

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

Injury No.: 08-079143

Employee: Jessica Lee
Employer: KLNT
Insurer: State Farm Insurance Company

The above-entitled 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 and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 1, 2010, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued November 1, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of September 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Jessica Lee

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 reversed.

The administrative law judge denied employee's claim on the issue of medical causation because she felt employee lacks credibility. But medical causation is a question for the experts, and employee's credibility or lack thereof is largely irrelevant—the parties agree employee helped lift or tip the plant in her employer's office. The administrative law judge did find employer's expert Dr. Prostic credible, but only in an offhand manner after she had already denied employee's claim, and with no analysis or explanation why Dr. Prostic is more credible than the expert testimony from Dr. Stuckmeyer. Because I am convinced the administrative law judge improperly confused the issues in this matter, I would reverse the award. And, because I am convinced Dr. Stuckmeyer is more credible than Dr. Prostic, I would enter an award for employee granting temporary total disability, past medical expenses, and future medical treatment.

Employer disputes whether employee sustained an accident for purposes of the Missouri Workers' Compensation Law. The language of § 287.020.2 RSMo defines "accident", as follows:

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.

The claimed injury in this matter resulted from an incident on June 11, 2008, in which employee bent over and lifted a pot containing a large plant that, together with the dirt-filled pot, weighed approximately 75 pounds. I'm convinced these circumstances constitute an "accident." The event was unexpected and traumatic: there is no indication employee was expecting to hurt her back when she bent over to pick up the plant. The event is identifiable by time and place: employee established the time and place with her testimony. The event produced, at the time, objective symptoms of an injury: employee felt discomfort in her back that prompted her to remark to her supervisor (who was helping her) that she'd hurt her back. Finally, employee's work was not merely a triggering or precipitating factor: Dr. Stuckmeyer credibly opined (as will be further discussed below) that lifting the plant was the prevailing factor resulting in employee's injuries.

The primary issue in this matter is whether employee proved medical causation. Section 287.020.3(1) RSMo provides, as follows:

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

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relation to any other factor, causing both the resulting medical condition and disability.

Dr. Stuckmeyer opined that the accident on June 11, 2008, was the prevailing factor causing employee to sustain a significant increase in back pain with the development of radicular symptoms in the right lower extremity—a symptom employee had never experienced before that date. Dr. Prostic concedes there is no evidence of radiculopathy in the medical records preexisting June 11, 2008, and on cross-examination, opined that employee's lifting the plant "could have been" the prevailing factor causing her resulting medical condition.

Here is where it would have been helpful if the administrative law judge (or the majority) identified *why* they believe Dr. Prostic is more credible than Dr. Stuckmeyer, but the award contains nothing beyond a quick recount of Dr. Prostic's opinions, and is written in such a way that the choice to credit Dr. Prostic appears wholly arbitrary, provoking the question whether the administrative law judge really looked at the expert testimony in this matter or rather (as I suspect) credited employer's evidence as a mere postscript to an award motivated by the administrative law judge's feeling that employee lacks credibility.

In light of Dr. Prostic's admission that employee experienced new symptoms after the June 11, 2008, accident, I find Dr. Stuckmeyer more credible than Dr. Prostic. I find that the accident on that date was the prevailing factor causing employee's resulting medical condition and disability.

Despite the fact employee was injured at the workplace during work hours while performing a task her supervisor requested of her, employer remarkably disputes whether employee's injuries arose out of and in the course of her employment. I am convinced employee met her burden on this issue as well. 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.

I have already determined that the accident of June 11, 2008, is the prevailing factor in causing employee's injury. I am convinced employee has also proven that her injury did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of work in normal life. To the contrary, employee's injuries came directly from a risk related to her employment—namely, the risk that her

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supervisor would ask her to move a heavy plant. Because the risk was related to her employment, employee has met her burden, and there is no need to ask whether workers are equally exposed to such risks outside the workplace. See *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463, 467 (Mo. App. 2010).

Finally, employer disputes whether employee gave proper notice of her injury for purposes of § 287.420 RSMo which provides, in relevant part, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

The purpose of the foregoing section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

Employee was injured in the presence of her supervisor. Employer thus had unequivocal, instantaneous, actual notice of her injury as it occurred. As a result, employer cannot now claim it was in any way prejudiced by claimant's failure to provide a written notice that met the strict requirements of the foregoing statute. I find the testimony from Ms. Stracke to the contrary lacking credibility. I conclude that employer was not prejudiced by employee's failure to provide written notice under § 287.420.

In sum, I am convinced employee met her burden on all of the disputed issues in this matter. I would award employee the temporary total disability, past medical expenses, and future medical treatment to which she is clearly entitled as a result of the compensable injury she sustained on June 11, 2008.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

Issued by DIVISION OF WORKERS' COMPENSATION
Employee: Jessica Lee

Injury No. 08-079143

AWARD

Employee: Jessica Lee

Injury No. 08-079143

Dependents: N/A

Employer: KLNT

Insurer: State Farm Insurance Company

Additional Party: N/A

Hearing Date: October 13, 2010

Checked by: PAM/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: June 11, 2008.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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? N/A.
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:
N/A
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A

Issued by DIVISION OF WORKERS' COMPENSATION
Employee: Jessica Lee

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16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$296.87
20. Method wages computation: By agreement.

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: Jessica Lee

Injury No. 08-079143

Dependents: N/A

Employer: KLNT

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Hearing Date: October 13, 2010

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FINDINGS OF FACT AND RULINGS OF LAW

On October 13, 2010, the parties appeared for hearing. The Employee, Jessica Lee, appeared in person and with counsel, Steffanie Stracke. The Employer/Insurer appeared through Denise Tomasic.

STIPULATIONS

At the hearing, the parties entered into the following stipulations:

- 1) That both the Employer and Employee were operating under and subject to the Missouri Workers' Compensation law;
- 2) That Jessica Lee was an employee of KLNT and is entitled to a compensation rate of \$296.87;
- 3) That a timely Claim for Compensation was filed;
- 4) That no temporary total disability has been provided; and
- 5) That no medical benefits were paid.

ISSUES

The parties request the Division to determine:

- 1) Whether Jessica Lee sustained an injury by accident arising out of and in the course of her employment with KLNT on June 11, 2008;
- 2) Whether the an accident of Jessica Lee was the prevailing factor in Lee's need for treatment or disability;
- 3) Whether Lee is entitled to past temporary total disability;
- 4) Whether the Employer had notice of the injury;
- 5) Whether Lee is entitled to past medical expenses; and
- 6) Whether Lee is in need of future medical treatment.

FINDINGS and RULINGS

Jessica Lee claims she injured her back on June 11, 2008, while helping her employer place a water tray under a large tropical plant. There is no real dispute that Lee assisted her employer with this task but whether Lee sustained injury.

Lee's testimony contained numerous inconsistent statements regarding her history of back complaints, as well as reporting her injury to her employer. Medical records from the first two emergency room visits following the incident fail to mention any work-related injury. The most significant inconsistency is Lee's failure to disclose and active denial of her prior low back problems both in her deposition and in her initial evaluation with the Employer's expert Dr. Prostic. These omissions and inconsistent statements cast doubt on the totality of Lee's testimony. While there is no denying the severity of Lee's back condition and need for treatment, I simply cannot find that it was related in any way to the plant lifting/tipping on or about June 11, 2008.

ACCIDENT

§ 287.020.2 RSMo (2005) defines accident as:

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.

I do not believe or find that the incident of lifting/tipping caused Lee injury under §287.020.2. Assuming arguendo that the incident did cause symptoms of an injury, Lee would still have to show the injury is the prevailing factor in her need for treatment.

§ 287.020.2. The definition of "injury" in Section 287.020.3 also requires that the accident be the prevailing factor, rather than merely a substantial factor, in causing the resulting medical condition and disability:

- 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.

§ 287.020.3(1). Section 287.020.3(2) defines the scope of injuries that will be deemed to arise out of and in the course of employment:

- (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 an unrelated to the employment in normal life.

Dr. Prostic after having an opportunity to review Lee's prior medical records opined that the lifting/tipping incident was not the prevailing cause of Lee's need for surgery or her current condition. Dr. Prostic testified that the incident was not the prevailing factor in Lee's need for treatment. Dr. Prostic's testimony is credible.

Based on the testimony and applicable law and cases, this Claim for Compensation is denied.

Date: _____

Made by: _____

Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2010, by:

Naomi Pearson
Division of Workers' Compensation