

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

Injury No. 11-044808

Employee: Rifet Obic
Employer: St. Louis Antique Lighting Co.
Insurer: Secura Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 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

Injury arising out of and in the course of employment

The administrative law judge determined that employee did not sustain injuries arising out of and in the course of his employment when, on May 23, 2011, a gust of wind knocked him down as he was crossing a public street en route to his workplace from a Lee's Chicken restaurant. We essentially agree with the administrative law judge's analysis, but the award (at least implicitly) applies criteria for compensability which, however reasonable, are no longer clearly applicable given the 2005 legislative abrogation of case law set forth in § 287.020.10 RSMo. Instead, the facts in this particular case can and must be analyzed by application of the test set forth in § 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.

It is undisputed that the accident of May 23, 2011, is the prevailing factor causing employee's injuries, so subsection (a) above is satisfied. We are convinced, however, that employee fails to meet the requirements of subsection (b), for the following reasons.

The risk or hazard of exposure to wind gusts is not only unrelated to employee's employment, but was increased when employee left the place of employment to purchase

Employee: Rifet Obic

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his lunch at Lee's Chicken. Nothing about employee's workplace or work duties necessitated his leaving the workplace to eat lunch at a fast food restaurant. There is no evidence that the employment was located in an area more prone to wind gusts than elsewhere. Given these considerations, we must conclude that employee's injuries 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. See *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012).

Conclusion

We affirm and adopt the award of the administrative law judge to the extent it is not inconsistent with our supplemental findings, analysis, and conclusions herein.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued July 25, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Rifet Obic

Injury No.: 11-044808

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: St. Louis Antique Lighting Co.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (SIF)

Insurer: Secura Insurance

Hearing Date: May 13, 2014

Checked by: KMH

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? Yes
4. Date of accident or onset of occupational disease: May 23, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 fell on his way back to work and fractured his right elbow.
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 upper extremity at the elbow
14. Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Rifet Obic

Injury No.: 11-044808

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$681.46
- 19. Weekly compensation rate: \$454.31/\$418.58
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

weeks of permanent partial disability from Employer	None
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22. Second Injury Fund liability: No

TOTAL:	NONE
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23. Future requirements awarded: n/a

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rifet Obic

Injury No.: 11-044808

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: St. Louis Antique Lighting Co.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: SIF

Insurer: Secura

Checked by: KMH

A hearing was held on the above captioned matter May 13, 2014. Rifet Obic (Claimant) was represented by attorney Frank Niesen. St. Louis Antique Lighting Co. (Employer) was represented by attorney Dennis Lassa. The SIF was left open.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

Claimant alleges he fell in the course and scope of his employment and injured his elbow. Employer denies liability.

STIPULATIONS

The parties stipulated to the following:

1. Although the claim for compensation lists an injury date of May 12, 2011, the alleged date of injury is May 23, 2011.
2. Employer and Claimant were acting under the provisions of the Missouri Workers' Compensation law on the alleged date of injury.
3. Employer's liability was fully insured by Secura.
4. Employer had notice of the alleged injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage was \$681.46 and his rates for TTD and PPD are \$454.31 and \$418.58 respectively.
6. Employer has paid no benefits to date.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Accident
2. Arising out of and in the course of employment

3. Medical causation
4. Future medical care
5. TTD from May 23, 2011-August 19, 2011
6. Permanent disability

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 60 year-old, right-handed, male who is divorced and lives with his daughter. Claimant was born and raised in Bosnia, where he graduated from high school and had some technical training in the textile industry. Upon arrival in the United States, he attended one month of English language classes and became a United States citizen. Claimant can speak English to some extent, but testified with the assistance of a translator.
2. Claimant worked at a textile plant in Bosnia for 21 years and supervised about 30 people. After the Bosnian civil war, Claimant was in a refugee camp in Croatia until he immigrated to the United States in November 1996. He came directly to St. Louis.
3. Claimant's first job in St. Louis was for a small plastics company. He also worked at the Holiday Inn Hotel washing dishes and at Schnucks as a stocker. Claimant worked for Employer from February 1998 through May 23, 2011. He cleaned, polished, and restored historic light fixtures. Claimant has not worked since the accident.
4. Claimant worked eight hour shifts, from 8 am through 4:30 pm. He drove to work and parked in the lot designated by Employer for employee parking. He clocked in and out at the beginning and end of the day, but employees were not required to clock in and out when they went to lunch. Claimant got two 15 minute breaks and one 30 minute, unpaid, lunch break each day.
5. The plant did not have vending machines or a cafeteria, but there was a lunch area with a refrigerator, microwaves, coffee, and seating for 24. Employees also had their own lockers. Many employees brought their lunches and ate in the lunch room. Claimant testified he was free to do whatever he wanted during his 30 minute lunch break, and he almost always went out to lunch. The closest restaurants were Lee's Chicken and Taco Bell. Claimant walked to one of these restaurants during his lunch break almost every day and ate either in the restaurant or in his car.
6. Employer's plant is on Skinker Blvd. To get to Lee's and Taco Bell, Claimant walked out of the plant, turned left, walked north on Skinker, passed another business, and crossed Vernon Avenue. Lee's Chicken is at the corner of Vernon and Skinker.

7. On May 23, 2011, Claimant decided to go buy his lunch at Lee's Chicken and bring it back to the plant to eat because the weather was bad. He thought a tornado may be coming, and it was safer to be in the plant than at Lee's. By the time he got his food and came out of the restaurant, the weather had worsened, and the wind was blowing strongly. As he was crossing Vernon Avenue to return to the plant, Claimant felt the wind pick him up and push him down. He fell forward in the street, onto his right arm.
8. Claimant agreed he fell on a public street, and not on Employer's property. Claimant was not picking up food for Employer or any co-workers, and no one from Employer instructed him to go to Lee's. He was not working at the time of his fall, and he was not running an errand for Employer.
9. Claimant had difficulty getting up after he fell. He had pain in his hip, leg, and arm. An employee of Lee's helped him up, carried him back to Lee's, and called the police and firefighters. This all occurred within about 15 minutes of the time Claimant left the plant to get lunch.
10. The ambulance came and took Claimant to St. Mary's Emergency Room. He had complaints in his right arm, elbow, left leg, and hip. He was diagnosed with an intra-articular comminuted fracture of the right radial head, and was told to follow-up with a specialist. Claimant returned to the Emergency Room a few days later with complaints of left leg pain. He was diagnosed with a hematoma and discharged. Claimant testified he could not walk at all for two to three weeks.
11. Claimant saw Dr. Perry who treated him conservatively. He noted Claimant's left leg symptoms had resolved, but he continued to have tenderness and reduced motion in his elbow. He released Claimant to return to work in early July 2011.
12. Claimant returned to Employer's plant and worked about 1 ½ -2 hours before the owner, Mr. Behm, came to see him. Claimant testified Mr. Behm said that Claimant had sued him, and that doesn't happen in his company. Claimant said he did not sue him; he was just trying to take care of his injuries. Claimant testified the owner told him to leave Employer's property and send a doctor's note that he is able to return to work full-duty.
13. In August 2011, Dr. Perry released Claimant from treatment. He opined surgery would not relieve Claimant's ongoing symptoms. He noted he issued a light duty work restriction at Claimant's request.
14. Claimant did not return to work. He testified he understood he didn't have a place there. He applied for and received SSD in late 2011.
15. Claimant testified his hip is a lot better, but he still has complaints in his right arm. He has difficulty lifting and carrying things. He has trouble bending his arm and can't straighten it at the elbow. He is not able to do yardwork or housework. Every movement of his arm is painful. He can only use it for light activities. His pinky and ring fingers are always numb and he frequently has a burning sensation in them. He is an artist and

displays his oil paintings, but this injury inhibits his art. He can't stand long, use his arm long, or sit long. He does not take any medicine for his arm.

16. Claimant has a number of prior medical conditions and his primary care physician, Dr. Keric, prescribes Hydrocodone and Aleve for all these conditions. These medications help with his symptoms in his hip, back, and right arm.
17. Employer, Gary Behm, testified. He is one of the owners of the company and was an owner on the date of injury. Mr. Behm testified he found Claimant to be a good employee and an honorable man. Mr. Behm was able to converse with Claimant in English. It was difficult at first, but improved. By the time Claimant left Employer, he could converse in English about his work nearly 90% of the time.
18. Mr. Behm testified he does not direct employees where to go for their lunch break. Employees do not clock in and out for lunch, but are not paid for their 30 minute lunch break.
19. Mr. Behm was at work on the date of the accident. He had not sent Claimant on an errand, had not instructed Claimant to go to Lee's, and Claimant wasn't doing anything for the business at the time of his fall. Claimant was not getting food for anyone else.
20. Mr. Behm typically does a walk through in the morning and afternoon. He didn't see Claimant at his work station during his afternoon walk through on the date of the accident, and the foreman had not seen Claimant that afternoon. They were worried about Claimant because of the bad weather. They asked other employees, and no one had seen Claimant. His car was still on the premises, so Mr. Behm went to Lee's and asked about Claimant. An employee of Lee's showed Mr. Behm a pothole area in the street on Vernon where Claimant fell, and told Mr. Behm they helped Claimant and called an ambulance. Vernon is a public street and does not border Employer's building. It is about half of a block away. Employer doesn't own or control the area.
21. Claimant returned to work several weeks after the fall. Mr. Behm did not know Claimant was back, and asked the foreman if Claimant had given him a release to return to work. Mr. Behm asked him how he was, and Claimant said he still had considerable pain and could not do the work. Claimant had a partial work release. Mr. Behm told Claimant he needed a full release, and he should return when he had one. Claimant did not respond to letters and did not come back to work, so he was terminated. Mr. Behm never threatened Claimant's job over his worker's compensation claim. He continued Claimant's benefits and health insurance for 90 days. Claimant never asked for treatment related to the fall through workers' compensation. Mr. Behm testified Claimant had a prior bad injury when he was beaten up. He said he was stiff and sore from his other old injuries and was trying to get on disability.
22. Employer's medical expert, Dr. Doll, reviewed the records, examined Claimant, and issued a report in March 2013. He opined Claimant's fall caused his fracture, and he rated Claimant's disability at 5% of the right arm at the elbow.

- 23. Claimant’s medical expert, Dr. Volarich, reviewed the records, examined Claimant, and issued a report in July 2012. He opined the fall was the prevailing factor in causing the fracture, and he rated Claimant’s disability at 35% of the right arm at the elbow.
- 24. Claimant and Mr. Behm are credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant was injured by accident May 23, 2011.

Section 287.020.2 (RSMo 2005) defines an accident as “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.” Claimant fell while walking back to work. He developed immediate pain in his arm and leg. Both medical experts opined Claimant’s elbow fracture is the result of his fall. I find Claimant was injured by accident May 23, 2011.

2. Claimant’s injury did not arise out of and in the course of his employment.

In order for the injury to be compensable, Claimant must establish his injury “arose out of” and occurred “in the course of” employment. These are two separate elements.

Section 287.020.3(2) (RSMo 2005) provides an injury arises out of and in the course of employment only if the accident was the prevailing factor in causing the injury, and the injury “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 find Claimant’s injury did not occur “in the course of” his employment. Claimant was not performing any work duties when he fell. Claimant was on a lunch break, away from Employer’s premises, and on a public street when he fell. He chose to leave for lunch, and was not directed by Employer to leave the premises for lunch. Claimant was not on a special errand for Employer. While Claimant was not “clocked out”, his testimony and Mr. Behm’s testimony establish the lunch break was Claimant’s own time. Claimant worked from 8-4:30, and was paid for 8 hours. He was not paid for his 30 minute lunch. Employer did not control what employees did during their unpaid lunch break.

In addition, Claimant’s injury did not “arise out of” his employment. Claimant’s fall did not occur because of any condition of his employment. Nothing about his work caused the injury. There is no risk or hazard of his work that caused his injury. Claimant fell because a gust of wind knocked him over while he was walking back to work. Claimant produced no evidence to show that his normal nonemployment life exposed him to a lesser risk of gusts of wind knocking him over, as compared to the risk he faced of gusts of wind knocking him over in the workplace. This is a hazard unrelated to his employment to which he is not exposed at all while working his indoor job. He was not required to leave the premises for lunch. He was not in an unsafe location because of his employment. Claimant admitted he was safer inside Employer’s premises than at Lee’s.

CONCLUSION

Claimant has failed to establish he suffered a compensable accident on May 23, 2011. As a result of this ruling, all remaining issues are moot and the SIF is hereby dismissed.

Made by: _____
 KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation