IN THE MISSOURI SUPREME COURT

ST. JOHN'S MERCY HEALTHCARE	)	
	)	
Appellant/Employer,	)	
	)	
vs.	)	SC92113
	)	
SANDY JOHME,	)	
	)	
Respondent/Employee.	)	

By Transfer from Missouri Court of Appeals, Eastern District

APPELLANT'S SUBSTITUTE BRIEF

Respectfully Submitted By:

/s/ Maurice D. Early
MAURICE D. EARLY, MoBar No. 32159
Attorney for Appellant
Early & Miranda, P.C.
720 Olive Street, Suite 700
St. Louis, Missouri 63101
(314) 241-3030
(314) 241-7455 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

JURISDICTIONAL STATEMENT

This case comes before the Missouri Supreme Court having been transferred by the Missouri Court of Appeals for the Eastern District.

This case was first tried before the Division of Workers' Compensation in St. Louis City, appealed to and reversed by the Labor & Industrial Relations Commission, and then appealed to the Court of Appeals for the Eastern District, pursuant to Section 287.495 RSMo. 2000.

STATEMENTS OF FACTS

Appellant recites the following Statement of Facts pursuant to Rule 84.04 (f) of the Missouri Rules of Civil Procedure.

Relevant Facts

Employee's Direct Examination

Sandy Johme (Employee) worked for doctors at St. John's Mercy Healthcare as a billing representative. (Tr. 9). She sat at a computer typing charges. (Tr. 9). Her office was located at Maryville Center in Chesterfield, Missouri. (Tr. 10). The office space was on the lower level of a three floor building. There were cubicles, restrooms and a kitchen that the whole floor used. (Tr. 10). The kitchen contained two refrigerators, two microwaves, an ice machine, and coffee machines. (Tr. 10). That whole floor of the building was used by St. John's employees. (Tr. 10, 11).

At the time of the alleged accident in June of 2008, Employee's desk was thirty walking steps away from the kitchen. (Tr. 11).

Employee testified it was customary for the person who took the last cup of coffee to make another pot. (Tr. 12).

On June 23, 2008, Employee began working around 9:00 a.m. (Tr. 13). She decided about an hour after she began working that she wanted a cup of coffee. (Tr. 13). She got up from her desk and walked to the kitchen. (Tr. 13). She was the only person in the kitchen when she made coffee that morning. (Tr. 13). She stood making the coffee. (Tr. 14). She does not know exactly what she was doing. (Tr. 14). She could have been opening the coffee, or pouring the coffee into

the filter. She does not really remember. (Tr. 14). She turned and then went on the side of her shoe and went down. (Tr. 14). That is all she can remember. (Tr. 14).

There was no one in the kitchen and she was lying in the middle of the floor and could not get up. (Tr. 14). She pulled herself to the counter and pulled herself up. (Tr. 14). A co-employee came in and asked if she was alright. (Tr. 14). She said she was not, and asked the co-employee to get her manager. (Tr. 14).

When she fell, she was wearing sandals with one-inch thick soles. (Tr. 15). The sandals have very thick heels, but the bottom of the sandals are flat. (Tr. 15). She turned and went down on the side of the shoe and just fell on her side. (Tr. 15).

Employee's Cross-Examination

Employee has rheumatoid arthritis. (Tr. 17). When she was diagnosed with rheumatoid arthritis, she was told that one leg was shorter than the other and that some day she would probably need a hip replacement. (Tr. 18). But because she was young, she should wait. (Tr. 18).

She does not know what caused her to fall. (Tr. 18). She just turned and fell on her right side. (Tr. 18). Employee was asked if she recalled her deposition testimony given on February 23, 2009. (Tr. 18). She said she remembered her deposition. (Tr. 18). She remembers answering in that deposition that she did not know what caused her to fall. (Tr. 19). She testified in that deposition she did not remember if she was turning to go to the counter or turning to leave the room. (Tr. 20). She does not think she was leaving the room because she would have turned to her left. (Tr. 20). She guessed she must have been going to the counter to throw something away. (Tr. 20). She was asked in her deposition if when she started to fall, either foot slipped. (Tr. 21). In the deposition she answered that she thought her right foot slipped. (Tr. 21). Employee said

she guesses it would be fair to say she just turned and fell, and does not really know how she fell. (Tr. 21).

Employee's Redirect Examination

Employee was shown Exhibit G, a form her manager sent to her home. (Tr. 22). She filled out a portion of the form that said she felt her shoe suddenly on the floor and she pulled herself up and leaned against the counter. (Tr. 23, 24, 25).

The opposite side of the form was filled out by her manager, Nora, and the Employee never saw the portion Nora filled out at the time Employee filled out her portion of the form on August 13, 2008. (Tr. 23, 24).

The manager's portion of the form stated that Employee was making coffee in the kitchen, turned to put grounds in the trash, twisted her ankle and fell off her shoe, and fell backwards. (Tr. 23).

Employee's Re-cross Examination

Employee told her manager, Nora, that she fell on the side of her shoe. (Tr. 25). She told Nora that she felt her shoe fall on the side and she fell. (Tr. 25). Employee has no idea why Nora would put in the report that she twisted her ankle. (Tr. 25, 26).

Medical Records

The records from various medical providers were admitted into evidence.

Employee was taken by ambulance to St. John's Mercy Medical Center's Emergency Room on June 23, 2008. (Tr. 195). The rapid triage note at the emergency room noted that Employee complained of a fall today at work. (Tr. 196). She states she tripped because of the shoes she is wearing. (Tr. 196). She complained of low back and left leg pain. (Tr. 196). She

denied loss of consciousness. (Tr. 196). Employee also complained of bruising and swelling of her right hand from the back of the hatch of an SUV closing on her hand. (Tr. 196).

X-rays of Employee's lumbar spine were taken at St. John's Mercy Medical Center on June 23, 2008. (Tr. 214). The impression of those x-rays was degenerative changes at L5-S1. (Tr. 214).

X-rays of Employee's hips and pelvis revealed a fractured right superior pubic ramus. (Tr. 215). Future evaluation with a CT scan or MRI was considered. (Tr. 215). Because the Employee is very claustrophobic, an MRI was not performed. (Tr. 36).

A right femur x-ray taken on June 27, 2008, showed right femoral neck fracture and questionable non-displaced fracture of the right pubic bone. (Tr. 35).

Employee was admitted to St. John's Mercy Medical Center as an inpatient on June 27, 2008. (Tr. 30). She was essentially admitted for pain control and received pain medication and physical therapy at the hospital until she was discharged and sent home weight bearing on July 3, 2008. (Tr. 36). She did not undergo surgery to her right hip or pelvis. (Tr. 30-287). She did have surgery to her right thumb on July 1, 2008. (Tr. 36).

Prior Decisions from which Appeal is Taken and Procedural History

The Administrative Law Judge, Cornelius T. Lane, entered his award on April 16, 2010. He ruled that the Employee did not sustain an injury arising out of and in the course of her employment.

The Administrative Law Judge ruled in his award that the Employee was not performing her duties at the time of her fall at work. Claimant just fell and would have been

exposed to the same hazard or risk in her normal non-employment life. The Administrative Law Judge denied the Employee's claim for benefits.

The Labor and Industrial Relations Commission (Commission) reversed the award of the Administrative Law Judge as explained in its Final Award Allowing Compensation dated February 22, 2011.

The Commission found that Employee's act of making coffee was incidental to and related to her employment. The Commission found that the Employee's making of coffee inured to the employer's benefit in that coffee was available for their comfort.

Since the Commission found that the Employee's activity of making coffee was incidental to and related to her employment, it did not analyze whether or not the Employee is equally exposed to this hazard or risk in normal, non-employment life.

The Commission ruled that the Employee showed the accident was the prevailing factor in causing the injury and the injury did not come from a hazard or risk unrelated to her employment, and awarded benefits of temporary total disability payments, past medical expenses and permanent partial disability. Those benefits totaled $51,825.37.

Employer appealed the Commission's ruling to the Court of Appeals for the Eastern District. Oral arguments were presented to Division Two of the Court on October 6, 2011. Division Two of the Court of Appeals ruled on October 25, 2011 that it would reverse and remand the decision of the Commission because the work injury did not arise out of Ms. Johme's employment. However, because of the general interest of the question raised by the Commission's Award in applying the doctrine of "personal comfort" in finding the work injury compensable, the Court of Appeals transferred this case pursuant to Rule 83.02.

STANDARD OF REVIEW

Pursuant to Article V, Section 18 of the Missouri Constitution, judicial review of an award by the Labor and Industrial Relations Commission is provided to determine whether the award is "supported by competent and substantial evidence upon the whole record." Mo. Const. art. V, Section 18 (cited in Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222 (Mo.banc 2003)).

According to Section 287.495.1 RSMo., when considering appeal of an award by the Commission, "The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other:

(1) That the commission acted without or in excess of its powers;

(2) That the award was procured by fraud;

(3) That the facts found by the commission do not support the award;

(4) That there was not sufficient competent evidence in the records to warrant the making of the award."

Section 287.495.1 RSMo. (2000).

In discussing the standard of review for workers' compensation cases on appeal, the Court explained that: "The constitutional standard...is in harmony with the statutory standard...A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence." Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222-223 (Mo.banc 2003) (citing Wood v. Wagner Electric Corp., 197 S.W.2d 647, 649 (Mo. 1946)). The Court explained that "whether the award is supported by competent and substantial

evidence is judged by examining the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence." Id. at 223.

To satisfy this standard of review, "There is nothing in the Constitution or Section 287.495.1 that requires a reviewing court to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award." Id. at 223.

POINT RELIED ON

I. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN REVERSING THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN AWARDING BENEFITS BECAUSE THE AWARD IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE IN THAT EMPLOYEE'S ACCIDENT DID NOT ARISE OUT OF AND DID NOT OCCUR WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT AS REQUIRED BY SECTION 287.020.3 (2) RSMo. 2005.

Bennett v. Columbia Healthcare and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002)

Drewes v. TWA, 984 S.W.2d 512 (Mo.banc 1999)

Miller v. Mo. Highway Transportation Commission, 287 S.W.3d 671 (Mo.banc 2009)

Bivins v. St. John's Regional Health Center, 272 S.W.3d 446 (Mo.App. S.D. 2008)

Section 287.020.3(2) RSMo. (2005)

Section 287.020.10 RSMo. (2005)

ARGUMENT

I. THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN REVERSING THE DECISION OF THE ADMINISTRATIVE LAW JUDGE IN AWARDING BENEFITS BECAUSE THE AWARD IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE IN THAT EMPLOYEE'S ACCIDENT DID NOT ARISE OUT OF AND DID NOT OCCUR WITHIN THE COURSE AND SCOPE OF HER EMPLOYMENT AS REQUIRED BY SECTION 287.020.3 (2) RSMo. 2005.

Section 287.020.3 (2) RSMo. 2005 states that an injury arises out of and in the course and scope of employment when "it is reasonably apparent, upon consideration of all circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life".

With Section 287.020.10 RSMo. (2005), the legislature rejected and abrogated earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not limited to, holdings in: Bennett v. Columbia Healthcare and Rehabilitation, 80 S.W.3d, 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. Banc 1999); and Drewes v. TWA, 984 S.W.2d 512 (Mo. Banc 1999); and all cases citing, interpreting, applying or following those cases.

This case is similar to Drewes. In Drewes, the Commission found, as it did in the present case, that the Employee was tending to her personal comfort in the activity in which she was engaged before she fell. In Drewes, the Employee was carrying her lunch tray when she fell. The Commission in Drewes, concluded that activity, eating lunch, was incidental to her employment and arose out of her employment. Similarly, the Commission in the present case found that the Employee making coffee was incidental to her employment.

The Commission concluded that the accident in the present case was a prevailing cause of Employee's injury, but did not proceed to the second step of the analysis required by Section 287.020.3 (2) (b) that the "accident 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 non-employment life."

In Miller v. Mo. Highway Transportation Commission, 287 S.W3d 671 (Mo. Banc 2009), this Court found that: "An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved... is one to which the worker would have been exposed equally in normal non-employment life." Miller at 674.

In Bivens v. St. John's Regional Health Center, 272 S.W3d 446 (Mo. App. S.D. 2008), the Court of Appeals determined that an unexplained fall is not compensable, finding no rational connection between the accident, the injury and the employment. In Bivens, the Claimant gave several different versions regarding how and why she fell, including that she

"tripped", "slipped", that "foot stuck to the floor", and finally, that "she just fell." The Commission found the credible evidence supported the finding that the Claimant "just fell", meaning that she simply or merely fell, without explanation. Bivens at 447.

The Court also noted that Bivens is similar to Drewes, where an employee sustained an unexplained fall while on her lunch break in a common room, but not performing her assigned duties. Id. at 449. The Court reasoned that present law does not allow recovery under Drewes. Id. "The burden rests upon the Employee to show some direct causal connection between the injury and the employment". Id. at 447. The employment must expose the employee to an unusual risk not shared by the general public. Id. The injury must have been a rational consequence of that hazard which exists because of and as part of the employment. It is not sufficient that the employment simply furnished the occasion for an injury. Id. at 448.

In the present case, similar to Bivens and Drewes, the Employee simply or merely fell. Her written statement states that she was standing at the coffee pot and when she turned to walk back to her desk, she felt her shoe suddenly on the floor. (Tr. 315-316). The floor was not wet, sticky or in any unusual or hazardous condition. (Tr. 316).

Similar to Drewes, Ms. Johme was not performing assigned duties at the time of her fall. Ms. Johme testified multiple times that she does not know what she was doing exactly when she turned to walk back to her desk, and does not know how she fell or what caused her to fall. (Tr. 14, 19, 20, 21).

Employee argued before the Labor & Industrial Relations Commission that this case is factually similar to the facts of Pile v. Lake Regional Health Systems, 321 S.W.3d 464 (Mo.App. S.D. 2010). However, the present case is easily distinguishable from Pile. In Pile, the Employee was a supervising nurse. Id. 464. Ms. Pile was on her feet and attending to patients eighty (80) percent of the time over the course of her twelve (12) hour shifts. Id. 464. She was attending to a patient who requested pain medication. Pile moved quickly from the patient's room, turned the corner at the carpeted hallway, stumbled and turned her ankle and foot. Id. 465. The Southern District Court of Appeals determined that Pile's injury was within the course and scope of her employment because her job duties exposed her to excessive walking. Id. at 467. The Court concluded that had Pile's job not exposed her to excessive walking, Pile would not have sustained the injury.

In the present case, turning and walking are not integral to Employee's job. In fact, by her own testimony, her job required her to "just sit at a computer and type in charges and things like that." (Tr. 9).

The Court of Appeals for the Southern District recently issued an opinion, Whiteley v. City of Poplar Bluff, SD 31287, hand down date of October 11, 2011, which employee requested the Court of Appeals consider in her Motion for Leave to submit a supplemental citation. The Court of Appeals denied that motion and did not consider Whiteley.

Danny Whiteley was the Chief of Police for the Poplar Bluff Police Department. He filed a claim for a neck injury that occurred while he was washing the inside of the

windshield of his patrol car. Extensive evidence was presented that keeping his patrol car clean was an integral part of his job. Therefore, the Southern District Court of Appeals found there was a clear nexus between the activity Whiteley was engaged in at the time he sustained his injury and his employment. Such is not the case in the instant case. Unlike Whiteley, in the present case, Employee has not presented evidence that the activity she was engaged in at the time she fell was integral to her job. In the instant case, the Employee presented no evidence that her job exposed her to a greater risk of a broken hip due to falling while turning to walk. Because the Employee testified that it would be fair to say she just turned and fell, and does not know how she fell (Tr. 21), there is no rational connection between the accident, injury and her employment. Since the injury to Ms. Johme was a result of an unexplained fall, she was equally exposed to the same hazard or risk in her normal non-employment life.

The facts in the present case demonstrate that Employee simply "fell off-felt my shoe fall on the side and I fell." (Tr. 25). Like the Employees in Bivens and Drewes, she was not performing any activity integral to her job as a patients account representative when she fell. In this case, Employee's work merely furnished the location of an accident, but not the cause of the accident. As this Court determined in Miller, such an injury is not compensable.

CONCLUSION

The Labor & Industrial Relations Commission's Final Award Allowing Compensation is not supported by substantial competent evidence on the record as a whole. Based upon the manifest weight of the evidence presented, the Commission erred in finding that the Employee was injured due to and arising out of her employment. The Commission erred in reversing the decision of the Administrative Law Judge denying the Employee's claim for benefits.

Appellant, St. John's Mercy Healthcare, prays that the Final Award Allowing Compensation be reversed and the Award and decision issued by Administrative Law Judge Lane be reinstated.

Respectfully Submitted By:

/s/ Maurice D. Early
Maurice D. Early #32159
Attorney for Appellant
Early & Miranda, P.C.
720 Olive Street, Suite 700
St. Louis, Missouri 63101
(314) 241-3030
(314) 241-7455 Fax

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the number of words in Appellant's Substitute Brief is 3,783. The undersigned relied on the word count feature of this firm's word processing system to arrive at that number.

/s/ Maurice D. Early

CERTIFICATE OF SERVICE

A copy of the above Appellant's Substitute Brief has been served upon Ms. Ellen E. Morgan, Attorney for Respondent, via the Court's eFiling system, a registered user.

/s/ Maurice D. Early