thereof, even though

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not foreseen or anticipated; but, in all events, it must be the rational consequence of some hazard connected therewith.²

We believe it a matter of common knowledge that throughout the course of a workday, workers undertake activities that do not fall squarely within their assigned duties, which activities minister to their personal needs. Workers get drinks and snacks. Workers use the restroom. Workers even make coffee. This was true 80 years ago as well and courts were quickly called upon to consider the meaning of “arising out of and in the course of employment” in the context of some inevitable worker activities.

Beyond this the authorities also hold that [the risk]...may even be one arising from the act of the employee in the doing of something ancillary to his employment, and essential to his own personal comfort and convenience.

...

[I]f the injury is received while the employee is engaged in doing something incidental to the employment, though not strictly within the limits of the duties he is obliged to perform, the case will nevertheless be one for compensation. Then too, the thought is again applicable, as was expressed in the preceding paragraph, that the injury may arise by accident “in the course of” the employment, even though the act itself may be primarily personal to the employee, so long as it tends ultimately to react to the benefit of the employer.³

These basic meanings controlled the application of arising out of and in the course of employment for over sixty years. In 1993, the legislature enacted a statutory fence around the meaning of “arising out of and in the course of employment.” By its terms, the change did not abrogate the basic common law meaning of the phrases, but merely defined the outer limits of the meanings.

287.020.3(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 nonemployment life;

² *Smith v. Levis-Zukoski Mercantile Co.*, 14 S.W.2d 470, 472 (Mo. App. 1929)(internal citations omitted).

³ *Jackson v. Euclid-Pine Inv. Co.*, 22 S.W.2d 849, 851 (Mo. App. 1930).

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After the 1993 amendment, courts used the common law meanings and statutory limits together to determine when an injury arose out of and in the course of employment.

In 2005, the legislature again amended the language of § 287.020.3(2).

287.020.3(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.

The legislature also abrogated all cases dealing with the topic: "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."⁴ Without the underlying common law meanings, § 287.020(2) has become a statutory definition.

As pointed out above, early in the life of our workers' compensation system, courts adopted the *personal comfort* doctrine. By the facts of the instant case, we are faced with the question of whether the personal comfort doctrine is consistent with the statutory definition of § 287.020(2) RSMo. We think that it is.

The rationale of the doctrine is that humans have basic needs that must be met throughout the workday (hunger, thirst, elimination) and the benefit of tending to those needs inures not only to the employee, but to the employer as well. Thus, where 1) a benefit inured to the employer, 2) the extent of the departure from one's duties was not so great that an intent to temporarily abandon the job could be inferred, and 3) the method chosen to tend to one's comfort was not so unusual and unreasonable that the conduct could not be considered an incident of the employment, courts have routinely held that risks arising from tending to personal comfort were risks related to employment.

We find this rationale is still sound and is consistent with § 287.020.3(2).

Conclusions of Law

In this case, it is clear that the accident was the prevailing factor in causing employee's injury. Therefore, the analysis of whether employee's injury arose out of and in the course

⁴ § 287.020.10 RSMo.

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of her employment is dependent on the determination of whether the injury came 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 court in *Pile v. Lake Regional Health System*⁵ recently held that the application of § 287.120.3(2) (b) RSMo, involves a two-step analysis. The first step in the analysis is to “determine whether the hazard or risk is related or unrelated to the employment.”⁶ The court explained that “[o]nly 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.”⁷

Based on employee’s testimony, making coffee was not something that was required of employee as part of her job as a patient billing representative. But neither was making coffee prohibited or discouraged by employer. In fact, employer provided the coffee pot and supplies for its workers’ use. In this particular situation, claimant was making coffee as a gesture of courtesy to the other workers in the office, as she had just poured herself the last cup from the pot. We find that employee’s act of making coffee inured to employer’s benefit in that the coffee was available to all employees for their comfort (and probably energy and focus). Employee did not depart long from her assigned duties and the method whereby she made the coffee was not unusual or unreasonable. We find employee’s activity of making the coffee was incidental to and related to her employment. We need not proceed to the second step of the analysis.

Employee has shown that the accident was the prevailing factor in causing the injury and the injury did not come from a hazard or risk unrelated to her employment. For the foregoing reasons, we find that the employee’s accident and resulting injury and disability arose out of and in the course of her employment.

Award

The parties stipulated that employee’s temporary total disability rate is \$649.32 and her permanent partial disability rate is \$340.12.

The parties stipulated that employee is entitled to 5 weeks of temporary total disability benefits. We award from employer to employee temporary total disability benefits in the amount of \$3,246.60.⁸

The parties stipulated that employee incurred \$27,457.32 in past medical expenses for reasonable medical care necessary to cure and relieve her of the effects of the injury. We award from employer to employee \$27,457.32 for her past medical expenses. The parties stipulated that employee sustained a 30% permanent partial disability at the level of the hip as a result of the June 23, 2008, accident. We award from employer to employee permanent partial disability benefits of \$21,121.45.⁹

⁵ *Pile v. Lake Reg'l Health Systems*, 321 S.W.3d 463 (Mo. App. 2010).

⁶ *Id.* at 467.

⁷ *Id.*

⁸ 5 x \$649.32 = \$3,246.60.

⁹ 62.1 x \$340.12 = \$21,121.45.

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Ellen E. Morgan, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued April 16, 2010, is attached and incorporated by this reference except to the extent modified herein.

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

Given at Jefferson City, State of Missouri, this 22nd day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED
Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

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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 affirmed by supplemental opinion.

The findings of fact and stipulations of the parties were accurately recounted by the majority and I adopt the same to the extent they are not inconsistent with this dissent.

Historically, at a minimum, our courts have required a showing that the employee's injury was caused or due to a risk of employment. Missouri cases have uniformly held that an accident and resultant injury "arise out of" the employment when there is a causal connection between the conditions under which the work was required to be performed and the resulting injury. The injury "arises out of" the employment so long as the injury was a rational consequence of a hazard connected with the employment.

Generally speaking, all risks causing injury to an employee can be brought within three categories: risks distinctly associated with the employment; risks personal to the employee; and "neutral risks," i.e., risks having no particular employment or personal character. Harms from the first category are universally compensable; harms from the second are universally non-compensable; and harms from the third result in controversy.

Various lines of interpretation of the phrase "arising out of" have historically arisen of which three are the increased risk doctrine, the actual risk doctrine and the positional risk doctrine.

The increased risk doctrine, in summary fashion, requires that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to the employment.

As to the actual risk doctrine, whether the risk was also common to the public is of no concern, if it were a risk of the employment. The employment subjected employee to the actual risk that caused the injury.

The positional risk doctrine determines that an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed employee in the position where he was injured.

Consequently, since risks distinctly associated with the employment fall readily within the increased risk doctrine, they are considered to arise out of the employment. As to risks personal to an employee, the origins of harm are personal and cannot possibly be attributable to employment.

However, neutral risks are defined as being neither distinctly employment nor distinctly personal in character. Furthermore, the cause is unknown, unexplainable or happenstance; known, but not associated with employment or the employee personally. In these types of

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risks, an award of benefits can only be justified by accepting the *but for* reasoning of the positional risk doctrine.

As discussed by the majority, the legislature, in 2005, redefined the words accident and injury. See §§ 287.020.2 and 287.020.3 RSMo. In addition the legislature specifically abrogated certain earlier case law interpretations concerning the meaning of accident, arising out of and in the course of employment. See § 287.020.10 RSMo. All three of the cases referred to in the statute that were abrogated have one component in common, i.e., it was difficult, or impossible, to ascertain where or if the employment subjected the employee to some risk or hazard greater than that to which an employee regularly experiences in everyday life. In other words, there was no rational connection between the employment and the injury.

In this case, employee was injured, while in the process of making coffee, when she turned and twisted her right ankle, which caused her right foot to slip off of her sandal, and she fell.

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be issued if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and as a part of the employment. It is not sufficient that the employment may simply have furnished an occasion for an injury from some unconnected source.

In my opinion, this case is a prime example of the employment simply having furnished an occasion for an injury from some unconnected source. Employee was not engaged in an activity that is integral to the performance of her job. Employee was making coffee at the time the accident occurred. There is no “rational connection” between the risk of turning to walk while making coffee, and employee’s job in this case. Accordingly, the element of proof needed to establish that the injury arose out of her employment is lacking.

I would affirm the award of the administrative law judge denying compensation as supplemented herein.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Alice A. Bartlett, Member