

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

Injury No.: 06-109564

Employee: Garry Session
Employer: The Boeing Company
Insurer: Indemnity Insurance Company of North America
Additional Parties: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 briefs, heard the parties' arguments and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated February 23, 2011.

Preliminaries

The issues stipulated at the hearing were: (1) accident; (2) arising out of and in the course of employment; (3) medical causation; and (4) nature and extent of permanent partial disability.

The administrative law judge made the following findings: (1) the expert opinions of Drs. Stillings and Bassett are not persuasive; and (2) the evidence in this case does not demonstrate employee sustained an injury in accordance with the language of § 287.020.3(5) RSMo, or a mental injury from work stress under § 287.120.8 RSMo.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred because he disregarded the only medical expert opinions on record in favor of an opinion on medical causation that was not offered into evidence by any party.

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

Findings of Fact

The work injury

Employee worked for employer as a machinist. On September 22, 2006, employee and a coworker, Richard Miller, had a discussion about racism. Mr. Miller told employee he'd read something interesting about racism and told employee he'd bring it in so he could read it. On September 25, 2006, employee discovered a piece of paper on his toolbox. Employee picked up the paper and read it. The paper was a printout of an email chain-letter. The chain-letter was in defense of "white pride" and contained numerous racial slurs and indicated the author's view that there was nothing improper about using these slurs. Employee felt shocked and threatened after reading the paper. He did not associate the incident with his conversation with Mr. Miller on September 22, 2006; rather, employee was afraid the letter meant someone was out to get him. He took the

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letter to his supervisors, who called security. Richard Miller then came forward and confessed that he'd left the letter on employee's toolbox. Employer disciplined Mr. Miller with three days suspension and sent him to sensitivity training.

Employee felt better when he learned the paper was from Mr. Miller, as he'd known Mr. Miller for a long time and he realized Mr. Miller didn't intend the letter as threatening. Employee was, however, reminded of previous incidents in which he'd felt threatened or harassed because of his race at work, such as when he believed someone had scratched the letter "N" into the paint on his truck. Employee went to a counselor on employer's premises to discuss the events and his reaction to them. Employee did not receive any other psychiatric treatment after the incident on September 25, 2006, and does not believe he needs any such treatment.

Medical expert testimony

Dr. Wayne Stillings and Dr. Gregg Bassett, the two psychiatrists who testified in this matter, agreed that employee suffered psychiatric injury as a result of the incident of September 25, 2006. Dr. Stillings opined that the incident was the prevailing factor causing aggravation of employee's preexisting bipolar II disorder and employee's developing a paranoid disorder, which he rated at 15% and 25% permanent partial disability of the body as a whole, respectively. Dr. Bassett opined that the incident was the prevailing factor causing employee to sustain an adjustment disorder, which Dr. Bassett rated at 4% permanent partial disability of the body as a whole. Dr. Bassett believed employee also suffered from a preexisting paranoid disorder, which he rated at 2% permanent partial disability of the body as a whole.

There are no contrary expert opinions in the record. The nature of employee's claimed injury is complex and beyond the realm of lay understanding, and we can discern no basis for rejecting the consistent opinions from both Drs. Stillings and Bassett that employee suffered a psychiatric injury and permanent disability. As to the nature or specific diagnosis referable to that injury, we note that both doctors believe employee has a paranoid disorder, although they disagree as to whether the condition was preexisting. On this question, we credit Dr. Stillings's opinion.

We find that employee's discovering and reading the chain-letter on September 25, 2006, was the prevailing factor causing employee psychiatric injury in the form of a paranoid disorder and permanent disability to the extent of 7.5% permanent partial disability of the body as a whole.

Conclusions of Law

Accident

We conclude that employee has met his burden of demonstrating he sustained an accident for purposes of the Missouri Workers' Compensation Law. The language of § 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

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caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

The claimed injury in this matter resulted from employee picking up and reading an offensive, racially-themed chain-mail letter that a coworker left on his toolbox. We conclude that these circumstances constitute an "accident." The event was unexpected and traumatic: employee had discussed racism with his coworker and may have been aware the coworker was bringing a document about racism to work, but there is no evidence employee was expecting, when he came into work on September 25, 2006, to find on his toolbox a chain-mail letter advocating the use of racial slurs. The event is identifiable by time and place: employee established the time and place of the incident with his testimony. The event produced, at the time, objective symptoms of an injury: employee experienced shock and fear that someone was out to get him; the doctors who testified in this case agreed that these were symptoms of a psychiatric injury employee sustained at that time. Finally, employee's work was not merely a triggering or precipitating factor: both doctors agreed, rather, that the accident was the prevailing factor resulting in psychiatric injury.

There is no need to consider § 287.120.8 RSMo, in this matter. That section applies to employees who claim work-related stress as an injury. See *Williams v. Depaul Health Ctr.*, 996 S.W.2d 619 (Mo. App. 1999). The present matter is not a claim of work-related stress but instead involves a psychiatric injury sustained in the workplace as a result of a specific unusual event.

Medical causation

We conclude that employee has met his burden on the issue of medical causation. Section 287.020.3(1) RSMo provides, as follows:

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.

We have found that the accident of September 25, 2006, was the prevailing factor in causing employee to sustain a paranoid disorder and a 7.5% permanent partial disability of the body as a whole. Our findings are based on the testimony from both psychiatrists. We conclude that the accident of September 25, 2006, was the prevailing factor in causing employee's resulting medical condition and disability.

Arising Out Of and In the Course of Employment

We are convinced employee has met his burden of demonstrating that his psychological injuries arose out of and in the course of his 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:

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(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 September 25, 2006, is the prevailing factor in causing employee's psychiatric injury. We must now determine whether employee has satisfied the second prong of the foregoing section, namely, that his injury 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 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 related to his employment. Employee's job for employer involved being on premises at employer's worksite and working in proximity to other individuals. The plain language of § 287.120.3(2) (b) does not restrict our inquiry to inanimate hazards or risks, such as slippery floors or heavy objects. Simply stated, employee's presence in the same workplace as Mr. Miller subjected employee to the risk that Mr. Miller would place an inappropriate and racially-themed letter on his toolbox. Employee's injuries came directly from that risk. Obviously, receiving such a letter from Mr. Miller was not part of employee's job duties or work tasks, but the *hazard* or *risk* that such an event might occur was a part of being present at employer's workplace and working alongside Mr. Miller.

We find that Mr. Miller was the nexus to employee's work. We need not proceed to the second step of the analysis. We conclude that employee met his burden of proving his injuries arose out of and in the course of employment.

Nature and extent of permanent partial disability

Employee has met his burden of proving he sustained permanent disability as a result of the accident of September 25, 2006. We have found employee sustained a 7.5% permanent partial disability of the body as a whole referable to his developing a paranoid disorder. Accordingly, employer is liable under § 287.190 RSMo, for 30 weeks of permanent partial disability benefits at the stipulated rate of \$376.55, for a total of \$11,296.50.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee met his burden of proof on the issues of accident, medical causation, whether the claimed

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injuries arose out of and in the course of employment, and his entitlement to permanent partial disability benefits from employer.

Employee is entitled to, and employer is ordered to pay, \$11,296.50 in permanent partial disability benefits.

This award is subject to a lien in favor of Joseph Monticello, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge John A. Tackes, issued February 23, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 18th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Garry Session

Injury No.: 06-109564

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Boeing Company

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

Additional Party: SIF (Open)

Insurer: Indemnity Ins. Co. of North America

Hearing Date: November 16, 2010

Checked by: JAT

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: September 25, 2006
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
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 read a document left for him on his tool box by a coworker.
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: BAW/Psych (alleged)
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

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- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: Sufficient for maximum PPD
- 19. Weekly compensation rate: \$376.55 (PPD)
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None

- 22. Second Injury Fund liability: None herein; Claim remains open

- TOTAL: \$0.00

- 23. Future requirements awarded: None

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Joseph Montecillo

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Garry Session

Injury No.: 06-065306 & 06-109564

Dependents: Two daughters

Before the
**Division of Workers'
Compensation**

Employer: Boeing Company

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

Additional Party: SIF (Open)

Insurer: Indemnity Ins. Co. of North America

Hearing Date: November 16, 2010

Checked by: JAT

On November 16, 2010, a hearing in this Matter was held in the City of Saint Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Claimant, Garry Session, appeared in person and by his attorney, Joseph Montecillo, for a hearing requesting a final award on his claims against the employer, Boeing, and its insurer, Indemnity Insurance Company of North America. The Second Injury Fund is a party to the claim. The Fund did not appear at the hearing and the claim remains open. The Employer and its Insurer were represented by attorney Terry Mort. Richard (Rick) Miller testified on behalf of the Employer/Insurer.

Stipulations & Issues:

06-065306 (7/21/06)

The parties stipulated to the following:

1. On or about July 21, 2006, Claimant sustained an injury by accident arising out of and in the course of his employment.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Saint Louis, Missouri.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.

6. The average weekly wage at the date of injury was sufficient for a permanent partial disability rate (PPD) of \$376.55. Temporary total disability (TTD) is not at issue.
7. Employer paid \$0.00 TTD or medical expenses.

The sole issue to be determined is:

1. Nature and extent of PPD

06-109564 (9/25/06)

The parties stipulated to the following:

1. Date of alleged injury is September 25, 2006.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Saint Louis, Missouri.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The average weekly wage at the date of injury was sufficient for a permanent partial disability rate (PPD) of \$376.55. Temporary total disability (TTD) is not at issue.
7. Employer paid \$0.00 TTD or medical expenses.

The issues to be determined are:

1. Accident
2. Arising out of and in the course of employment
3. Medical causation
4. Nature and extent of PPD

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are

marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Exhibits

Claimant offered the following exhibits, which were received into evidence:

- A. Dr. Berkin IME report
- B. Dr. Stillings Deposition
- C. Claimant's letters from January/February 2004*
- D. Police report from March 2004*
- E. Injury and Illness report

* Exhibits C and D were entered over objections to relevance and hearsay.

Employer offered the following exhibits, which were received into evidence:

- 1. Dr. Hurford Deposition
- 2. Mr. Bassett Deposition
- 3. Division Records (DWC) 05-005048
- 4. Dr. Musich medical report
- 5. Claim for compensation 06-109564
- 6. Claim for compensation 06-065306

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

FINDINGS OF FACT

Based on the competent and substantial evidence presented at hearing, as well as my personal observations of Claimant at hearing, I find:

Claimant's Testimony

Claimant is a long term employee of Employer where he began work in June, 1980. Prior to this he worked five years with another company after technical training to work in a machine shop. Claimant worked with Employer as a tool and die maker. He made the tools used to build the airplanes.

Accident dated July 21, 2006

Claimant was in the shop at work on July 21, 2006 picking up debris when he leaned over to get a heavy cable when he felt his back go out. He was treated in-house at the medical facility by a physician and received physical therapy for several months. He was sent to a specialist, Dr. Hurford, where he was treated with oral medication, no injections, and no surgery. In November 2009, Claimant was diagnosed by the authorized treating physician with left-side posterolateral disc protrusion at L5-S1. Claimant was released from treatment January 18, 2007 with a 3% rating for permanent disability referable to his low back.

On March 21, 2007, Claimant was evaluated by Shawn Berkin, D.O., who rated his PPD for the July 21, 2006 injury at 15% of the low back. This is in addition to preexisting low back disability. Claimant continues to complain of pain in his low back and pain radiating down his left leg. Claimant sustained a low back strain with protruding disc and radiating symptoms as a result of the July 21, 2006 injury.

In 2005, Claimant sustained a back injury which he settled with Employer (Injury No. 05-005048) for 3.5% of the body as a whole referable to the low back.

Incident dated September 25, 2006

On Friday, September 22, 2006, Claimant had a conversation with a co-worker (Rick Miller) regarding the subject of an email in the possession of Mr. Miller. The conversation was personal and not related to work. The topic of the conversation was race. Claimant and Mr. Miller are of different racial/ethnic backgrounds. There is nothing to indicate that the conversation was anything other than a normal discussion between two co-workers. Mr. Miller asked Claimant if he wanted him to bring in the email so Claimant could see it. Claimant agreed that this would be okay. The next day Mr. Miller brought in the email and placed it on Claimant's tool box. The purpose of doing this was informational in connection with their previous conversation and not intended to threaten or intimidate Claimant. Mr. Miller is also a tool and die maker and works in the same department with Claimant.

On Monday, September 25, 2006, Claimant reported to work and found the document where Mr. Miller had placed it. The document contains racial slurs and derogatory statements against persons of many ethnic backgrounds including those of European, African, and Asian descent. It is general in nature and not directed at Claimant personally in any way. Claimant testified that he was offended and threatened by the contents of the document. He reported the document to a supervisor and named Mr. Miller as the person who gave it to him. Mr. Miller admitted he had given the document to Claimant and said he had no intention of offending or threatening Claimant. Claimant admitted he was relieved to find out Mr. Miller had put the document on his tool box because he did not have any problems with Mr. Miller.

Previous incidents described by Claimant are not addressed in this Award because they are not the subject of this claim.

Claimant was seen by Dr. Wayne Stillings (Psychiatrist) for an IME on March 28, 2007. He diagnosed Claimant with an aggravation of a preexisting bipolar disorder, and paranoid

disorder. He rated Claimant with 40% PPD referable to the body as a whole because of mental injury sustained as a result of the September 25, 2006 incident.

Dr. Greg Bassett testified on behalf of Employer. He diagnosed Claimant with an adjustment disorder and that Claimant is predisposed to take situations that are not extraordinary and characterize them as threatening. Dr. Bassett also diagnosed Claimant with preexisting depressive disorder and a propensity for paranoia. He rates the PPD from the email incident at 4% BAW and preexisting disability (PPD) at 2% BAW. He opined that Claimant sustained no appreciable difference in function as a result of the events of September 25, 2006.

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:

Low Back (06-065306)

On July 21, 2006, Claimant sustained an injury by accident at work which resulted in a disability that is permanent in nature and partial in degree to the area of his low back. Claimant continues to complain of pain, tightness, and periodic muscle spasms. He also experiences pain extending into his leg and limited motion. I find that the accident resulted in a permanent disability over and above his preexisting disability at the level of the lumbosacral spine and that the accident on July 21, 2006 was the prevailing factor in causing the current disability. Based on the diagnoses, objective findings, and Claimant's ongoing complaints (low back), I find that the disability which results from the accident on July 21, 2006 is 10% PPD referable to the body as a whole.

Stress claim/Mental injury (06-109564)

The incident of September 25, 2006 was not caused by the actions of Mr. Miller who merely did what he had already told Claimant what they had agreed he was going to do. Claimant should already have been on notice of what the contents or nature of the document before he received it based on the conversation he had with his coworker. On its face there was no threat, intimidation directed specifically at Claimant. If he took it that way it was done in spite of the letters content rather than because of it.

The expert medical opinions of Drs. Stillings and Bassett are not persuasive. The percentage of disability therefore is not given any weight in this award. The medical evidence does not support the findings of the experts as to disability or functional limitation. The ratings are based on the subjective information provided by Claimant rather than objective findings of disability.

Furthermore, Dr. Bassett's conclusions assume a predisposition of paranoia by Claimant and his conclusions accept the claimant's characterization of the incident as being somehow

extraordinary, though Dr. Bassett admits it is likely that the situation was not extraordinary to anyone else. At best, Dr. Bassett's describes a minor diagnosis triggered by the incident, which is not evidence of a compensable injury. An injury is not compensable because work was a triggering or precipitating factor. *V.A.M.S. 287.020.2*

The claimant has not demonstrated a compensable injury under section 287.020.3(5). The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body. *V.A.M.S. 287.020.3(5)* The Claimant has the burden of proving all essential elements of the claim and must establish medical causation. *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296 (Mo.App. 1991).

The claimant has not demonstrated a mental injury under section 287.120.8. The testimony of the claimant is not credible, and the testimony of Rick Miller and a review of the document itself, does not demonstrate extraordinary work stress. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events. *V.A.M.S. 287.120.8*.

The exceptions for "traumatic events" in *E.W. vs. Kansas City Missouri School District* 89 S.W.3d 527, 172 (W.D. 2002) *Jones v. Washington University*, 199 S.W.3d 793 (E.D. 2006) are not applicable. Claimant did not describe a traumatic event comparable to the events in these cases. There was no physical contact or physical assault, and the facts do not rise to the level of trauma.

Further, the exceptions to the mental stress section of the statute are not part of the statute and are born out of case law. This case law creates a judicial construct which predates the 2005 amendments to the statutes and predates the mandate of strict construction in 287.800.1. That provision reads:

Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly. *V.A.M.S. 287.800.1*

Now that the statute is to be strictly construed, previous case law which creates constructs beyond the plain language of the statute can no longer apply. *Berra v. Danter*, 299 S.W.3d 690, 696 (Mo.App.2009). I find the evidence in this case does not demonstrate an injury in accordance with the plain language of *Section 287.020.3(5)*, and does not demonstrate a mental injury from work stress within the plain language of *Section 287.120.8*.

CONCLUSION

Claimant sustained a compensable injury to his low back on July 21, 2006 resulting in 10% permanent partial (40 weeks) or \$15,062. Claimant did not sustain a compensable injury resulting from the incident on September 25, 2006.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation