

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

Injury No. 12-020529

Employee: Kent Kersten
Employer: Jackson County, Missouri
Insurer: Self-Insured

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence 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 by this separate opinion.

We agree with the administrative law judge's ultimate conclusions in this matter but we write separately to disavow the administrative law judge's treatment of the testimony of two of employee's former co-workers. The administrative law judge declared that he was weighing the testimony of the two former co-workers with a "jaundiced eye" because the co-workers were terminated from employment with employer. Although we deem it appropriate in all cases to weigh evidence in a manner which takes into account potential bias and/or self-interest, we remain mindful of our obligation (and the legislative imperative of § 287.800.2 RSMo) to weigh evidence impartially. In fact, we have no reason to believe the administrative law judge weighed evidence inappropriately. To the extent the unfortunate language quoted above might suggest otherwise, we (again) disavow same.

We have objectively reviewed the evidence. Employee has failed to carry his burden that his work-related stress was the prevailing factor in causing his psychiatric disability. We believe employee's job duties as a prosecutor were inherently stressful and were undoubtedly rendered more stressful by employee's home-life stressors and preexisting psychiatric problems. But the evidence convinces us that employee was not subjected to greater work-related stress than his co-workers. This alone has been held to disqualify claimants from receipt of compensation.² We have serious doubts as to whether the holdings in these cases can survive a strict construction analysis.³ We further find however that employee has failed to prove that he was subjected to work stressors that were extraordinary or unusual so must we find that his injury did not arise out of and in the course of employment.

¹ Statutory references are to the Revised Statutes of Missouri 2011, unless otherwise indicated.

² See, for example, *Williams v. Depaul Health Ctr.*, 996 S.W.2d 619 (Mo. App. 1999) and *Sherman v. First Fin. Planners, Inc.*, 41 S.W.3d 633, 636 (Mo. App. 2001), both overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

³ See § 287.120.8 RSMo, which provides, in relevant part: "Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events." Given that all case law mandating a comparison of a claimant's stress exposure to that of co-workers appears to have been abrogated by § 287.020.10 RSMo (2005), and absent any statutory directive to compare a claimant's stress with that experienced by co-workers, we believe that any comparison of claimant's stress exposure to that of co-workers is only relevant as part of an overall objective analysis.

Employee: Kent Kersten

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We attach the award and decision of Administrative Law Judge Mark S. Siedlik, issued July 15, 2014, and we affirm, adopt, and incorporate the administrative law judge's findings, conclusions, award and decision to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 5th day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kent Kersten

Injury No. 12-020529

Dependents: N/A

Employer: Jackson County, Missouri

Self-Insurer: Self-Insured

Additional Party: N/A

Hearing Date: May 1, 2014

Checked by: MSS/lh

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: January 19, 2012.
5. State location where accident occurred or occupational disease was contracted: Jackson 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: Claimant alleges mental stress at work.
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: Whole body alleged.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: -0-

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: Unknown
19. Weekly compensation rate: \$727.75/\$425.19
20. Method wages computation: Claimant's testimony.

COMPENSATION PAYABLE

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kent Kersten

Injury No. 12-020529

Dependents: N/A

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Self-Insurer: Self-Insured

Additional Party: N/A

Hearing Date: May 1, 2014

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FINDINGS OF FACT AND RULINGS OF LAW

This case comes on for hearing before Administrative Law Judge Siedlik in Kansas City, Missouri, on May 1, 2014. The Claimant Kent Kersten was present with his counsel Mr. Carl Kimbrell. The Employer and Insurer were represented by their counsel Ms. Tracey Chappell. This case involves injuries alleged on or about January 19, 2012, while the Claimant was in the employ of Jackson County, Missouri, and sustained injury by accident arising out of and in the course and scope of employment in Jackson County. At the time of the injuries the parties were subject to the Missouri Workers' Compensation Law and the Employer's liability was self-insured. The Employer had notice of an injury and claims were timely filed.

There have been no benefits paid to date. The issues to be resolved at the hearing are:

- 1) Accident;
- 2) Whether the accident arose out of and in the course and scope of employment;
- 3) Medical causation;
- 4) The need for future medical care;
- 5) The compensation rate;
- 6) The nature and extent of temporary total disability; and
- 7) The nature and extent of permanent disability.

The evidence at trial consisted of the Claimant's testimony in person together with Mr. John Cullom, Mr. David Mitchell, Mr. James Klobnak, Ms. Jennifer Phillips, and Dr. Todd P. Hill, D.O. Claimant had marked exhibits A through M and all were admitted into evidence with the exception of Claimant's Exhibit I, which was not admitted, and Claimant's Exhibit K, which although marked was never offered. The Employer and Insurer offered their Exhibit No. 1, the report of Dr. Hughes, which was admitted into evidence.

The Claimant testified that he began his employment with the Jackson County Prosecutor's Office in August of 2003, and his employment ended in March 2012. The Claimant was employed as a full-time assistant prosecutor handling trial dockets and various other court dockets involving child custody matters, drunk drivers, probation revocation, and any other duties assigned to the Jackson County Prosecutor's Office for disposition. The Claimant testified he initially started with a Family Support Division caseload docket and in 2006 was reassigned to a warrant desk. In January 2008, the Claimant was assigned to Criminal Activities Forfeiture Act docket and in 2010 was assigned additional

responsibilities of handling probation violation dockets for which the Claimant testified he made appearances on two different probation violation dockets.

The Claimant was of the opinion that the increased docket loads to which he was exposed caused extreme mental stress and at some point in approximately 2010 the Claimant asked to be relieved of trial docket duties. The Claimant continued to have docket responsibilities for a variety of dockets involving property matters, probation violations, and DUI's. The Claimant testified in 2011 he requested from his supervisor Dawn Parsons relief from what he described as the crushing number of dockets. It is at this time the Claimant had already been relieved of trial duties and was only assigned docket call matters. Claimant's request for additional assistance was refused. The Claimant testified in late 2011 he began to experience physical symptoms related to what he felt was extreme stressful situations placed on him by his employer. The Claimant testified he experienced tremors, which would only subside once he left work. The Claimant testified in late December of 2011 the tremors became constant and would not subside. The Claimant also mentioned periods of excessive sweating while at work. The Claimant further testified to experiencing severe headaches and memory problems and that on Sunday evenings thinking about the work week ahead he would begin to vomit a number of times. The Claimant in December of 2011 sought help from the physicians at the University of Kansas Medical Center and was eventually referred to the psychiatric department where he received treatment and was prescribed several anti-depressant type drugs. The Claimant testified his work continued to be affected by his depression and other symptoms and that he had episodes of being unable to respond to simple questions while in court because of issues with concentration and attention. The Claimant was discharged on March 29, 2012 for poor performance. The Claimant testified he continued to treat with the physicians at the University of Kansas Medical Center until his insurance benefits expired and thereafter was accepted as a patient at Swop Health Services. The Claimant testified he continues to receive treatment from Swope Health Services and is prescribed a significant number of medications including anti-depressant drugs.

The Claimant testified he has been unable to work since being discharged in March of 2012, and that he has difficulty remembering things and sleeps and stays confined in the bedroom on his home for 10 to 12 hours per day. The Claimant testified he is unable to be out around crowds of people and stays confined as much as possible. The Claimant testified he rarely watches television because the change in volume when commercials come on TV startles him and that he only reads the newspapers or does research on his computer. The Claimant testified he is unable to even answer the telephone because of the loud noises of the phone ringing and his inability to write down messages.

The Claimant on cross-examination admitted that he had periodically sought psychiatric treatment as early as 2003 at the end of a relationship. The Claimant was medicated for a period of time but indicated that he felt that had resolved and the medication was discontinued. The Claimant in 2008 experienced major trauma in his home life with his wife becoming quite ill and being treated for Leukemia with bone marrow transplant which did not go well. During this process the Claimant's wife was pregnant and delivered a quite premature female baby which remained in the hospital along with the Claimant's wife for some period of time. It was during this lengthy period the Claimant remained off work on FMLA leave. Upon return to work, the Claimant indicated to his superiors that he was unable to handle the trial docket matters and was assigned only docket calls for the various dockets described, including DUI's probation revocations and property matters.

The Claimant continued with significant stressors in his home life when his wife and young child were allowed home. The Claimant's wife was suspected of being bipolar and alternatively threatening herself, the Claimant, the children and telling the Claimant on a frequent basis she was going to leave or divorce him. Eventually, the Claimant's wife did leave the home and took the children with her not allowing the Claimant to see or be aware of their whereabouts. Prior to that time the Claimant had endured significant stresses balancing the home life with work, and at one point took his young child to

court which caused a reprimand by the Sixteenth Judicial Circuit for the Claimant making docket appearances with an infant child. The Claimant testified that he had no nanny at the time or was in between nannies and from the period of July of 2009 through June of 2010 and into 2011, the Claimant had significant daycare issues which had to be addressed. In February 2011 his wife entered hospice and October of 2012 the Claimant's wife took the children and left the household.

The Claimant by history on cross-examination admitted episodes of major depression dating back to 2003 for which he had periodic treatment. The Claimant admitted the major stressors in his home life began in 2008 and continued through 2012 and continuing with the separation of his wife and as the Claimant characterized "kidnapping" of his children. It was during that period of time the Claimant came under the care of different healthcare professionals and was prescribed a number of medications to help with sleep disorders, anxiety disorders, as well as the Claimant's issues in the workplace. It was during this period that Claimant began abusing alcohol during 2011 and into 2012.

The Claimant testified to a number of conditions of ill to which he attributes to the work environment, including major depression to the point to where he feels an inability to get out of bed on a daily basis. The Claimant continues to abuse alcohol, and has testified that most of his anxiety related symptoms have not abated after he lost his job but have increased.

The Claimant called other fact witnesses who were all attorneys who either practiced with the Claimant or encountered the Claimant in their professional activities. Mr. John Cullom, a defense attorney, who handled matters with the Claimant while the Claimant was in the prosecutor's office testified as well as Mr. David Mitchell and James Klobnak. Messrs. Mitchell and Klobnak were associates of the Claimant in the prosecutor's office and testified that the Claimant had what they believed to be a large workload and were able to testify they believed the Claimant to be under stress. The witnesses were largely unaware of the extent of the Claimant's shattered home life and the Claimant's drinking problem together with the number of medications the Claimant was taking. It should be noted that Messrs. Mitchell and Klobnak were also terminated from the prosecutor's office and have their own legal matters pending resulting from the circumstances of their discharge.

The Employer and Insurer called Jennifer Phillips, an employee of the Jackson County Prosecutor's Office, to testify on their behalf. Ms. Phillips testified that she is a supervising team leader and was the Claimant's supervisor at the time of his employment. During the period of the Claimant's employment the office was reorganized under the newly appointed prosecutor of the Jackson County office and the workload and dockets of the various assistants were revised from time to time. Ms. Phillips noted the Claimant handled probation violation dockets, a DUI docket, a CAFA docket, and at some point carried a trial case load. After the Claimant's return to work from FMLA leave, the Claimant asked to be relieved of trial responsibilities and retained only call dockets. The Claimant was assisted by Ms. Kelly Gibbs on the CAFA dockets which involved forfeitures. Ms. Phillips testified that the Claimant's assistant did most of the electronic filing for the CAFA docket cases and while the CAFA docket carried approximately 120 cases, in Ms. Phillips' testimony it was a matter of babysitting cases on a housekeeping matter with less than a half-day per week of work. Ms. Phillips testified that the DART docket, involving seizures and generally involved the Jackson County sheriff serving warrants. The Claimant testified that he would go on the service of these warrants but Ms. Phillips said that was not the duties of the prosecutor and was not a good use of the Claimant's time. Ms. Phillips also talked about the probation violation dockets for which the Claimant indicated he covered two dockets, and Ms. Phillips indicated that these dockets generally had between 3 and 15 cases for which the Claimant would either workup plea deals or pass on for later trial to other prosecutors.

Ms. Phillips addressed the Claimant's performance issues and testified that for the Claimant's number of years of being an attorney he did not meet the expectations of professional conduct or ability

to engage in the work assigned. Ms. Phillips testified the Claimant while carrying the number of call dockets only, was relieved of trial responsibilities and in her mind as team leader carried no more of a workload than any of the other assistant prosecutors in the office. The Claimant testified to the extreme stress of juggling the different and various dockets to which he was assigned to which Ms. Phillips in response indicated that upon the Claimant's termination the majority of the Claimant's workload was handed off to a Rule 13 law clerk because of the ease and lack of experience or sophistication needed to be able to manage the call dockets assigned.

MEDICAL EVIDENCE

The Claimant was examined by Dr. Todd Hill, a physician specializing in general psychiatry. Dr. Hill noted that Claimant had been taking anti-depression medication since 2003, and contrary to later diagnosis of post traumatic stress disorder, Dr. Hill specifically did not find post traumatic stress disorder but found major depressive disorder with anxiety and alcohol abuse. Dr. Hill testified to a measuring device used in this field of psychiatry involving Global Assessment Functioning level and on a 0 to 100 scale found the Claimant to be existing at a level of 40. Dr. Hill was of the opinion that any number less than 50 is a person in need of medical treatment. Dr. Hill specifically found the Claimant is not bipolar or psychotic but suffers from mental illness by social stressors. Dr. Hill on cross-examination admitted the Claimant had a history of psychiatric treatment for depressive disorder dating back to 2003 which was not continuous but began again in 2008 for which the Claimant was medicated and began abusing alcohol. Dr. Hill noted that the majority of these events were home-life related involving the stressors of his ill wife, premature child, and his children and the stressors provided by the situation as outlined earlier. Dr. Hill noted that during this period of time beginning in approximately 2008 and continuing the Claimant began abusing alcohol. Dr. Hill noted that after the Claimant returned from FMLA leave to the prosecutor's office and requested a reduction in duties is when the first signs and complaints of work-related stressors began being manifested. Dr. Hill is of the opinion that the entirety of the Claimant's home life and the stressors and medications and alcohol abuse which it brought on were acknowledged to be present but it was the stress at work which makes the Claimant unemployable.

The Claimant was examined by Dr. Patrick Hughes, a psychiatric specialist, on behalf of the Employer and Insurer. Dr. Hughes was provided medical records encompassing the Claimant's history and treatment provided to date after which he examined the Claimant. Dr. Hughes noted the Claimant reporting depression beginning in 2009 involving the life pressures and concerns of his critically ill wife and his prematurely born child. The Claimant related to Dr. Hughes a history of insomnia dating back five to six years in October of 2010, necessitating treatment with Trazodone and Lunesta. The Claimant also admitted increased stress because of his home-life issues involving his wife's hospice visits in February 2011 for which the Claimant was prescribed additional medications. The Claimant by history reported in January 2012 ongoing depression regarding his wife's health and the home life involving his children. The Claimant testified at that time he suffered from full panic attacks, multiple physiological depression symptoms and feeling overwhelmed by family and work demands. It was at that time the Claimant's primary care doctor diagnosed the Claimant with adjustment disorder and provided additional medications and recommended psychological counseling. Dr. Hughes noted in March of 2012 a significant increase in alcohol abuse after the Claimant's wife had left him taking the three children with her. It was at that time the Claimant's primary physician increased anti-anxiety medication.

Dr. Hughes noted that upon the Claimant's consultation with the Kansas University Psychiatric Unit that the Claimant laid all of the current psychiatric symptoms which were noted above as beginning after the appointment of the new prosecutor and boss to the Claimant. This statement is not consistent with the recorded facts and medical records provided dating back to 2008 of the Claimant's symptoms of psychiatric disorder the prescription of anti-depressant medications and ongoing biological symptoms, including panic attacks, sleep disturbance and ongoing alcohol abuse. Dr. Hughes noted in his interview

with the Claimant the Claimant appeared visually anxious and quite vigorous in asserting his upset with what he perceives to be excessive work demands which were placed on him alone and his perception that he was retaliated against by his coworkers after being out on FMLA to care for his ill wife and child. The Claimant indicated to Dr. Hughes that he believed his resignation was unjust and essentially coerced, and now regrets entering into such resignation because in the Claimant's words "it caused me to waive a bunch of my legal rights, most notably any right to sue for discrimination or hostile work environment", leaving the Claimant in his mind left with filing a workers' compensation claim as the only way to get compensated and treatment.

Dr. Hughes notes at the time of his examination the Claimant reports his psychiatric symptoms are much worse than at the start of the year and have increased in their significance since leaving the prosecutor's office. The Claimant continues on a number of psychiatric medications but indicated he wishes to cut back because in the Claimant's words "he does nothing but sleep all the time." Claimant admits to continued alcohol abuse which has increased in the past year. Claimant continues to have tumultuous home life with his infant child finally doing better health wise and a stressful yet continuing marriage which involves his life leaving the family home from time to time. The Claimant admits this is a cause of great stress but believes he is coping adequately. Dr. Hughes notes the Claimant believes he has no ability to return to work because of his mental foggingness and his tremors and admits that he hasn't even tried to look for a job since he was fired.

Dr. Hughes is of the opinion the Claimant is in need of additional treatment but finds the Claimant's major depressive disorder one to be most probably a genetically caused condition involving a biochemical dysfunction in the brain. Dr. Hughes is of the opinion that it is not medically probably or plausible that the Claimant's current major depression was caused by workplace interactions or him losing his job. Dr. Hughes noted that such workplace interactions while potentially generating modest levels of "reactive" distress do not likely cause full major depressive disorder episodes as evidenced by the preponderance of scientifically sound, medical research. Dr. Hughes noted that in the years predating the Claimant's discharge the Claimant's was experiencing likely greater "reactive" distress and worry over his catastrophic family situation. Dr. Hughes noted his major depressive disorder when coupled with the Claimant's continuing and increasing alcohol abuse may be the cause of the Claimant in his own words "never being able to get enough sleep and staying in bed all day with tremor disorders and startled reactions to light and sound." Ultimately Dr. Hughes opined the Claimant while in need of medical treatment believed and opined that the Claimant's alleged stressors at work were not the prevailing factor in the Claimant's need for treatment or his current conditions of ill.

FINDINGS

The Claimant bears the burden of proof in workers' compensation matters to prove the entitlement to benefits. In this case the Claimant alleges the work environment was the prevailing factor in the Claimant's resultant psychiatric condition and need for treatment and inability in his own words "to retain employment." I find for the reasons set forth below the Claimant has failed to meet his burden of proof and award no benefits. The court in this matter involving a claim for mental injury is guided by §287.120.8. which provides "mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events."

I find the testimony as presented from the witnesses called by the Claimant and the Employer and Insurer document the workload of the Claimant and while the Claimant's proffered witnesses indicated the Claimant appeared busy and at time harried and stressed were unaware of the entirety of the Claimant's workload or the Claimant's personal life, and rarely, if ever, knew of the entirety of the

Claimant's overall situation. Further, the proffered witnesses for the Claimant were largely unaware of workload other than their own and relied on the Claimant's assertion that he was given more work than anyone else in the office. This testimony proffered by two of the Claimant's witnesses which were former prosecutors also terminated from the employment with their own pending lawsuits involving that termination must be weighed with a jaundiced eye as to the interests involved. Further, the testimony of Jennifer Phillips, the trial team leader, who was aware of the workload assigned to each of the individuals working for her testified the Claimant had no greater workload than others. In fact, Ms. Phillips testified the Claimant had a lighter workload than most with the removal of the trial docket responsibilities. Lastly, Ms. Phillips testified that the bulk of the Claimant's workload was assigned to Rule 13 clerks for handling upon the Claimant's termination, which factually establishes nothing extraordinary and unusual as a stressful work environment.

I find the medical evidence offered to be as predicted. Dr. Hill, a psychiatrist and physician who almost exclusively testifies on behalf of the injured claimants, found the Claimant to be in need of treatment and indicated in his direct testimony he believed it was because of the work-related stressors. Dr. Hill on cross-examination freely admitted that the Claimant's tumultuous home life certainly played a part in the Claimant's long-standing stressor, medication and alcohol abuse which were present long before the Claimant's assertion of work-related stress upon the appointment of a new prosecutor. This testimony when compared to Dr. Hughes who over recent decades has almost exclusively testified for the employer and insurer and predictably found none of them to suffer from any work-related stressors or need for treatment admitted the Claimant is in need of treatment but noted the Claimant's tumultuous personal life dating back to 2003 with ongoing medication and the onset of alcohol abuse coupled with whatever stressors the Claimant believed were brought on by the job.

I find these two experts with their noted biases and predictable testimony to be of some value but not controlling and defer to the language of the statute which requires the alleged stressors to be extraordinary and unusual based on objective standards and actual events. I find that the greater weight of the evidence presented indicates the Claimant was under no unusual or extraordinary stress as objectively measured by the work duties to which he was assigned, which arguably were no greater and in all likelihood lesser than his associates within the prosecutor's office.

For the reasons set forth above I find the Claimant has failed to meet his burden of proof to entitlement to workers' compensation benefits and find the Employer and Insurer has no obligation to the Claimant for benefits in this matter.

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation