



**In the Missouri Court of Appeals
Eastern District**

DIVISION THREE

MITCHELL MILLER,)	No. ED91671
)	
Appellant,)	Appeal from the Labor and
)	Industrial Relations Commission
vs.)	
)	
MISSOURI HIGHWAY AND)	
TRANSPORTATION COMMISSION,)	FILED:
)	February 17, 2009
Respondent.)	

Mitchell Miller ("Claimant") appeals from the final award of the Labor and Industrial Relations Commission ("the Commission") denying Claimant workers' compensation benefits. Claimant argues the Commission erred in finding the injury did not arise out of and in the course of Claimant's employment. This case is a case of first impression involving the interpretation of the amendments to the workers' compensation statutes regarding the definitions of "arising out of" and "in the course of" employment. We would affirm the Commission's decision; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Rule 83.02.

Claimant worked for the Missouri Highway and Transportation Commission ("Employer"). Claimant had worked for Employer for twenty years and attained the title of Assistant Maintenance Supervisor. Claimant's job duties included doing paperwork,

lining out crews in the morning, and then working with the crew, usually acting as the crew chief.

On September 29, 2005, Claimant, then age forty-five, and his crew were repairing a section of road on Route N in Pike County. Claimant parked his truck approximately two hundred feet from where his crew was working. Claimant was driving a truck hauling asphalt amalgam. The two-hundred feet of road was paved and flat. After being informed that the crew was running out of asphalt amalgam, Claimant began walking back to his truck. Claimant described his walking speed as "a brisk walk." Although no one on Claimant's crew had urged to him hurry and there was no evidence of a need to hurry to the truck in order to prevent the asphalt amalgam from cooling and becoming unusable on that day, Claimant said he felt the need to walk briskly to his truck in order to get the job completed.

About three-quarters of the way back to his truck, Claimant felt a pop behind his right knee followed by pain. Claimant stated he did not know what triggered the pop. Claimant had no prior history of problems with his right knee.¹ Claimant put his foot down no differently than in his other steps. Claimant did not slip, trip, or stumble. Claimant did not fall to one knee or both knees and he did not lose his balance. There was not a hole or other impediment on the asphalt, nor were there any obstructions on Claimant's boots, which were the boots he always wore at a job site.

Claimant reported the injury to Employer, who subsequently denied the case. Claimant sought treatment on his own. On October 3, 2005, an MRI was performed, which suggested a tear of the inferior aspect of the meniscus. Claimant thereafter underwent surgery. The surgeon arthroscopically inspected the joint space and meniscal

¹ Claimant did have two previous surgeries to his left knee and a surgery to his back.

surfaces and found no tear in Claimant's medial meniscus. The surgeon found and repaired an impinging medial shelf plica. Claimant reported initial improvement but that pain recurred and became more prominent. Claimant subsequently filed a claim for workers' compensation benefits.

On October 30, 2006, Employer sent Claimant for an independent medical exam from Dr. Herbert Haupt. At the time of the independent medical exam, Claimant had resumed full duties at work. The x-rays taken at that time revealed no acute pathology and well maintained joint spaces. Dr. Haupt recommended another MRI or arthroscopic surgery to discover the source of Claimant's continued pain. Although no diagnostic testing supported such a conclusion, Dr. Haupt suspected that Claimant suffered from an under the surface meniscal tear on September 29, 2005, but that the surgeon did not see it when he operated on Claimant's knee. Dr. Haupt explained that a meniscal tear can cause the development of symptomatic plica. Dr. Haupt opined that "without any information to the contrary" the work related injury on September 29, 2005 was the prevailing factor in the development of the symptomatic plica.

Claimant testified he liked to get out and walk around outside of work. Claimant stated walking was part of his lifestyle and he "always enjoyed [his] walking." In 2004 and 2005, Claimant took regular walks and his walks covered a half-mile to a mile a couple times a week. Claimant varied his pace, sometimes walking briskly, at the same pace he was walking when he felt the pop behind his knee, and other times walking "pretty fast."

Dr. Haupt admitted that a brisk walk is not a normal mechanism of injury for a meniscal. Even so, Dr. Haupt concluded that walking was the prevailing factor for the Claimant's injury because Claimant was pain free before it, and without any other

information, he considered Claimant's walking the prevailing factor. In addition, Dr. Haupt stated there was no difference in the risk of developing damage to the knee from walking at home or walking at work. Thus, Dr. Haupt agreed, assuming all other factors were equal, that walking at home and walking at work carried the same risk.

After finding both Claimant and Dr. Haupt credible, the Administrative Law Judge ("ALJ") denied Claimant benefits finding Claimant failed to meet his burden of proof that he suffered a compensable injury as a result of a work related accident arising out of and in the course of his employment. Claimant appealed to the Commission. The Commission issued its decision affirming the ALJ's denial of benefits adopting the ALJ's decision. In applying the new amendments to the workers' compensation statutes adopted in 2005, the Commission stated:

[r]ather than focusing solely on the activity itself, one must carefully and thoughtfully examine the facts of each individual case in the context of how that activity interacts with the employment. Since prior case law has been abrogated, a logical common sense approach would be to examine if the incident or activity occurred while the individual was engaged in performing the necessary and required duties of the job in furtherance of the employer's business. While the employee certainly would have to get to his truck, whether by walking or some other means, before being able to move the truck, under the facts of this case the activity of "walking" appears to be "incidental" to the employment.

After reviewing the record, the Commission held that "[t]here was nothing in the record that would lead to a conclusion this activity of walking would expose the employee to any greater risk than walking outside of the employment," and denied Claimant benefits. Claimant now appeals.

In his sole point, Claimant argues the Commission erred in finding the injury did not arise out of and in the course of Claimant's employment. Claimant asserts his testimony and the testimony of the independent medical examiner, Dr. Haupt, established

that the injury was the result of a work related accident arising out of and in the course of Claimant's employment and was therefore compensable.

Pursuant to Section 287.495.1, RSMo 2000, we review the award of the commission and we may only modify, reverse, or set aside that award upon the following grounds:

- (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 record to warrant the making of the award.

We consider the evidence in the context of the record as a whole to determine whether sufficient competent and substantial evidence exists to support the award of the commission, or whether the award is contrary to the weight of the evidence. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 222-23 (Mo. banc 2003). However, when the pertinent facts are not in dispute, the issue of whether an accident arose out of and in the course of employment is a question of law requiring de novo review. Cox v. Tyson Foods, Inc., 920 S.W.2d 534, 535 (Mo. banc 1996). As a reviewing court, we must "construe the provisions of this chapter strictly."² Section 287.800.1, RSMo Cum. Supp. 2007.

Here, the Commission determined the injury did not arise out of or in the course of Claimant's employment because the injury came from a hazard or risk unrelated to his employment to which he was equally exposed outside of work. Section 287.020.3, RSMo Cum. Supp. 2007, provides the definition of "injury" and states, in pertinent part:

² The previous version of Section 287.800 provided that "[a]ll provisions of this chapter shall be liberally construed with a view to the public welfare." Under the new version of Section 287.800, RSMo Cum. Supp. 2007, reviewing courts shall strictly construe the workers' compensation statutes and the administrative law judges and the Commission "shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing the evidence and resolving factual conflicts."

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

We must determine whether Claimant's injury arose out of or in the course of his employment. As the Commission did, we will focus on this second prong of the statute and need not address the prevailing factor prong of Section 287.020.3(2), RSMo Cum. Supp. 2007. Under Section 287.020.3(2)(b), RSMo Cum. Supp. 2007, for an injury to be deemed to arise out of and in the course of employment, it must come from a hazard or risk related to the job that the worker would not have been equally exposed outside of the employment.

In the 2005 amendments, the legislature specifically abrogated earlier case law interpretations of the meaning of arising out of and in the course of employment in Section 287.020.10, RSMo Cum. Supp. 2007, which provides:

[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate 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 be limited to, holdings in: Bennett v. Columbia Health Care 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.

In order to understand what has been abrogated by the legislature and the changes under the new workers' compensation statutes, it is necessary to examine the cases

specifically mentioned, Bennett, Kasl, and Drewes.³ In Bennett, the claimant was a hospital nurse's aid nurse who was walking around the foot of a patient's bed when she felt a pop in her right knee, in which she had a prior history of problems. Bennett, 80 S.W.3d at 526. Later that day, while walking up a flight of stairs, she felt another pop in her right knee. Id. The Commission denied the claimant workers' compensation benefits. Id. at 527. On appeal, the court in Bennett held the Commission erred in concluding that an injury caused or aggravated by walking could not be considered "arising out of" the claimant's employment. Id. at 531. The court concluded that while walking is an activity done routinely outside of employment life, it nonetheless could constitute an injury arising out of and in the course of employment because "walking, both on level floors and traversing stairs, was an integral part of [the claimant's] job activities" and the claimant "was engaged in activities incidental to her duties at the time she experienced each 'pop' or 'giving way' of her knee." Id.

In Kasl, the claimant, a manager at a residential care facility, fell and broke her ankle when she arose from her chair, unaware that her foot had "fallen asleep," to dispense medicine. Kasl, 984 S.W.2d at 852. The Commission awarded the claimant temporary benefits finding "the conditions of [the claimant's] required work--waiting for

³ The previous version of Section 287.020.3, RSMo 2000, analyzed in the Bennett, Kasl, and Drewes cases provided:

- (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.
- (2) An injury shall be deemed to arise out of and in the course of the employment only if:
 - (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
 - (b) It can be seen to have followed as a natural incident of the work; and
 - (c) It can be fairly traced to the employment as a proximate cause; and
 - (d) 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.

the appointed time for [a resident's] medication--caused her foot to fall sleep, which, when coupled with the job requirement of getting the medication, caused an accident." Id. at 853, 854. On appeal, the court in Kasl affirmed the Commission concluding the injury arose out of and in the course of the claimant's employment. Id. at 854. In the majority opinion authored by Judge Benton, the court stated the claimant's:

foot falling asleep was a common condition clearly related to her work. Without having to wait for the appointed time to dispense medicine, her foot would not have fallen asleep. And without having to arise to dispense medicine (a job requirement), with a foot that had fallen asleep, [the claimant] would not have fallen, breaking her ankle. By itself, having a foot fall asleep was neither a hazard nor a risk to [the claimant]. Only in conjunction with and exacerbated by her work did [the claimant's] common condition subject her to injury.

Id.

In Drewes, the claimant was an airline reservation agent whose workday included a regularly scheduled thirty minute unpaid lunch break. Id. at 513. On the day of the accident, the claimant was carrying her lunch through a break room, when she fell and injured her ankle. Drewes, 984 S.W.2d at 513-514. The Commission awarded workers' compensation benefits. Id. at 513. On appeal, the court affirmed the Commission finding the injury arose out of and in the course of the claimant's employment. Id. 514-515. In finding the injury arose out of the claimant's employment, the majority opinion, also authored by Judge Benton, stated that there was not any evidence that the injury came from a hazard or risk that was unrelated to the claimant eating lunch and the claimant was not equally exposed outside of her employment to the risk of falling during her lunch break. Id. at 514. In finding the injury occurred in the course of the claimant's employment, the court found accidents in or about the premises, during a scheduled unpaid lunch break, occur in the course of employment. Id. at 515.

After reviewing the cases, we assume the legislature intended to exclude cases where the injury is from a hazard or risk unrelated to the worker's employment to which the worker is equally exposed outside of employment from workers' compensation coverage. After an extensive review of the record, we do not believe the present case is distinguishable from the Bennett, Kasl, and Drewes cases. Here, we believe Claimant failed to satisfy the requirement of proving the injury arose out of and in the course of his employment because he did not prove brisk walking was a hazard or risk related to his employment, to which he was not equally exposed outside of work. Claimant bears the burden of proving an injury arose out of and in the course of employment. Clayton v. Langco Tool & Plastics, Inc., 221 S.W.3d 490, 492 (Mo. App. S.D. 2007).

Here, the evidence showed Claimant was walking, albeit briskly, on flat pavement with no irregularities or obstacles when he felt a pop behind his right knee. Claimant had no idea what caused the pop. Claimant stated nothing specific had happened, he did not slip, trip, or fall and he put his foot down no differently than in his other steps. Claimant was not instructed to walk briskly. There was no distinctive condition of Claimant's employment that caused or contributed to Claimant's injury. Claimant testified that he walks on a regular basis outside of work and often at a brisk pace. Claimant was equally exposed to the risk of injury from walking briskly at home as he was at work. The independent medical examiner, Dr. Haupt, admitted there was no greater risk of injury from walking at home or walking at work. Under the specific facts of this case, there was equal exposure in both Claimant's employment and his nonemployment life. Although walking was incidental to get to the truck, there was no testimony indicating Claimant's walking briskly was required as part of his employment. We would agree with the Commission's decision that under the facts of this case Claimant's injury resulted from a

hazard or risk unrelated to his employment to which he would have been equally exposed outside of his employment in his normal nonemployment life. Thus, under Section 287.020.3(2)(b), RSMo Cum. Supp. 2007, an award of compensation would be precluded under the facts of this case. We would find the Commission did not err in finding the injury did not arise out of and in the course of Claimant's employment and deny Claimant's point.⁴

We would affirm the Commission's decision in light of our above analysis. However, because of the general interest and importance of the issues presented, this case is transferred to the Missouri Supreme Court pursuant to Supreme Court Rule 83.02.

ROBERT G. DOWD, JR., Presiding Judge

Clifford H. Ahrens, J. and
Sherri B. Sullivan, concur.

⁴ By abrogating Bennett, Kasl, and Drewes, the amendments to the workers' compensation statute regarding "arising out of" and "in the course of" employment, appear to require proof that the injury occurred while the employee was engaged in performing a necessary and required activity of the employment in furtherance of the employer's business rather than merely being injured while on the job from incidental activity. We assume from the Commission's decision that the compensability of an injury resulting from a necessary or required work-related activity should not be affected by the fact that the same activity may occur in the employee's nonemployment life. To assume otherwise, would permit a "slippery slope" interpretation allowing a refusal of benefits for any otherwise compensable injury from a necessary or required work-related activity that also has some similarity or equal exposure to normal nonemployment activities. To allow such an interpretation would render the workers' compensation law meaningless. Thus, we confine our holding to the particular facts of this case.