

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

Injury No.: 04-137548

Employee: James V. Parrot
Employer: City of Perry
Insurer: Missouri Rural Services Workers' Compensation Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (2nd job wage loss)
Date of Accident: December 26, 2004
Place and County of Accident: City of Perry, Ralls 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, heard oral argument, read the briefs, 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 July 13, 2006, as supplemented herein.

The administrative law judge concluded that employee failed to meet his burden of proof that he was in the course of employment at the time of the accident and as a result, denied his claim for workers' compensation benefits. Employee, through his attorney, filed a timely Application for Review with the Commission alleging that the administrative law judge: 1) erred in finding that the employee failed to meet his burden of proof that he was in the course of employment at the time of the accident; 2) erred by making an improper, unreasonable inference that the employee could not respond to the emergency call; and 3) erred by not making findings as to the nature and extent of permanent partial disability and the proper rate of compensation. We disagree and affirm the award of the administrative law judge.

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. § 287.120.1 RSMo; *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 610 (Mo.App. W.D. 2005).

The terms "out of" and "in the course of" are separate tests which must both be met for the injury to be compensable. It is well settled that an accident arises "out of" the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. "In the course of" has been defined to mean "occurring within the period of employment at a place where the employee may reasonably be, while the person is reasonably fulfilling the duties of employment or engaged in doing something incidental thereto." Every case involving the phrase "arising out of and in the course of employment" should be decided upon its own particular facts and circumstances.

Hilton v. Pizza Hut, 892 S.W.2d 625, 631 (Mo.App. W.D. 1994)(overruled on other grounds)(citations omitted).

We agree with the administrative law judge that employee did not injure himself within the course of his employment; however, we feel the reasoning in coming to that conclusion needs further discussion. The administrative law judge found that employee was not engaged in performing the duties of his employment

because no testimony was provided regarding whether employee had any intention of responding to the emergency call. Additionally, employee was not obligated to respond to the call, but had the discretion to decide whether or not he was going to respond. We agree that there is no evidence in the record to show whether employee intended to respond to the call and that there is no way of knowing whether he would have responded to the call if he was not injured. However, we believe the key factor is not whether he intended to respond, but whether he actually did respond. Therefore, we are persuaded by employee's actions rather than his intentions. Employee's injury occurred when he went to answer the emergency call which prevented him from making any attempt to respond to the call; thus, he never began fulfilling the duties of his employment.

If employee had been en route to the emergency at the time of the accident, there would be no dispute that the injury would be compensable under the "special errand" rule, an exception to the standard "going and coming" rule.

In general, an employee does not suffer injury arising out of and in the course of employment if the employee is injured while going or journeying to or returning from the place of employment. This is true because in most circumstances, a trip to or from one's place of work is merely an inevitable circumstance with which every employee is confronted and which ordinarily bears no immediate relation to the actual services to be performed. . . . While this is the general rule, the principle may be modified by the particular facts, circumstances and situations resulting in various and varied exceptions in order to accommodate both the employer and the employee. Certain exceptions to the general rule have been clearly delineated by the courts which permit a worker to be entitled to compensation.

Custer, 174 S.W.3d at 610. One well established exception provides compensation to an employee who is performing a "special errand" for his employer. The special errand rule provides that:

when an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself. . . . Thus, while the general rule is that accidents incurred while an employee is going to or coming from work are not compensable because they do not arise out of and in the course of employment, that rule is not applicable where the employee during that period performs a special task, service or errand in connection with [his or] her employment. Such circumstance might be better characterized as causing a trip made in performing such a special task to be a part of the employment.

Id at 614.

In *Hilton*, the court found that in order for the special errand rule to apply the employer must direct the employee to do a specific task at a particular time and the accident or injury must occur while the employee is on that "special errand" for the employer. The voluntary nature of employee's job would preclude such direction; however, the question remains whether employee was on a special errand for his employer. We believe he was not. Turning to *Larson's*, the circumstance that the employee is "subject to call" should not be given any independent importance in the narrow field of going to and from work; the important questions are whether the employee was in fact on an errand pursuant to call, and what kind of an errand it was. 1. A. Larson, *Workers' Compensation Law*, § 14.05 (6)(2004). As a volunteer firefighter, employee was on-call at all times; however he was only on duty when he was on an errand pursuant to call, i.e., en route to the emergency. Employee may or may not have been about to engage in an errand pursuant to the call, but incurred injury preventing the start of any such errand. Employee's injury prevented any response to the emergency call; thus, employee never began an errand pursuant to the call.

