

FINAL AWARD DENYING COMPENSATION
(Reversing Temporary or Partial Award and Decision of Administrative Law Judge)

Injury No.: 05-031979

Employee: Ricky Tharp
Employer: Pepsi Bottling Group Inc.
Insurer: Old Republic Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 15, 2005
Place and County of Accident: Jasper 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. We have reviewed the evidence, read the briefs of the parties, heard oral arguments and considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the temporary award and decision of the administrative law judge dated January 25, 2007, and in lieu thereof the Commission issues its final award. The temporary award and decision of Administrative Law Judge Karen Fisher, is attached hereto solely for reference.

The dispositive issue is whether or not the employee sustained an injury due to an accident arising out of and in the course of employment. Section 287.120.1 RSMo. The administrative law judge concluded that the employee sustained an injury due to an accident arising out of and in the course of his employment. The Commission disagrees with this conclusion and reverses the award.

I. Factual Summary

A. Witnesses for Employee

1. Employee, Ricky Tharp

Employee began working for employer as a loader in November, 2004; employee's job required him to operate a forklift, retrieve various soft drink products, and load the products on trucks; the product was located on pallets approximately six feet in height, and two pallets high.

On April 15, 2005, employee was working with a co-employee, Bruce Morgan, another loader; employee was using a forklift loading apple juice; employee recalls parking the forklift in the warehouse near the stacks of apple juice, then getting off the forklift and grabbing the apple juice with his hands, but cannot recall any subsequent event; employee's next memory is coming to, either in the warehouse or in the ambulance; employee does not know what occurred on April 15, 2005, as he has no knowledge of how he got on the floor, how the product got on the floor, whether he hit anything, whether anything fell on him, and there were no witnesses to the event.

On direct examination employee admitted he had a history of suffering migraine headaches beginning at age 17 or 18; the migraines would occur once or twice a year on average and were of such significance that he could not tolerate light or sound and at times had to "hole up in a room"; sometimes the migraines were of such severity that he sought medical treatment; prior to April 15, 2005, employee had blacked out on numerous occasions over the years but always associated the blackouts with his migraines.

Employee recalled two occasions when he passed out without suffering a migraine; in 1995, employee was struck in the head with a cheater bar and was knocked unconscious; medical records indicated he was found unconscious on the floor; employee was taken to a hospital and eventually a cyst was removed from his skull.

Employee was involved in a motor vehicle accident in 1997; he was knocked unconscious; he was treated at a hospital and the medical records from the hospitalization reveal employee had a seizure while he was there.

In the year 2005, prior to April 15, 2005, employee consulted a family physician, Dr. Smith, concerning his migraines, and Dr. Smith referred employee to Dr. Robbie for treatment; Dr. Robbie prescribed several medications for his migraine condition.

Employee testified that the blackouts he has suffered since April 15, 2005, are different than those he had before; employee described the blackouts since April 15, 2005, to include shaking uncontrollably, wetting himself, drooling, followed by exhaustion and confusion.

On cross-examination employee admitted he does not know what happened on April 15, 2005; employee admitted to his history of migraines and passing out on several occasions; employee admitted that his history of headaches and dizzy spells worsened after he was rendered unconscious by the cheater bar episode in 1995; employee admitted that he was diagnosed with syncopal episodes in 1995; employee admitted that he consulted Dr. Smith of his own volition on February 24, 2005, with a history of passing out three times in the preceding three days; employee admitted the diagnosis was headaches with syncopal episodes and that Dr. Smith referred him to Dr. Robbie, a neurologist.

Employee consulted Dr. Robbie March 1, 2005, and employee's history given Dr. Robbie was that he had a history of migraines and syncopal episodes since the age of 17 and these episodes had gotten progressively worse over the last several months; the medical records of Dr. Robbie indicated a history from employee that there were times over the preceding years when employee would pass out without having a headache.

2. Witness, Amy Tharp, wife of employee

As of the trial date Mrs. Tharp had been married to the employee for five years; she has no knowledge of what occurred on April 15, 2005; Mrs. Tharp recalled employee having migraines quite often prior to April 15, 2005; Mrs. Tharp also recounted that employee would have episodes periodically before April 15, 2005; Mrs. Tharp did not notice employee convulsing, drooling, or wetting himself due to any other prior syncopal episodes.

3. Witness, David Evans

David Evans is a firefighter and paramedic for Metro Emergency Transport System; Mr. Evans responded to a call to the Pepsi warehouse in Joplin, Missouri, on April 15, 2005; Mr. Evans described arriving at the scene and finding a man lying near a forklift with soft drink containers everywhere; the observations of Mr. Evans upon his arrival were that a person was supine on the warehouse floor, his head was near the rear wheels of a forklift and bottles of soft drinks were scattered around him; much of the product had been pushed aside so that there was space to stand next to the forklift and the individual was not verbally responsive; "there were bottles and a flat" on him, and some of the product had to be removed from him; the "flat" made an indentation on his chest; and Mr. Evans noted that the only physical injury was a chest indentation from the "flat".

On cross-examination Mr. Evans admitted there were maybe a half dozen Pepsi employees at the scene of the accident when he arrived; nobody knew what happened; Mr. Evans admitted he did not find bruising, redness, discoloration or hemorrhaging; Mr. Evans further admitted there were no external signs of trauma other than a place around his right shoulder indicating a checkerboard pattern, from the

flat; however, Mr. Evans does not know how it occurred or what happened.

4. Dr. Arthur Daus

Dr. Daus is a neurosurgeon who initially treated employee when employee was hospitalized subsequent to the event occurring April 15, 2005; Dr. Daus diagnosed employee as suffering from a delayed post-traumatic seizure disorder and post-concussive syndrome; it was the opinion of Dr. Daus that employee sustained a head injury on April 15, 2005, substantially contributing to employee's condition.

On cross-examination, Dr. Daus testified that he was aware of employee's history of boxing but had no information about prior occasions when employee had been knocked unconscious; employee advised Dr. Daus that he did have a 20 year history of migraines, sometimes associated with syncopal episodes; Dr. Daus was also aware that employee had a history of passing out on occasions over the years without any connection to a headache; Dr. Daus was of the opinion that prior to April 15, 2005, there were two separate reasons which occasioned employee's history of passing out: syncope associated with migraine headaches and syncope without headache caused by an undiagnosed and unexplained cardiovascular condition.

On further cross-examination Dr. Daus admitted that he assumed as true a history he found in treating medical records that some products fell on the employee and hit him on April 15, 2005; Dr. Daus conceded that if this history were proven to be inaccurate his medical opinions and conclusions would be questionable; Dr. Daus agreed there were other possibilities as to what occurred on April 15, 2005, including that employee simply passed out where he was found unconscious; and given employee's history of passing out, Dr. Daus agreed that it was a reasonable possibility that employee could pass out and fall unconscious at any time anywhere.

B. Employer's Witnesses

1. Witness, Wade Kinney

Mr. Kinney is a warehouse employee of employer; Mr. Kinney did not see how the employee got on the floor, how the product got on the floor, nor does Mr. Kinney have any knowledge of how the alleged incident occurred.

When Mr. Kinney arrived at the scene he saw employee laying on the floor, near the forklift, and laying on top of some bottles of Mug Rootbeer; none of the product or pop bottles or the pallet was on the employee.

2. Witness, Bruce Morgan

Mr. Morgan is also a warehouse employee; when Mr. Morgan arrived at the scene of the incident, the forklift was running; the employee was curled up on the floor, near the forklift, unconscious; there was no product on him; rather, employee was lying on top of spilled product; and witness Morgan does not know what happened.

3. Witness, Richard Filarski

Mr. Filarski was the night supervisor on April 15, 2005; when Mr. Filarski arrived at the scene of the accident he observed the forklift, some bottles of 20 oz. Mug Rootbeer on the floor, as a top pallet of rootbeer had fallen to the floor, and employee laying prone with his chest on a case or two of product; there was no product on top of employee.

4. Witness, Stacey Lortz

Ms. Lortz is an administrative assistant for the employer at the plant in Joplin; part of her job duties are

to report injuries on behalf of the employees to the employer; when Ms. Lortz arrived at the scene of the accident where employee was found, she saw employee lying face down on the floor, approximately two feet from the forklift with product around him; there was no product on top of employee.

5. Witness, Alan Gouge

Mr. Gouge is the productability supervisor for the employer; Mr. Gouge was not on the premises at the time of employee's event; subsequently, Mr. Gouge spoke with employee about the incident but employee could not remember what occurred or what happened; Mr. Gouge conducted an investigation in an attempt to determine what had occurred, but there were no witnesses to the event and no determination could be made as to what happened.

6. Dr. Ahmed Robbie

Dr. Robbie is a board certified neurologist; Dr. Robbie began treating employee on March 1, 2005; when employee presented to Dr. Robbie on March 1, 2005, his history included symptoms of headaches and passing out since age 17, and symptoms had become more frequent and severe in the preceding few months; sometimes employee would have syncope connected with a migraine, and others were pure syncope, without a migraine.

After this initial visit Dr. Robbie's differential diagnoses were migraines, a cardiogenic source of the problems, as well as seizures; employee's history of boxing was relevant as boxing can cause passing out and seizures; and Dr. Robbie prescribed medication including an anti-seizure drug.

Dr. Robbie also saw and treated employee while he was hospitalized at Freeman Hospital on April 17, 2005; Dr. Robbie examined employee and the results were the same as they had been on March 1, 2005; employee had several syncopal episodes while hospitalized one of which Dr. Robbie witnessed; Dr. Robbie described these syncopal episodes as similar to employee's prior episodes.

At the request of the employer/insurer, Dr. Robbie saw employee on January 24, 2006, at which time Dr. Robbie reviewed employee's medical records; Dr. Robbie diagnosed the employee with syncope of unknown etiology and was of the opinion the possible explanations were migraines, a heart condition or anxiety; Dr. Robbie did not believe the incident at Pepsi on April 15, 2005, was a substantial factor in employee's condition and ongoing complaints; Dr. Robbie further did not believe employee suffers from seizures, but that employee continues to have the same problems he had experienced prior to the incident of April 15, 2005.

7. Dr. Dennis Estep

Dr. Estep is board certified in occupational medicine; Dr. Estep performed an independent medical evaluation of employee at the request of the employer/insurer on April 11, 2006; Dr. Estep noted that it was unknown how the incident of April 15, 2005 occurred; the review of the medical records performed by Dr. Estep indicated to him that there were no signs of trauma when employee arrived at the hospital.

Dr. Estep's opinion is that employee has syncopal episodes that are cardio-genic in nature and are unrelated in any way to any event occurring at the Pepsi plant on April 15, 2005; and Dr. Estep agrees with Dr. Robbie that the employee is not having true seizure activity.

II. General Principles of Law

The Commission reviews the record, and, where appropriate, it will also determine the credibility of witnesses and the weight of their testimony, resolve any conflicts in the evidence, and reach its own conclusions on factual issues independent of an administrative law judge. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228 (Mo.App. S.D. 2003).

The ultimate determination of credibility of witnesses rests with the Commission. The Commission should take into consideration the credibility determinations made by an administrative law judge. However, the Commission is

not bound to yield to an administrative law judge's findings, including those relating to credibility, and the Commission is authorized to reach its own conclusions. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not give those determinations deference. *Kent v. Goodyear Tire and Rubber Co.*, 147 S.W.3d 865 (Mo.App. W.D. 2004).

A decision made by an administrative law judge in a workers' compensation proceeding does not in any way bind the Commission and in fact, the Commission is free to disregard an administrative law judge's findings of fact. *Bell v. General Motors Assembly Division*, 742 S.W.2d 225 (Mo.App. E.D. 1987).

When an employee is found injured at a place where his duty requires him to be a rebuttable presumption arises that employee was injured in the course of and in consequence of his employment. However, such presumption is merely procedural in nature, and disappears when the employer produces substantial rebutting evidence on the issue of how the injury occurred, and consequently, thereafter, the issue must be determined solely on the evidence as though no presumption had ever existed. *McCoy v. Simpson*, 139 S.W.2d 950 (Mo. 1940); *Mershon v. Missouri Public Service Corporation*, 221 S.W.2d 165 (Mo. 1949); *Duff v. St. Louis Mining & Milling, Corp.*, 255 S.W.2d 792 (Mo. en Banc. 1953); *Toole v. Bechtel Corporation*, 291 S.W.2d 874 (Mo. 1956); and *Kelley v. Sohio Chemical Company*, 392 S.W.2d 255 (Mo. en Banc. 1965).

III. Findings of Fact and Conclusions of Law

At the outset, the Commission notes that neither party produced an eye witness to the occurrence nor were there any visible signs of injury, but for an indentation near the employee's right shoulder.

In the award, the administrative law judge reached the following conclusions:

. . . After considering the witness testimony and written statements regarding what occurred the day of April 15, 2005 it is my finding that an accident did in fact occur when by some mechanism (emphasis added) a flat of soda product fell and landed on the claimant . . . I find the testimony of paramedic David Evans to be most compelling in that he noted in his report from the day of the accident that the claimant was found unconscious and with the criss-cross pattern of a flat embedded on his shoulder.

. . . I find the opinion of the treating neurosurgeon, Dr. Daus to be most compelling. It is his opinion that the claimant suffers from a new seizure disorder resulting from the accident. It is not his opinion that he no longer suffers from the type of syncope which he experienced before the accident, . . .

After reviewing the entire record, the Commission does not agree that employee sustained an injury due to an accident arising out of and in the course of his employment; that the testimony of David Evans was more credible or believable than the testimony of the employer's witnesses concerning the event that occurred; and the Commission does not agree the medical opinions rendered by Dr. Daus were more credible or believable than the medical opinions of Dr. Robbie and Dr. Estep.

As to the medical opinion evidence proffered an administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo.App. 2004).

As to the testimony of witness David Evans, his recollection of the events is contradicted by the witnesses proffered by the employer, and his arrival at the scene of the accident was subsequent to the employer's witnesses, rendering his observations less accurate than the observations made by the employer's witnesses, who arrived at the scene more contemporaneous to the event.

After carefully reviewing the entire record the Commission makes the following findings: (1) that because employee was found during his work day unconscious, lying on top of product on the floor, at a place where his duties were reasonably expected to be performed, a presumption necessarily arose that employee had been injured in an accident which arose out of and in the course of his employment; (2) that the employer produced substantial evidence to rebut the presumption, whereby the presumption went out of the case; and (3)

consequently, the employee failed to carry his primary burden of proving that his injury was a result of an accident arising out of and in the course of his employment.

Witnesses Wade Kinney, Bruce Morgan, Richard Filarski and Stacey Lortz, all came to the scene of the accident, prior to the arrival of witness, David Evans, and all four witnesses saw employee on the floor of the Pepsi plant unconscious; when each of these four witnesses were specifically asked what they observed, each recalled seeing employee lying on top of product, i.e., prone, but no product on top of him, and employee was not supine.

By the time witness, David Evans, arrived at the scene of the incident, he observed employee to be supine, next to the forklift, with his head next to the rear wheel. Witness, David Evans, noted that much of the product was pushed aside and he in fact had space to stand next to the forklift and logroll him to his left recumbent side as he was not verbally responsive. Mr. Evans also admitted on cross-examination that he did not find any bruising, redness, discoloration or hemorrhaging concerning employee, and there were no external signs of trauma other than a place around his right shoulder indicating a checkerboard pattern on it from the flat.

Based on the more credible evidence proffered by the employer's witnesses, the Commission finds that employee was found unconscious, laying prone on a flat which obviously was underneath employee causing the indentation to the right shoulder. There is no credible evidence for the Commission to find or conclude that a pallet of product somehow fell and struck employee to cause any subsequent injury.

Employer introduced direct and substantial evidence that employee being found unconscious, prone, resting on the floor, was just as likely to be due to a syncopal episode, vis-a-vis, a flat of product falling on him, and rendering him unconscious on the floor.

The circumstances have been sufficiently shown by evidence to permit a reasonable inference that a syncopal episode occurred, resulting in employee being unconscious on the floor when observed by several witnesses. A syncopal episode would have no connection with and would not arise out of his employment. Thus, in such a situation, the burden rests upon the employee to show some direct causal connection between any possible injury sustained and his employment. The injury must have been a rational consequence of some hazard to which the employee has been exposed and which exists because of and as part of his employment. It is not sufficient that the employment may simply have furnished an occasion for an injury from some unconnected source.

The fact that the employee was an innocent victim and himself nowise at fault entitles him to sympathy, but does not serve to bring him within the protection of the Act. We cannot see in the evidence presented anything that serves as a reasonable basis for a conclusion that this incident, his being found unconscious while at work, was caused by something intimately connected with his employment. In fact, the wording used by the administrative law judge in the temporary award, i.e., ". . . it is my finding that an accident did in fact occur when by some mechanism a flat of soda product fell and landed on the claimant", tends to show an inability to find anything concrete in the evidence. This finding in and of itself resorts to speculation, conjecture and guess-work.

The Commission finds there are too many possible causes to permit a fair and reasonable inference that employee being found unconscious was caused by or arose out of his employment. The burden is on employee to show that his injury resulted from an accident arising out of and in the course of his employment. At best, these facts in this case are not sufficient to show that it was likely that his being found unconscious resulted from a compensable cause rather than a noncompensable cause. Employee's proof was insufficient to show that his being found unconscious at work resulted from a cause for which his employer would be liable.

In addition to finding that employee did not sustain an injury due to an accident arising out of and in the course of his employment, the Commission finds from a review of the medical records and the opinions of both Dr. Robbie and Dr. Estep, that employee's present medical condition and need for any treatment is related to a prior condition suffered by the employee, independent to and unrelated to any possible event occurring on April 15, 2005.

The administrative law judge found that the opinion of Dr. Daus was the most compelling and the Commission reverses said finding.

The Commission specifically finds the most compelling and persuasive medical evidence to be the medical

opinions of both Dr. Robbie and Dr. Estep as well as a review of the medical records offered in evidence.

Dr. Robbie, a physician from whom employee sought treatment of his own volition prior to the event of April 15, 2005, diagnosed employee's condition as syncope of unknown etiology. Dr. Robbie proposed three possible explanations for the syncopal episodes, i.e., migraines, a cardiovascular condition or anxiety. Dr. Robbie found the event occurring April 15, 2005, to not be a substantial factor concerning employee's current condition.

The Commission finds the opinion of Dr. Robbie to be the most trustworthy and credible as Dr. Robbie is the only physician who had the unique opportunity to evaluate and treat employee both before and after his alleged work injury.

Dr. Robbie saw and treated employee on March 1, 2005, and Dr. Robbie also attended employee at Freeman Hospital following the event occurring April 15, 2005. There was a subsequent follow-up visit to Dr. Robbie April 21, 2005, and an evaluation rendered January 24, 2006. From this perspective Dr. Robbie concluded that employee's present symptoms and presentation were no different than the syncopal episodes from which he had suffered for many years.

Dr. Estep further buttressed the opinion of Dr. Robbie by concluding that employee sustained an episode while working at Pepsi on April 15, 2005, of unknown etiology. Dr. Estep concurred with the opinion of Dr. Robbie that employee's ongoing condition is not related in any way to the incident at Pepsi on April 15, 2005.

IV. Conclusion

In conclusion, the Commission is of the opinion that any presumption of compensability that arose in the instant case was completely rebutted by the evidence developed by the employer and accordingly the presumption, thereupon, went out of the case. Consequently, the fact of whether the employee's injury was the result of an accident which arose out of and in the course of his employment was then necessarily to be determined upon the evidence offered by both parties, and that on the whole record the Commission finds employee's proof is insufficient to show that he sustained any injury due to an accident arising out of and in the course of his employment. The scant circumstantial evidence is insufficient to support a finding of accident without resorting to speculation, guesswork and surmise. In addition, the most compelling and credible medical evidence reveals that employee's condition is merely a continuation of his long standing problems, independent of and unrelated to the occurrence of April 15, 2005.

Accordingly, the award of the administrative law judge issued January 25, 2007, is reversed; the employee is not entitled to any amount of compensation payable; and all additional issues are rendered moot.

The award and decision of Administrative Law Judge Karen Wells Fisher, issued January 25, 2007, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 11th day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

Did employee sustain an injury by accident?

"Injury" is defined as "violence to the physical structure of the body..." Section 287.020.3(3) RSMo (2000).^[1]
"Accident" is defined as "an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Section 287.020.2 RSMo. The testimony of employee establishes that the event resulting in his lying on the ground unconscious with the soda bottles was not expected by employee. The testimony of Bruce Morgan establishes that employee had been gone only 2 to 3 minutes when Mr. Morgan discovered employee on the ground. There is no dispute that a pallet of 20 ounce Mug's Root Beer bottles fell from atop a stack of pallets. The photographs of the fallen soda bottles, flats and pallet establish that the event happened suddenly and violently. Employee displayed objective symptoms of an injury in that he was initially unconscious; he had an indentation on his shoulder; and, upon waking, he complained of neck and shoulder pain. No doubt employee's fall to the floor and the impact causing the indentation resulted in violence to the physical structure of his body. Employee has established that he sustained an injury by accident.

Did the injury arise out of and in the course of employment?

Is employee entitled to compensation for his injury by accident under the Workers' Compensation Act?

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person....

§287.120.1 RSMo.

...An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

§287.020.2 RSMo.

This Court's interpretation of the workers' compensation act is informed by the purpose of the act, which is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. *Wolfgeher v. Wagner Cartage Serv., Inc.*, 646 S.W.2d 781, 783 (Mo. banc 1983). Accordingly, the law "shall be liberally construed with a view to the public welfare . . ." Section 287.800, RSMo 2000. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *Wolfgeher*, 646 S.W.2d at 783.

Schoemehl v. Treasurer of State, 217 S.W.3d 900, 901 (Mo. banc 2007).

The evidence is undisputed that employee was on the ground in an area covered with the fallen soda bottles. But the record provides more than just circumstantial evidence that employee was struck by falling soda bottles. The report of David Evans -- prepared within 30 minutes of the accident -- records Mr. Evans' observation that employee was covered with soft drink bottles and/or flats, thereby providing direct evidence to support the finding that the soda bottles fell on employee. I believe that is what happened.

The majority discounts the testimony of Mr. Evans as being in contradiction to the rest of the witnesses because Mr. Evans described finding employee in a "supine" position. I suspect Mr. Evans simply misspoke during his testimony when he used the word "supine." Fortunately, we have more than just Mr. Evans' recollection of what he

saw a year and a half after the event. We have his report that was made within 30 minutes of delivering employee to the emergency room. The report is largely consistent with the testimony of the other witnesses. The report indicates employee was prone lying on a flat of product. Mr. Evans went on to report that, although it appeared some product had been cleared, there was still product on and against employee when Mr. Evans arrived on the scene.

Notwithstanding the evidence just summarized, the majority “cannot see in the evidence presented anything that serves as a reasonable basis for a conclusion that this incident, his being found unconscious while at work, was caused by something intimately connected with his employment.” I think the fallen pallet of soda and the unconscious employee surrounded by the fallen soda and flats serves as a reasonable basis for a conclusion that when the pallet of soda bottles fell, something struck employee. Not surprisingly, that is what every witness who arrived on the scene believed had happened.

Does the Found Injured Presumption apply?

Missouri courts have developed a method for determining whether an injury is work-related where an employee is found injured under unexplained circumstances.

[T]here arises a rebuttable presumption if an employee is shown to have died or been injured under unexplained circumstances on the employer's premises and during the hours of employment, that the death or injury resulted from an accident arising out of and in the course of employment.

Parrish v. Kansas City Sec. Service, 682 S.W.2d 20, 23 (Mo.App. 1984).

Employee is shown to have been injured under unexplained circumstances on the employer's premises and during the hours of employment, so there has arisen a rebuttable presumption that his injury by accident arose out of and in the course of his employment. The majority agrees. The majority concludes that employer has rebutted the presumption that the injury by accident arose out of the employment. I disagree.

Was the Found Injured Presumption Rebutted?

The employer presented very little evidence to rebut the presumption that the injury arose out of the employment. Employer offered testimony that the soda bottles and/or flats were around employee but not on top of employee. The report and testimony of Mr. Evans offer evidence that some product and/or flats were on or lying against employee. I think the issue of whether or not soda bottles, flats, or the pallet were on top of employee is a red herring. Proof that nothing was on top of employee when he was discovered on the floor is not proof that nothing fell on employee or struck him in the head. I suspect it is the rare case when something falls on someone's head and stays there.

Employer and employee offered evidence that employee suffered one to two syncopal episodes per month before the work accident. The syncopal episodes were associated with headaches.

The pallet of soda fell from the stack of pallets. Bruce Morgan testified that an individual could not pull down a properly balanced pallet. Several witnesses testified it did not appear that the forklift employee was operating hit the stack of pallets from which the product fell. There is no evidence to suggest that employee did anything to trigger the fall of the pallet. Several employees testified that an unbalanced pallet could fall and that pallets have fallen in the past but falling pallets were very rare. The reason the pallet of soda fell remains unexplained.

There is no mathematical formula for determining whether employer/insurer has offered enough evidence to constitute the “substantial rebutting evidence” necessary to rebut the presumption that employee's injury arose out of and in the course of employment. Where the law provides no rule, I resort to common sense. For purposes of my application of common sense, I accept that employee suffered one to two syncopal episodes a month associated with migraines and that on very rare occasions pallets have fallen. What makes more sense: that employee coincidentally had one of his occasional syncopal episodes at the very moment the Pepsi Bottling Group warehouse experienced the rarity of a falling pallet *or* that the falling product had something to do with employee's condition of lying unconscious on the floor (i.e. the falling product caused that condition)? I think it is beyond question that the second explanation describes the most likely occurrence. The majority's finding that, “[e]mployer introduced direct and substantial evidence that employee being found unconscious, prone, resting on

the floor, was **just as likely** to be due to a syncopal episode, vis-a-vis, a flat of product falling on him, and rendering him unconscious on the floor,” is against the great weight of the evidence (and statistics). (Emphasis added).

The found injured presumption was not rebutted in this case. By operation of the presumption, employee has shown that his injury arose out of and in the course of his employment.

Medical Causation

Employer is liable for employee’s resulting medical condition or injury. §287.120.1. What is employee’s resulting medical condition or injury? Employee alleges that employee’s resulting medical condition from the work accident is a seizure disorder brought on by head trauma. Employer/insurer alleges that employee developed no permanent injury or medical condition as a result of the work accident but, rather, that employee continues to suffer from the syncope he has experienced for years.

I have compared the testimony of the medical experts in light of the other evidence in this case. The testimony of employee, employee’s wife, Dr. Robbie, and Dr. Estep convince me that the most credible medical opinion is that of Dr. Daus. Dr. Daus treats employee regularly. Dr. Robbie saw employee on only four occasions and concedes that Dr. Daus is in a better position to evaluate and diagnose employee’s condition. Dr. Estep saw employee only once for an independent medical examination. Dr. Daus is a neurosurgeon; Dr. Estep practices in occupational medicine and has no advanced training in diseases of the central nervous system. Dr. Daus is the most qualified to diagnose employee’s condition.

Before the accident, employee suffered blackout episodes in conjunction with migraine headaches. Employee’s wife described that employee would simply fall to the ground and appear to be sleeping during these episodes. She testified that after the work accident, employee experienced much different blackout episodes characterized by convulsions, loss of bladder control, eye fluttering and drooling. These episodes were shorter in duration but more frequent and intense than the blackouts employee experienced before the work accident. Neither Dr. Robbie nor Dr. Estep offered an explanation for the dramatic change in the nature and frequency of the episodes. Dr. Daus did. Dr. Daus explained that employee suffers from two disorders; a syncopal disorder that he has had since he was a teenager and a seizure disorder that he developed as a result of the head injury he suffered when he was struck by falling soda product during the work accident of April 15, 2005.

I conclude that employee sustained a head injury during the April 15, 2005, work accident and that the head injury was the substantial factor in employee’s development of the resulting seizure disorder, which disorder is a different condition than employee’s long-standing syncope.

Conclusion

Based upon the foregoing, I conclude that employee has established that he suffered a personal injury by accident arising out of and in the course of employment. Section 287.120.1 dictates that employer is liable to employee for workers’ compensation benefits. I would affirm the temporary award of the administrative law judge.

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Ricky Tharp

Injury No. 05-031979

Before the
**DIVISION OF WORKERS’
COMPENSATION**

Department of Labor and Industrial Relations of Missouri

Dependents: n/a

Employer: Pepsi Bottling Group

Additional Party: Second Injury Fund

Insurer: Old Republic Insurance

Hearing Date: October 20, 2006

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: APRIL 15, 2005
5. State location where accident occurred or occupational disease contracted: JASPER COUNTY, MO
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? YES
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 happened or occupational disease contracted:
RETRIEVING A CASE OF APPLE JUICE WHEN A PALLET FELL ON HIM
12. Did accident or occupational disease cause death? NO
13. Parts of body injured by accident or occupational disease: BODY AS A WHOLE
14. Compensation paid to-date for temporary disability: \$1,164.00
15. Value necessary medical aid paid to date by employer/insurer? \$14,296.10
16. Value necessary medical aid not furnished by employer/insurer? NONE

Employee: Ricky Tharp

Injury No. 05-031979

17. Employee's average weekly wages: \$509.23
18. Weekly compensation rate: \$339.50
19. Method wages computation: STIPULATION

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: -0-

NONE weeks of temporary total disability (or temporary partial disability)

Future Medical: YES

TOTAL: UNKNOWN

Each of said payments to begin IMMEDIATELY and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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:

RANDY REICHERD

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ricky Tharp

Injury No: 05-031979

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: n/a

Employer: Pepsi Bottling Group

Additional Party n/a

Insurer: Old Republic Insurance

Checked by:

AWARD ON TEMPORARY HEARING

A hearing was held on October 20, 2006 regarding the above workers compensation case before Administrative Law Judge Karen W. Fisher. The employee appeared in person and with attorney Randall Reichard. Attorney Ron Sparlin appeared on behalf of the employer/insurer. The parties stipulated at the time of trial that the claimant's average weekly wage for purposes of this case is \$509.23 and that the workers' compensation rate is \$339.50 per week. By agreement of all parties the Second Injury Fund did not appear.

EVIDENCE PRESENTED

The following evidence was presented at hearing by the claimant:

- 1) The live testimony of Paramedic David Evans
- 2) The live testimony of Claimant
- 3) The live testimony of Amy Tharp
- 4) Photographs of the accident site following the accident
- 5) Claimant's complete Medical Records
- 6) Dr. Daus' recent records
- 7) Psychological Evaluation
- 8) Dr. Daus Deposition and Exhibits
- 9) Dr. Daus Supplemental Report
- 10) Alan Gouge Deposition and Exhibits
- 11) Claimant's Journal
- 12) Notice of Denial Letter
- 13) Dr. Estep Deposition

The employer/insurer presented the following evidence:

- 1) The live testimony of Wade Kenney
- 2) The live testimony of Bruce Morgan
- 3) The live testimony of Richard Filarski
- 4) The live testimony of Alan Gouge
- 5) The live testimony of Stacy Loritz
- 6) Dr. Robbie Deposition
- 7) Notice of Intent to Rely on Dr. Estep's Report
- 8) Records of Freeman Neosho Physician
- 9) Photograph of Warehouse

FACTS

Ricky Tharp is 39 years old and lives in Newtonia, Missouri. He has a history of one or two migraines per year since he was seventeen years old. He had experienced black outs with these migraines which occurred approximately once a year. His blackouts never occurred without a migraine. From the age of 14 until he was 26 the claimant boxed in 62 amateur boxing fights during which he was never knocked out and suffered no head injuries. He also boxed in six professional fights. He always wore headgear during these fights. His last fight was approximately five months prior to the work accident.

His history also includes the removal of a benign cyst from the left frontal lobe under the skull. This surgery was performed in 1995 with no complication. The claimant had also had prior problems with his neck and shoulder. He had treated for a bulging disc in his neck and a rotator cuff tear in his shoulder in Branson. In February 2005 the claimant saw Dr. Brian Smith in Neosho regarding headaches and increasing dizziness. He was referred to neurologist Dr. Robbie who prescribed medicine and recommended tests including an EEG which was not performed since the migraines stopped.

Claimant started work at Pepsi Bottling Group, Inc. on Nov. 1, 2004. He worked as a loader and as part of his job duties he drove forklifts to load route trucks. In the warehouse where he worked the product is kept stored in rows, stacked two pallets high, with each pallet six feet high. The claimant testified that on April 15, 2005 he

was assisting a coworker in loading a truck. The claimant went to get a case of apple juice. He drove the forklift back to where the apple juice was located. The claimant then got off, picked up the apple juice, turned around, and this is the last thing he remembers. He testified that he felt fine when he got off the forklift. He then remembers vaguely coming to in the warehouse or ambulance and hearing voices. He testified that the apple juice was waist or chest high. The Mug root beer fell from the top row of product in the next row. Claimant remembers being in pain in his neck and shoulder.

Wade Kenney, a warehouse employee who worked on the same shift testified that he heard Bruce making "a racket" and went over to see what was going on. He was approximately 100 ft. from the claimant at first sight and saw a pallet of soda on him. He testified that it looked like pallets fell over on the claimant and that he may have even indicated that to 911 although he did not witness the accident himself. He did report it to the supervisor.

Bruce Morgan the co-worker the claimant was working with testified that the forklift was still running and without being asked said that he first saw claimant lying in a "feral" position and that there was no product on top of him. He also admitted that he has spoken with his supervisor about pop being on top of the claimant after the accident.

The supervisor, Richard Filarski testified that he saw the claimant lying on and beside product still unconscious. Within five to ten minutes of the accident he instructed the secretary to call in a report to the Job Hurt Line. He told Alan Gouge that "some product must have fallen and Ricky got hurt." He said he had not tried to influence other workers regarding what happened and that no one had been able to determine what had happened. Mr. Filarski is still Bruce Morgan and Wade Kenney's supervisor.

Alan Gouge, supervisor over the entire warehouse, testified that he was not at work at the time of the accident, but he did go to the hospital. He indicated that after investigation it is undetermined as to how the pallet fell. He said that there had been no problem with product on plastic pallets falling prior to this accident. In his trial testimony Mr. Gouge admitted to erasing what he had originally written in the "supervisor's detailed accident description" and then wrote what is there now. He did not have a clear recollection of this at the time of his deposition (Exhibit G).

Stacy Loritz an administrative assistant testified at the hearing that she did not know first hand how the accident happened. She called in on the Job Hurt Line. The Job Hurt Line report which is attached as an exhibit to the deposition of Alan Gouge indicates that a call was received on April 15, 2005 and the accident was described as follows: "Caller stated while he was picking up case of apple juice off of a pallet, EE struck by a full pallet of product that fell from above, EE sustained unknown injuries to his neck and right shoulder areas, EE was lost consciousness momentarily."

David Evans, the paramedic who arrived at the scene testified that he saw collapsed pallets and collapsed product everywhere. He reported that he saw a man lying supine next to a forklift truck with product lying on him and next to him. He moved a blue container or flat and other product off the man's chest. He indicated that the flat had made an indentation on his chest. This is also noted in Mr. Evan's report from the day of the accident (Exhibit K). Mr. Evans also testified that at the time the paramedics suspected a head or spinal injury.

The claimant was discharged from the hospital on April 18. He did not return to work immediately as he was repeatedly passing out (Exhibit B p.455). He saw Dr. Robbie for the second time on April 21. He told Dr. Robbie that he was blacking out without a headache. Dr. Robbie indicated anxiety might be the cause and recommended a psychological exam.

The claimant kept a diary of how he felt each day from April 18, 2005 through May 6, 2005 (Exhibit H). He testified that he had never passed out like this before. He had no warning of when he was about to pass out. And when he came to he would be confused and suffer memory loss. He doesn't know who he is or where he is. He feels exhausted "like he was run over by a truck." The claimant testified that he had never experienced this before April 15, 2005. He also indicated that before April 15 there was no relation to lying down then standing with his blackouts. He further testified that he has had no migraines since the accident. He is not allowed to drive since the accident. His treating physician Dr. Daus won't return him to work due to seizures and blackouts. The claimant admitted that while he was on seizure medication in May 2005 he still had seizures, but they decreased to only

three to five seizures a month.

The claimant's wife Amy Tharp testified that when he had blacked out prior to the accident there were no convulsions, confusion or awkward behavior. Now they are unpredictable and last 5 minutes or less, he drools, has slurred speech, is disoriented, and takes a very long time to recuperate. She testified that none of this occurred during the blackout episodes prior to the accident. She also testified that he currently has approximately ten seizures per month.

The report and deposition of Dr. Arthur Daus, a board certified neurosurgeon, was admitted into evidence. Dr. Daus was the treating physician in this case. Dr. Daus states with a reasonable degree of medical certainty that claimant "appears to have post-traumatic epilepsy, new onset, and new presentation completely unique to and following the injury of April 15, 2005." In his record of August 9, 2005, Dr. Daus notes that Mr. Tharp has had 16 episodes since the last visit and that the arms and legs jerk for one to two minutes. Dr. Daus agrees that the tilt table test would have produced a syncopal episode similar to those he experienced prior to the accident, but the seizures from which claimant now suffers are a post traumatic temporal lobe epilepsy presentation from the April 15, 2005 injury. Additional symptoms were caused from the head injury of that date including cervical contusion, irritability, and easy fatiguability. Dr. Daus indicates that the work related accident is the substantial contributing factor in these medical issues. Dr. Daus recommends ongoing medication management to improve seizure control.

The deposition of Dr. Ahmed Robbie, a board certified neurosurgeon, was admitted into evidence. Dr. Robbie saw the claimant on three occasions. Once prior to the accident , and one time shortly following the accident on April 21. It is Dr. Robbie's opinion that the episodes from which the claimant now suffers are either the same as he had before the accident or are induced by anxiety and are not a result of the accident on April 15, 2005. Dr. Robbie feels that the tilt test performed in the hospital was sufficient to label all of claimants blackouts as cardiogenic related. In fact, Dr. Robbie does not believe the episodes from which claimant now suffers satisfy the criteria to be diagnosed as seizures.

He testified that there is no pattern as to the duration of the episodes. He testified that the claimant woke up from some of the episodes with no aftereffect. And he did not have a history of tongue biting or incontinence with any of the episodes. Dr. Robbie felt that the claimant should be evaluated by a psychiatrist. Dr. Robbie saw the claimant for the third time on January 24, 2006 for an IME on behalf of the employer/insurer. His opinion did not change at the time of that exam even though he also reports that since the accident Mr. Tharp reported that his syncopal episodes had become more frequent, occasionally associated with jerking movements, and that he had had one episode of incontinence on Christmas Eve.

The employer/insurer also offered the report and deposition of Dr. Dennis Estep, an occupational medicine physician, who concurred with Dr. Robbie that there is no indication of seizure activity. He opined that the claimant's current difficulty is related to an underlying disease process, namely, cardiogenic syncope, and is not related to the work accident of April 15, 2005. Dr. Estep did feel that claimant had sustained a mild concussion as a result of the accident which in his opinion had resolved. Dr. Estep also indicated that the claimant's ability to be in the workplace until his "syncopal episodes" are controlled is going to be difficult.

CONCLUSIONS

In determining the issue of accident in this case, I look to the definition as provided by statute in effect at the time. RSMo 287.020 (2) indicates an accident shall be construed to mean an unexpected or unforeseen identifiable event ... happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. After considering the witness testimony and written statements regarding what occurred the day of April 15, 2005 it is my finding that an accident did in fact occur when by some mechanism a flat of soda product fell and landed on the claimant causing immediate objective symptoms of injury. In this light I find the testimony of paramedic David Evans to be most compelling in that he noted in his report from the day of the accident that the claimant was found unconscious and with the criss-cross pattern of a flat embedded on his shoulder. As the claimant was fulfilling his job duties by retrieving a case of apple juice for the purpose of loading a truck for its route when this accident occurred I find that the injury arose out of and in the course and scope of his

employment.

The claimant requests additional ongoing treatment and temporary total disability as a result of ongoing episodes from which he suffers. After reviewing the medical reports, records and depositions in evidence I find the opinion of the treating neurosurgeon, Dr. Daus to be most compelling. It is his opinion that the claimant suffers from a new seizure disorder resulting from the accident. It is not his opinion that he no longer suffers from the type of syncope which he experienced before the accident, only that he now also has seizures as a result of a post traumatic temporal lobe epilepsy. No doctor suggested that these conditions were mutually exclusive and the evidence regarding the claimant's behavior which appropriately came from witnesses like claimants spouse corroborated Dr. Daus diagnosis. The specialists in the case are equally qualified with one having greater opportunity to see the claimant and his wife and to determine more completely what was occurring during these episodes. It is for this reason that I find in accordance with the opinion of Dr. Daus that the claimant has not yet reached maximum medical improvement and that his current symptoms are of a new onset and are as a result of the work accident on April 15, 2005. I therefore find that claimant is entitled to ongoing medical treatment necessary to cure and relieve him of the effects of the injury and order the employer/insurer to provide that treatment.

Claimant's seizures occur with such frequency and without warning as to make it unreasonable to expect an employer to hire this man while he suffers from this type of seizure disorder. I therefore, order the employer/insurer to pay the claimant temporary total disability benefits until he is released to work by a physician or has reached maximum medical improvement.

Date: January 25, 2007

Made by: /s/ Karen Wells Fisher
Karen Wells Fisher, Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret
Patricia "Pat" Secret
Director Division of Workers' Compensation

[\[1\]](#) All references are to the 2000 Revised Statutes of Missouri unless otherwise indicated.