

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

Injury No.: 05-039672

Employee: Dennis Pape
Employer: Huey's Collision Center, LLC
Insurer: Amerisure Companies
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: May 2, 2005
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 11, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued September 11, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 16th day of May 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee failed to meet his burden of proof that his injury arose out of and in the course of his employment.

In order to be compensable under Missouri Workers' Compensation Law, an employee's injury must arise out of and in the course of his employment. Section 287.120.1 RSMo; *Wells v. Brown*, 33 S.W.3d 190, 191 (Mo. banc 2000). There are two separate tests for the terms "out of" and "in the course of" both of which must be met in order for the employee to be entitled to compensation. *Id.*

To arise out of the employment, "the injury must be *incidental to* and not independent of the relation of employer and employee." *Drewes v. TWA*, 984 S.W.2d 512, 514 (Mo. banc 1999). "The inevitable facts of human beings in ministering to their personal comfort while at work, such as seeking warmth and shelter, heeding a call of nature, satisfying thirst and hunger, washing, resting or sleeping, and preparing to begin or quit work, are held to be incidental to the employment under the personal comfort doctrine." *Id.*

Workers are not "in the course of" their employment "except while engaged in or about the premises where their duties are being performed, or where their services require their presence as a part of such service." *Id.* at 514-15. The "premises" is property "owned or controlled" by the employer. *Id.* at 515. Accidents in or about the premises, during a scheduled unpaid lunch break, occur in the "course of employment." *Id.*

The administrative law judge concluded that there was no causal connection between employee's work conditions and injury as he found that employee was not fulfilling his employment duties at the time of the accident. The administrative law judge further found that neither the personal comfort nor mutual benefit doctrine would be applicable because watching television was not incidental to employment and employer received no substantive benefit from having the television in the break room.

However, contrary to the administrative law judge's finding, employee's activity would be covered under the personal comfort doctrine. It has been established that attending to one's personal comfort is incidental to employment. Activities for the personal comfort or convenience of the employee are considered incidental to employment when they occur within reasonable limits of time and place because they benefit the employee and thereby indirectly benefit the employer. *Clancy v. Armor Elevator Co.*, 899 S.W.2d 123, 125 (Mo.App. E.D. 1995). As a result, injuries which occur during these incidental activities are found to be in the course of employment. *Id.*

There is no question that employee was tending to the personal comfort of all employees when he incurred injury. Employee's wrist injury occurred when he was climbing a ladder to adjust a television antennae on the top of the roof of employer's building and fell. It is clearly established that employer provided a break room for its employees. It is further established that the employer provided a television set in the break room for the personal convenience and comfort of its employees. The television set was commonly used by the employees while they were on break. Employer was aware of the television's use by its employee's during their lunch and/or breaks.

Employee testified that the reception on the television was poor and that it was necessary to place an antennae on the roof in order to get a better reception. Employee testified that he hooked the antennae to

the satellite cable already on the roof in order to get a better television reception. Employer had knowledge of the fact that there had been an outside service hooked up to the television. Employee was not prohibited from installing the antennae. From time to time employee adjusted the antennae in order to improve picture quality. Employee testified that he believed employer was aware of the fact that he was periodically accessing the roof to adjust the antennae. Employee testified that he was never instructed not to do so by employer. There was no policy, written or otherwise, restricting roof access. Employee testified that he had in the past accessed the roof for work-related purposes. He testified that he had changed the filters on the heating and air conditioning units for the office on several occasions. Employer's body shop manager testified that he had no knowledge of whether another supervisor had given employee permission to access the roof.

It is undisputed that the television was provided in the break room for the personal comfort of all employees. Accessing the roof to improve the reception was directly related to employee's personal comfort. This activity was not only for the personal comfort of employee, but for all employees who made use of the television. Therefore, employee's efforts to improve the quality of the picture on the television would be incidental to his employment. In addition, employee's activity, adjusting the antennae, occurred within reasonable time limits and place, as employee testified that he had accessed the roof on previous occasions. Furthermore, tending to employee's personal comfort, i.e. adjusting the television reception, did provide a benefit to employee, and thereby indirectly benefited employer.

Having established that climbing the ladder to fix the reception on the television was an incident to employee's work, the next issue is whether the fall from the ladder was a substantial factor in causing his medical condition. In order to arise out of employment an incident of work must be a "substantial" factor in causing the resulting medical condition or disability; and injury "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." *Drewes*, 984 S.W.2d at 513.

The evidence supports that employee's injury on May 2, 2005, resulted from his fall from the ladder. The emergency records indicate that employee fell from the ladder while at work, fracturing his wrist. Employee was not equally exposed to falling from ladder outside of work. Moreover, there is no evidence to support that any idiopathic condition contributed to employee's fall. Therefore the evidence supports that employee's accident arose out of his employment.

The evidence further supports that employee's injury occurred in the course of his employment. In employee's case, the accident occurred on employer's premises. The building was owned and maintained by employer, and was used regularly by the employees. The fact that employee may have been on break at the time of his accident does not render his actions outside the scope of his employment. It is clearly established that employees who incur injury in and about the premises, while on break, are found to be within the course of employment. Therefore, employee's accident occurred in the course of his employment.

Employee has met his burden establishing that his injury arose out of and in the course of his employment. Accordingly, I would reverse the decision of the administrative law judge and award compensation.

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

John J. Hickey, Member