Furthermore, in special errand cases, compensation is limited to "portal-to-portal" coverage; relying on *Larson's*, which states:

[T]he effect of the special errand rule is to confer "portal-to-portal" coverage on the employee, [so] the question may arise, as in the case of outside workers enjoying similar coverage of their travels:

where precisely is the portal? One of the rare opinions addressing itself to this question is that in *Charak v. Leddy*, 261 N.Y.S.2d 486 (N.Y. 1965). The claimant, an attorney, fell and was injured on steps leading from the inner lobby to the outer lobby of her apartment. She was leaving on a special errand for her employer. The court held that she had not left her home and commenced her employment. Compensation was denied. The court pinpoints the in between nature of the claimant's situation by saying:

A fall in her apartment would not have given rise to any claim. If, however, in the performance of a special errand, she had fallen in the street, barely beyond the outer door of the building, the accident would have been compensable . . .

1. A. Larson, *Workers' Compensation Law*, § 14.05 (2). Therefore, portal to portal coverage generally covers an employee from the time he leaves home until the time he returns. In this case, employee was inside the confines of his home at the time of injury, barring coverage. Thus, employee's injury is not compensable under the special errand exception given that his injury occurred inside his home and he failed to commence performance of a special errand prior to his injury.

The Commission affirms the award of the administrative law judge as we agree with the ultimate conclusion reached by the administrative law judge that employee failed to meet his burden of proof that he was in the course of employment at the time of the accident.

The award and decision of Administrative Law Judge Ronald F. Harris, issued July 13, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28th day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

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 the burden of proof that he was in the course of employment at the time of the accident.

The purpose of the Missouri Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment and,

consequently, the law should be liberally construed so as to effectuate its purpose and humane design. The law must be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Therefore, any question as to the right of an employee to compensation must be resolved in favor of the injured employee.

Custer v. Hartford Ins. Co., 174 S.W.3d 602, 610 (Mo.App. W.D. 2005).

I believe employee is entitled to compensation as he has shown that he was in the course of employment at the time of his accident. The test for the term "in the course of employment" was met as employee's injury occurred within a period of employment at a place where employee may reasonably have been, while reasonably fulfilling the duties of his employment.

As a volunteer firefighter, employee was on-call twenty-four hours a day. Employee's volunteer status also gave him the discretion to either respond or decline to respond to an emergency. In this case, I believe the evidence shows that employee began to respond to the emergency. It is clear that employee was en route to answer the emergency call when he was injured. The question is whether responding to an emergency call is encompassed in employee's duties as a firefighter. I strongly believe that it is. The moment employee decided to respond to the emergency call; he began performing the duties of his employment.

Employee knew that the call was related to his employment because the ring associated with an emergency call differed from that of an ordinary telephone call. The "special" ring, particular to the emergency call, enabled employee to differentiate it from any other ordinary incoming telephone call and alerted him of the emergency. If employee had been responding to an ordinary telephone call, then employee would not be entitled to recover benefits; however, the special ring served as an alarm putting employee on notice that it was an emergency call.

Furthermore, it is necessary for employee to first answer the call before he is able to ascertain the details of the emergency including its location. Answering the telephone is a key component in responding to the emergency. As a result, employee's journey to answer the telephone was in the course of his employment and any associated injury with that journey would be compensable.

The fact that the injury occurred inside employee's residence does not negate the fact that employee was in the course of employment at the time of his injury. The alarm to alert employee of an emergency was located in his home and any response to the alarm immediately placed him on duty. Therefore, any injury associated with the response to the alarm, whether inside or out, would be within the course of employment. Employee incurred injury when he rushed to answer the emergency call; because he was performing the duties of his employment at the time of his accident, he is entitled benefits.

In addition, it would not serve public interest for firefighters to be discouraged from hurriedly responding to emergencies. Certainly, it would not be beneficial to the rural community for its volunteer force of firefighters to take their time in responding to incoming emergency calls. It is, however, in public interest to encourage volunteer firefighters to respond to emergency calls as quickly as possible. Limiting compensability to only those accidents that occur outside the home would not serve public interest.

Employee has met his burden by establishing that he was in the course of employment at the time of his accident. 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

AWARD

Dependents: N/A

Employer: City of Perry

Additional Party: Second Injury Fund (2nd. job wage loss)

Insurer: Missouri Rural Services Workers' Compensation Trust

Hearing Date: June 5, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: RFH/tmh

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: December 26, 2004.
5. State location where accident occurred or occupational disease was contracted: City of Perry, Ralls 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:
While getting out of bed, Claimant stepped down and fractured foot.
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 foot.
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.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: N/A.
19. Weekly compensation rate: N/A.
20. Method wages computation: Disputed.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James V. Parrott

Injury No: 04-137548

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: City of Perry

Additional Party: Second Injury Fund (2nd. job wage loss)

Insurer: Missouri Rural Services Workers' Compensation Trust

Checked by: RFH/tmh

FINAL AWARD

FINDINGS OF FACT and RULINGS OF LAW:

The matter of James V. Parrott ("Claimant") proceeded to a final hearing on June 5, 2006. Attorney Vicki Dempsey represented Claimant. Attorney Paul Huck represented the City of Perry ("Employer") and the Missouri Rural Services Workers' Compensation Trust ("Insurer").

