

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 07-019520

Employee: Kimberly Regan (Mercer)
Employer: Quest Diagnostics (Settled)
Insurer: Travelers Property Casualty Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of Administrative Law Judge Paula McKeon, dated October 26, 2010.

Introduction

The issues stipulated in dispute at the hearing were: (1) whether employee sustained an accident arising out of and in the course of her employment with employer on February 6, 2007; (2) whether the alleged accident was a prevailing factor in employee's need for medical treatment; and (3) Second Injury Fund liability.

The administrative law judge found: (1) the "causal hug" does not meet the statutory definition of accident under § 287.020.2 RSMo; (2) assuming, *arguendo*, that the "causal hug" met the statutory definition of accident, employee's injuries did not arise out of and in the course of her employment; and (3) work was not the prevailing factor in causing employee's injuries.

Employee filed an Application for Review alleging the administrative law judge erred in applying *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009) to the facts of this case.

For the reasons set forth herein, we reverse the award of the administrative law judge.

Findings of Fact

Preexisting conditions

In 2003, as part of her treatment for cervical myelopathy, employee underwent neck surgery that included an anterior cervical corpectomy at C6 with anterior plating from C5 to C7. She underwent a second neck surgery in 2005 that involved a C4 to C5 fusion. Following those surgeries, employee had numbness and tingling and could no longer engage in activities such as horseback riding. Employee needed some accommodations at work, such as having her computer monitor raised so that she didn't have to look down, which hurt her neck. Employee also had to take periodic vacation days from work in order to attend ongoing medical tests and diagnostic procedures to monitor her neck condition.

Employee: Kimberly Regan (Mercer)

- 2 -

Dr. James Stuckmeyer examined employee and reviewed her past medical history and provided the only expert medical testimony on record. Dr. Stuckmeyer opined that employee suffered a preexisting 30% permanent partial disability of the body as a whole referable to the cervical spine in connection with her neck surgeries and pain and limitations. We find Dr. Stuckmeyer credible and adopt his opinion and rating with regard to employee's preexisting neck condition.

Michael Dreiling performed a vocational evaluation of employee and provided the only expert vocational testimony on record. Mr. Dreiling opined that employee's preexisting neck condition constituted a hindrance and obstacle to her obtaining employment. We find Mr. Dreiling credible on this point.

Primary injury

Employee worked for employer processing medical records. Her duties involved getting medical records from the mail room, taking them back to her desk, opening the files, removing staples, examining the records, and preparing them for electronic scanning. On February 6, 2007, employee got up from her workstation to take a restroom break. As employee was walking toward the restroom, a coworker, Erin Logan, came up behind her suddenly and grabbed employee around the neck and pulled employee's head to her shoulder, causing employee's neck to pop. Employee experienced immediate and severe pain.

Ms. Logan did not mean to hurt employee and her actions were not undertaken maliciously. Ms. Logan was employee's friend at work but the two did not socialize outside the workplace. Employee was not expecting Ms. Logan to grab her. Employee's family and friends knew to be careful when hugging claimant due to her previous neck surgeries and employee believed they would not have grabbed her in the unexpected and forceful fashion that Ms. Logan did.

Employee's neck condition deteriorated after the event with Ms. Logan on February 6, 2007, and employee underwent a course of medical treatment that culminated in a third neck surgery in April 2007. Dr. Feigenbaum, the treating surgeon, performed a posterior left C3-4 transpedicular discectomy with extension of the existing hardware to C3 from C4, and released employee from his care on November 7, 2007.

Dr. Stuckmeyer opined that the February 6, 2007, event was the prevailing reason for the development of employee's increased symptoms and need for a third neck surgery. Dr. Stuckmeyer opined that employee sustained a 25% permanent partial disability of the body as a whole referable to the cervical spine as a result of the neck injury on February 6, 2007.

We find Dr. Stuckmeyer credible. We find that the February 6, 2007, event was the prevailing factor causing employee's injuries, resulting medical condition including an increase in her neck symptoms and need for a third surgery, and resulting disability. We find that employee reached maximum medical improvement on November 7, 2007, the date Dr. Feigenbaum released employee from his care. We find that claimant sustained a 25% permanent partial disability of the body as a whole as a result of the injuries she sustained when her coworker grabbed her around the neck on February 6, 2007.

Employee: Kimberly Regan (Mercer)

- 3 -

Permanent total disability

Employee has not worked since reaching maximum medical improvement from the primary injury. Employee now experiences ongoing pain, numbness, and tingling to a degree that is much worse than before February 6, 2007. Employee is only able to sleep about an hour per night due to neck pain. Employee can no longer lift a laundry basket, vacuum, make her bed, and no longer visits family and friends as much as she used to. After about 20 minutes of driving, employee experiences severe neck pain and her arms fall asleep. Employee takes ibuprofen every four hours for neck pain.

Dr. Stuckmeyer opined that employee should be restricted to the non-occupational sedentary level. Dr. Stuckmeyer explained employee is a “walking time bomb when it comes to her cervical spine,” because minimal lifting could cause devastating neurological injury to employee. Ultimately, Dr. Stuckmeyer opined that employee is permanently and totally disabled as a result of her overall neck condition. Mr. Dreiling agreed that employee is permanently and totally disabled based on her overall cervical condition.

We are persuaded by employee’s testimony and find credible the uncontested expert opinions of Dr. Stuckmeyer and Mr. Dreiling. We find that employee is permanently and totally disabled due to the combination of her preexisting cervical condition and the disability stemming from the injuries she sustained on February 6, 2007.

Conclusions of Law

Conflation of the stipulated issues

We have resolved the disputed fact issues and now proceed to the legal questions presented by the parties. First, however, we wish to point out that the issues stipulated by the parties appear to have been imprecisely stated and perhaps have not heretofore been appropriately framed. Some discussion is in order so that further confusion is avoided.

The parties asked the administrative law judge to resolve the issue whether employee “sustained an accident arising out of and in the course of her employment.” But the Missouri Workers’ Compensation Law does not require an employee to prove an “accident” arising out of and in the course of employment, but rather an “injury” arising out of and in the course of employment. See § 287.020.3(2) RSMo. This distinction is not merely academic where both “accident” and “injury” have specific definitions for purposes of Chapter 287. The problem with the way in which the parties have stated the issue is that it raises the question whether, by stipulating as a single issue whether employee “sustained an accident arising out of and in the course of her employment,” the parties really mean to stipulate *two* issues, i.e., whether employee sustained an “accident” as that term is defined in the Missouri Workers’ Compensation Law, and whether the injuries resulting from that accident “arose out of and in the course of employment.” Because we are duty-bound to resolve no more and no less than the particular factual and legal issues the parties stipulate as in dispute, the importance of precisely stating those issues can easily be seen.

In the present case, it appears from the parties’ briefs and arguments that we are, in fact, asked to resolve both (1) whether employee sustained an “accident,” and (2) whether employee’s injuries arose out of and in the course of her employment.

Employee: Kimberly Regan (Mercer)

- 4 -

Accident

Section 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.

We have found that on February 6, 2007, employee was walking to the restroom during her work shift when her coworker, Ms. Logan, unexpectedly came up behind her and grabbed her around the neck and pulled employee's head toward her shoulder. We have found that the event was traumatic: employee's neck popped and she experienced immediate and severe pain. We have found that, as a result of the February 6, 2007, event, employee suffered objective symptoms of injury in the form of a deterioration of her cervical spine condition which eventually necessitated a third surgery.

Given the foregoing facts, we are convinced that the February 6, 2007, event meets every aspect of the definition of "accident." That the accident occurred as a result of a coworker's joking around or horseplay does nothing to take this event outside the definition of "accident" under the language set forth above.

We conclude that the specific event on February 6, 2007, of Ms. Logan grabbing employee around the neck and pulling employee's head toward her constituted an "accident" for purposes of § 287.020.2.

Injury arising out of and in the course of employment

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.

We have already determined that the accident of February 6, 2007, is the prevailing factor in causing employee's injuries. We must now determine whether employee has satisfied the second prong of the foregoing section, namely, that her injuries 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.

In *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the court made clear that the application of § 287.020.3(2) (b) involves a two-step analysis. The first step in

Employee: Kimberly Regan (Mercer)

- 5 -

the analysis is to “determine whether the hazard or risk is related or unrelated to the employment.” *Id.* at 467. The court explained that “[o]nly if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.” *Id.*

Here, we are convinced that employee’s injuries stemmed from a hazard or risk directly related to her employment. Simply stated, working in the same office as Ms. Logan subjected employee to the risk that Ms. Logan would unexpectedly grab her neck from behind. Her injuries came directly from that risk. The *Pile* court made clear that an employee’s work activities can provide the “nexus” between the employee’s work and the claimed injuries, but so also can the “physical condition of the work environment.” *Pile*, 321 S.W.3d at 467 n.7. Employee’s work involved being on premises at employer’s offices and working in proximity to other individuals. Those individuals were as capable of presenting a hazard or risk to employee as any other “physical condition of the work environment,” as this case dramatically illustrates. The plain language of § 287.120.3(2) (b) does not restrict our inquiry to only those injuries resulting from inanimate hazards or risks, such as slippery floors or heavy objects. Obviously, being unexpectedly grappled from behind by Ms. Logan was not part of employee’s job duties or work tasks, but the *hazard* or *risk* that such an event might happen was a part of being present at employer’s workplace and working alongside Ms. Logan.

We find that Ms. Logan was the nexus to employee’s work. We need not proceed to the second step of the analysis. We conclude that employee met her burden of proving her injuries arose out of and in the course of her employment.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in “all cases of permanent disability where there has been previous disability.” As a preliminary matter, the employee must show that she suffers from “a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ...” *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

We are convinced that employee’s preexisting disability was serious enough to constitute a hindrance or obstacle to employment for purposes of § 287.220 RSMo. Employee’s preexisting cervical spine condition included multiple surgeries and the existence of hardware, and (as the circumstances of this case demonstrate) it clearly had the potential

Employee: Kimberly Regan (Mercer)

- 6 -

to combine with future work-related injuries so as to cause greater disability than would have resulted in the absence of those conditions. Dr. Stuckmeyer rated employee's preexisting cervical spine condition at 30% permanent partial disability and Mr. Dreiling opined that condition was a hindrance or obstacle to employment, and we have found both experts credible. We conclude that at the time employee sustained the primary injury, employee suffered from a preexisting permanent partial disability of the cervical spine that constituted a hindrance or obstacle to her employment or reemployment.

We now proceed to the question whether employee met her burden of establishing entitlement to compensation from the Second Injury Fund. For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found that, as a result of the last injury, employee sustained a 25% permanent partial disability of the body as a whole referable to the cervical spine. The record contains no expert medical or vocational evidence suggesting that employee is permanently and totally disabled as a result of the work injury considered in isolation. To the contrary, both Dr. Stuckmeyer and Mr. Dreiling opined that employee is permanently and totally disabled due to her overall cervical spine condition, or a combination of employee's preexisting condition and the disability from the primary injury. We have found these experts credible. We conclude that the primary injury, considered in isolation, did not render employee permanently and totally disabled, but that employee is permanently and totally disabled due to a combination of her preexisting disability as it existed on February 6, 2007, in combination with the disability stemming from employee's injuries sustained on that date. We conclude, therefore, that employee has met her burden of establishing Second Injury Fund liability under § 287.220.1.

Conclusion

We reverse the award of the administrative law judge. The Second Injury Fund is liable to employee for permanent total disability benefits in the amount of \$260.00 per week. To account for employer's theoretical liability for permanent partial disability benefits, payment of benefits from the Second Injury Fund are due beginning October 7, 2009, or 100 weeks after November 7, 2007, employee's date of maximum medical improvement. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Paula McKeon, dated October 26, 2010, is attached solely for reference.

Employee: Kimberly Regan (Mercer)

- 7 -

For necessary legal services rendered to employee, James E. Martin, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 20th day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD AS TO THE SECOND INJURY FUND ONLY

Employee: Kimberly Regan (Mercer) Injury No. 07-019520
Dependents: N/A
Employer: Quest Diagnostics
Insurer: Travelers Property Casualty Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: September 29, 2010 Checked by: PAM/pd

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: February 6, 2007
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:
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? 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: \$260.00
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kimberly Regan (Mercer) Injury No. 07-019520
Dependents: N/A
Employer: Quest Diagnostics
Insurer: Travelers Property Casualty Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: September 29, 2010 Checked by: PAM/pd

On September 29, 2010, the parties appeared for hearing. The Employee, Kimberly Regan Mercer, appeared in person and with counsel, James Martin. The Employer/Insurer settled the claim prior to hearing. The Second Injury Fund appeared through Assistant Attorney General Benita Seliga.

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 Kimberly Regan Mercer was an employee of Quest Diagnostics and is entitled to a compensation rate of \$260.00;
- 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 Kimberly Regan Mercer sustained an accident arising out of and in the course of her employment with Quest Diagnostics on February 6, 2007;
- 2) whether an accident of February 6, 2007 was the prevailing factor in Mercer's need for treatment or disability; and
- 3) whether the Second Injury Fund is liable.

FINDINGS OF FACT AND RULINGS OF LAW

The primary issue is whether Mercer sustained an accident arising out of and in the course of her employment. Kimberly (Regan) Mercer claims she sustained a work-related accident and was injured when a co-worker put her arm around her shoulders and pulled Mercer's neck towards her shoulder in a hug-like fashion. Mercer and the co-worker/friend were walking together at the time of her injury. Mercer felt immediate onset of pain but continued to work until the end of her shift. Mercer took the following day off due to pain. She returned to work the next day with a neck brace. Mercer's pain continued to the point she was unable to work the following week. Mercer has not returned to work since February 8, 2007.

Mercer has a very significant history of prior neck injury, including two cervical fusion surgeries. Mercer had been to the doctor with chronic neck complaints as recent as January 2007. Mercer had a third cervical surgery in April 2007.

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 causal hug as alleged meets the statutory definition of accident under §287.020.2 as "an unexpected traumatic event or unusual strain." Assuming arguendo that the co-worker's hug did rise to the level of an "accident," Mercer would still have to show the injury is deemed to arise out of and in the course of employment.

§ 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 and unrelated to the employment in normal life.

There was no testimony offered to demonstrate how the actions of the co-worker were in any way related to Mercer’s employment. The only evidence introduced by way of Mercer’s and the co-worker Erin Logan’s testimony was that Logan put her arm around Mercer in a one arm hug fashion and pulled Mercer’s head toward her shoulder.

Section 287.020.3(2)(b) excludes injuries that are unrelated to employment or to which workers are equally exposed outside the work environment. Here, the causal hug was not precipitated by any work activity. There was no evidence or testimony regarding the contact as a necessary work task or indeed any nexus showing that her injury resulted from a hazard or risk related to her employment. Work was not the prevailing factor in causing the injury.

The Missouri Supreme Court in Miller v. Missouri Highway and Transportation Commission, 287 S.W.3d 671,672-4 (Mo Banc 2009), specifically looked at the provisions of §287.020. In Miller, the Court considered the specific intent of §287.020 in regards to walking at work:

“The meaning of these provisions is unambiguous. An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved – here, walking – is one to which the worker would have been exposed equally in normal non-employment life.”

Based on the testimony and applicable law and cases, this claim for compensation is denied.

Date: _____

Made by: _____

Paula 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