

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

Injury No. 11-099793

Employee: Bernice Scott

Employer: Bellefontaine Gardens Nursing & Rehab Center

Insurer: Self-Insured

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.

Preliminaries

On July 16, 2014, the administrative law judge issued her award in this matter. On August 1, 2014, employee, acting pro se, filed a timely application for review with the Commission. On August 20, 2014, the Commission received a "Motion For Leave To File Motion To Dismiss Out Of Time And Motion To Dismiss Application For Review" (Motion) filed by counsel on behalf of employer/insurer. Employer/insurer allege in the Motion that employee's application for review is insufficiently specific for purposes of Commission rule 8 C.S.R. 20-3.030(3)(A). In the Motion, counsel alleges he and his law firm were prevented from timely filing the Motion because they were busy moving offices and setting up telephones and computers. The Commission has not received any response from employee to employer/insurer's Motion.

Interestingly, in the prayer for relief set forth at the conclusion of its Motion, employer/insurer request that we "allow the within Motion to Dismiss overrule the Motion to Dismiss Application for Review and proceed with consideration of said Review on the merits." Consistent with employer/insurer's prayer for relief, we hereby allow employer/insurer to file its Motion out of time, overrule its Motion, and will proceed with a consideration of the merits of employee's application for review.

For the benefit of the parties, we additionally conclude that employee's application for review is sufficiently specific for purposes of 8 C.S.R. 20-3.030(3)(A). In her application, employee alleges:

My lawyer did not give information of condition at work that caused injury. Working condition were so rushed and stressful do to administration cut back on staffing and I had 5 plus job duty's and my lawyer did not present it in court.

It is sufficiently clear to us from the foregoing that employee is challenging the administrative law judge's determination that employee failed to meet her burden of

Employee: Bernice Scott

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proving the requisite causal connection between the conditions of her employment and her injury. Employee cites specific conditions that she believed contributed to cause her injury. Although not a model of clarity or specificity, we do not deem the application for review so deficient as to warrant dismissal.

Discussion

Injury arising out of and in the course of the employment

The parties dispute whether employee's injuries arose out of and in the course of her employment. We agree with the administrative law judge's ultimate determination that employee's injuries cannot be deemed to arise out of and in the course of employment for purposes of § 287.020.3(2) RSMo as that provision was interpreted by the court in *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012).

The Missouri courts have determined that where an employee fails to identify the specific hazard or risk that caused an injury, the employee fails to show that the injury arose out of and in the course of the employment. *Porter v. RPCS, Inc.*, 402 S.W.3d 161, 174 (Mo. App. 2013). As employee admitted in her own testimony, she is unable to identify how or why she fell down at work, and her medical expert, Dr. Woiteshek, does not provide any explanation for why employee fell. This failure of proof prevents us from determining under § 287.020.3(2)(b) whether employee's injury 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. For this reason, we must deny the claim for compensation.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued July 16, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of October 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: Bernice Scott

Injury No.: 11-099793

Dependents: n/a

Employer: Bellefontaine Gardens Nursing & Rehab Center

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: none

Insurer: Self c/o Missouri Nursing Home Insurance Trust

Hearing Date: April 28, 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: December 3, 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 twisted her right knee at work while walking to the nurse's station.
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 knee
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? \$719.90

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$425.19 for PPD
- 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
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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: Bernice Scott

Injury No.: 11-099793

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Bellefontaine Gardens Nursing & Rehabilitation Center

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

Additional Party: none

Insurer: self c/o Missouri Nursing Home Insurance Trust

Checked by: KMH

A hearing was held on the above captioned matter April 28, 2014. Bernice Scott (Claimant) was represented by attorney Mark Cordes. Bellefontaine Gardens (Employer) was represented by attorney Patrick Reidy.

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

Claimant alleges she injured her right knee by accident in the course and scope of her employment. Employer denies liability.

STIPULATIONS

The parties stipulated to the following:

1. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law on the alleged date of injury.
2. Employer's liability was self insured through the Missouri Nursing Home Insurance Trust.
3. Employer had notice of the alleged injury and a claim for compensation was timely filed.
4. Claimant's rate for PPD is \$425.19.
5. Employer paid no TTD benefits, and paid \$719.90 in medical benefits.

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. PPD

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 49 year-old female who worked for Employer, off and on, several years as an LPN. The last date she worked for Employer was March 26, 2012. She has not worked since her last date with Employer, and testified she is collecting "SSA" disability now.
2. At the time of this alleged work injury, Claimant had worked for Employer several months. She was the supervisor of the night shift, and worked 10:45 pm through 7:15 am on Friday, Saturday, and Sunday nights. She was responsible for the care of over 50 patients. She assisted CNAs in turning and lifting patients. She handled pain management, treatment, documentation, safety, and all aspects of patient care.
3. On December 3, 2011, Claimant fell as she was walking to the nurse's station. She testified she does not know how or why she fell. Claimant testified she had unbearable pain into her right leg, and screamed for help. Two CNAs helped Claimant to the nurse's station. Claimant testified she was in so much pain; she immediately called the Director of Nursing and the Administrator to report her injury. Claimant did not speak to either of them that night. There was no one to cover for her, so Claimant finished her shift. Claimant testified her supervisor said she could not leave after her shift without completing an incident report. Claimant filled out the report, and called her son-in-law to pick her up. He took her directly to Touchette Hospital.
4. The records from Touchette Hospital show Claimant was seen December 3, 2011, with complaints of right knee and ankle pain. She had mild swelling in her knee. Claimant testified she told the Emergency Room doctors she didn't know how she fell. One doctor noted Claimant's knee "gave out" while at work the night before and she denied any trauma. Another doctor noted Claimant was at work the night before, and the next thing she knew she was on the floor in pain, and she denied any injury. Another notation in the Emergency Room records indicates Claimant said she was working and felt her knee give out. Claimant was diagnosed with knee pain, given medications, and released.
5. Claimant testified she could not work that weekend. She talked to the Director of Nursing on Monday, and was told to come in Friday until her workers' compensation kicked in. Employer sent Claimant to Concentra two weeks later. Claimant testified they did nothing for her on her first visit because Employer had not filled out the paperwork. Two to three days later, she went back to Concentra, and the doctor ordered two weeks of physical therapy. Claimant went to therapy, and it helped control the pain.
6. The records from Concentra show an initial visit date of December 16, 2011. Claimant gave a history that she fell and hurt her right knee on December 3, 2011. She stated after directing an aide to assist a resident, she turned, and she suddenly fell down. She did not know why she fell. She did not trip on anything or slip. She "just found myself on the

floor.” She said she tried to work over the next few days, but couldn’t, so she saw her private physician. He gave her a knee brace, and scheduled an MRI for December 21.

7. Employer authorized treatment, and Claimant returned to Concentra December 20, 2011, using a walker. She stated she had not been able to stand on the knee since the injury. She said the knee feels unstable and buckles under her with weight-bearing. The physical examination showed no deformity, and mild effusion. She had good range of motion, and her ligaments were intact. Claimant refused to bear weight on her knee and refused medications. The doctor ordered physical therapy.
8. An MRI was done December 21, 2011, at Touchette. The MRI showed mild medial collateral ligament and anterior cruciate ligament sprain.
9. Claimant returned to Concentra January 6, 2012. She continued to complain of knee pain and inability to put weight on her knee. She stated she was only able to walk with the aid of a walker. The MRI showed mild strains, and Dr. Motchan diagnosed a right knee strain. Dr. Motchan explained the MRI showed nothing that would prevent her from weight-bearing or walking normally. He released her from treatment, and at Claimant’s request, he gave her a knee brace. Claimant testified the doctor told her she could do her own physical therapy because she was a nurse.
10. Claimant testified she kept working because Employer told her if she did not, then she would not get workers’ compensation benefits. She was forced to work and coerced because she needed benefits to pay for her medical bills. Claimant got up one Friday evening to go to work. She grabbed her walker and walked to the driveway but could not move. She could not make it to the bus. She called work and told them she could not work because she could not even drag her leg anymore. Claimant testified Employer said she will lose her workers’ compensation benefits. She called off Saturday and went into work on Sunday evening. She was terminated Monday.
11. Claimant testified she continues to have numbness in her knee. She has pain that comes and goes. It lasts for about a minute at a time, and is sharp. She has no stability and her knee won’t support her weight. She testified she tore it up so badly that it is worthless. Her doctor told her to stay off her leg because she is diabetic and he doesn’t want it injured anymore. She bought a wheelchair on her own at a thrift store, and has been using it for about a year. She testified if she had gotten the proper time to rest and gotten the proper medical care, she would not need her wheelchair. She regularly takes Aspirin and Motrin.
12. Claimant testified her primary care physician, Dr. Hussain, suggested she use a wheelchair. His records are not in evidence, and Claimant testified she saw him approximately 10-15 times for her knee. She last saw him for her knee two to three months ago. He recommended another MRI but she could not afford it.
13. Claimant’s medical expert, Dr. Woiteshek, reviewed the records, examined Claimant, and issued a report April 16, 2012. He noted Claimant had difficulty sitting, driving, standing, walking, lifting, carrying, bending, reaching, pulling, climbing, squatting, and

kneeling. His physical examination was essentially normal, with only slightly positive Apley compression and distraction tests and a slight loss of flexion. Dr. Woiteshek diagnosed internal derangement with ligament sprains. He opined the injury wherein she fell at work was the prevailing factor in causing her condition and disability. He concluded Claimant had reached MMI and rated her disability at 20% PPD of the right knee.

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's injury at work did not arise out of and in the course of her employment.

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." I believe Claimant fell at work and developed minor symptoms in her knee as a result of the fall.

Section 287.020.3 (RSMo 2005) provides Claimant's injury must arise out of and in the course of her employment in order to be compensable. The law further 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."

Claimant's case is similar to *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671, (Mo. banc 2009). In that case, the claimant, Miller, was at work and walking to his truck for construction materials when he felt a pop and his knee began to hurt. Miller admitted he was not required to walk in a brisk way at work, he did not fall due to some condition of his employment, and he was not in an unsafe location due to his employment. The court found Miller's injury did not arise out of and in the course of employment because the risk involved, walking, was one to which he would have been exposed equally in normal non-employment life. The focus is on the risk source of the injury. An injury is not deemed to arise out of and in the course of employment merely because it happened while working.

In the present case, Claimant testified and told multiple healthcare professionals that she had no idea why she fell. She simply turned and her knee gave out. There is no indication she tripped over anything, there is no indication she was performing any work activity when she fell, and there is no indication there was anything on the floor to cause her fall. There is no

explanation as to why she fell. While her injury occurred in the course of employment, I find it did not arise out of her employment and is not compensable.

CONCLUSION

Claimant has failed to establish she suffered a compensable accident on December 3, 2011. As a result of this ruling, all remaining issues are moot.

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