The parties stipulated to the following:

1. Date and location of accident
2. Employer received proper notice
3. A timely claim was filed
4. Employer was insured for workers' compensation
5. Claimant sustained injury to his foot while getting out of bed to answer the phone for a fire alarm call
6. Employer has paid no medical or TTD benefits
7. Claimant was a covered employee
8. Claimant was a volunteer

The parties further agree that should this claim be found compensable the Claimant would be entitled to TTD benefits for ten weeks from 12/27/2004 to 3/07/2005 at the rate of \$40.00 per week and that the Employer would agree to reimburse Claimant for \$50.00 in out-of-pocket expenses as well as holding Claimant harmless for any and all claims from group health totaling \$4,512.69.

The issues to be determined are:

1. Did the accident arise out of and in the course of employment
2. Appropriate compensation rate
3. Nature and extent of any permanent partial disability

Claimant's attorney seeks a fee of 25% on all benefits awarded.

Claimant has been a volunteer firefighter for the City of Perry since 1988. In addition, Claimant's regular full time job is a correctional officer for the Missouri Department of Corrections at the facility in Vandalia, Missouri.

Claimant testified that at the time in question the employer had between 21 and 27 volunteer firefighters. The procedure for notifying volunteers when a call came in would be that the 911 operator would place the call which would ring through simultaneously to all volunteers. Volunteers would know the call was a fire alarm because it would be short distinctive rings as opposed to a regular telephone call. The operator would inform the volunteer of the location and nature of the alarm. Volunteers were under no obligation to respond to an alarm and were not required to inform the operator whether they would be responding to the alarm. Volunteers responding to an alarm would proceed in their own personal vehicles to the fire station where they would meet as a group, suit-up, obtain the necessary equipment and then once in route with the employer's fire truck the crew would so advise the 911 operator.

On the evening of December 26, 2004, Claimant was at home in bed when a fire alarm call came in at about 7:20 p.m. It was normal for Claimant to be in bed at that time in the evening as he was scheduled to report for his regular job as a correctional officer at 11:00 o'clock that evening. Claimant testified that he heard the call and "when I stood up, roughly both feet at the same time, I felt my foot - I felt it and heard it pop." Claimant did manage to get to the phone and was informed that the alarm involved the possibility of a gas leak. Claimant did not respond to the alarm and had his wife drive him to the hospital.

On January 13, 2005, Claimant underwent an open reduction with internal fixation for a comminuted fracture at the fifth metatarsal of the right foot. Claimant was released to return to work without restrictions on March 7, 2005.

Although volunteers were considered to be on call 24 hours a day 7 days a week, each volunteer had discretion whether to respond to any call and were not expected to leave their full-time job in order to respond to a call.

RULINGS OF LAW

The threshold issue in this case is whether Claimant's accident arose out of and in the course of his employment as a volunteer firefighter for the Employer. The courts have held that "arising out of" and "in the course of" employment are two separate tests, both of which must be met and that Claimant has the burden of proving both elements. Simmons v. Bob Mears Wholesale Florist, 167 S.W. 3d 222 (Mo. App. 2005).

Both parties attempt to rely on the decision in King v. City of Clinton, 343 S.W.2d 185 (Mo. App. 1961) as support for their respective positions. While the King decision is instructive in some respects it is also distinguishable from the instant case.

While both cases involve city employees subject to being on call 24 hours a day, the King case involved a full time police officer rather than a volunteer. Additionally, although the accident in King occurred at the officer's home, the city deemed an officer to be on duty (as distinguished from simply being on call) when the officer was in uniform. Consequently, the Court in King found that the officer, who was in uniform at the time and thus deemed to be on duty, was clearly engaged in the duties of his employment at the time of the accident. The Court set out a number of other factors in arriving at their decision but for purposes of the instant case the most pertinent is that the office was deemed to be on duty and engaged in the duties of his employment at the time of the accident.

Whether Claimant in this case was engaged in performing the duties of his employment is much less clear. No testimony was given regarding whether Claimant, knowing he had to report to his regular job within a few short hours, had any intention of actually *responding* to the call when he heard the phone ring rather than simply *answering* it.

On the contrary, Claimant did testify that volunteers had the discretion to decide whether or not to respond to a call; they were not required to respond to a call and they were not expected to leave their regular job in order to respond to a call.

The Claimant has the burden of proving all essential elements of the claim. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo. App. 1996). On the facts of this case, I find Claimant has failed to meet his burden of proving that he was in the course of employment at the time of this accident. To find otherwise would require a decision based merely upon speculation. Therefore, Claimant's claim for benefits is denied. As a result, the other issues are rendered moot and will not be addressed.

CONCLUSION

Claimant has failed to meet his burden of proof that he was in the course of employment at the time of the accident. Therefore, Claimant's claim for benefits is denied.

Date: _____

Made by: _____

RONALD F. HARRIS
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation