No. SC98168

IN THE SUPREME COURT OF MISSOURI

LUCILLE SCHOEN,

Employee - Appellant,

v.

STATE OF MISSOURI,
MID MO MENTAL HEALTH,

Employer - Respondent,

and

TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND INJURY FUND,

Additional Party - Respondent.

Appeal from the Labor and Industrial Relations Commission

RESPONDENT MID-MISSOURI MENTAL HEALTH CENTER'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

The Initial Work-Exposure

Lucille Schoen (Employee) was exposed to ant spray while working as a charge nurse at Mid-Missouri Mental Health Center ("Employer") on May 8, 2009. TR. 103. When Employee later developed respiratory symptoms, Employer sent her to the Emergency Room. Medications were prescribed, and Employee immediately returned to work without limitations. TR. 211.

The Alleged Secondary Injury

Two weeks later, Employer sent Employee to Dr. Eddie Runde's office for further evaluation. TR. 92. Another patient had brought a small dog to the doctor's office. The dog got loose while Employee was being escorted to an examination, the doctor attempted to divert the dog, and he accidentally tripped Employee instead. Tr. 93. As a result, Employee fell and allegedly sustained permanent injuries to her knees, low back, hip, and neck. Tr. 765, 766.

Further Evaluations of Respiratory Exposure

After the fall, Dr. Runde completed his evaluation and released Employee to regular duty with no restrictions. He opined that no permanent disability would be expected as a result of the May 8, 2009, exposure to any spray. TR. 93.

Employee then saw Dr. Lawrence Lampton for further evaluation of her respiratory symptoms. Tr. 101. Dr. Lampton explained to Employee that her cough and sinusitis were likely related to allergies, with asthma possibly playing a role. TR. 98. He ordered a pulmonary functions test, which showed Employee was within normal limits. TR. 101.

Employee next saw Dr. Thomas Hyers for an independent medical examination (IME) at the request of Employer. TR. 103. Dr. Hyers assessed transient bronchitis and upper airway irritation. TR. 104. He opined that those conditions were not chronic or permanent. *Id.* He placed Employee at maximum medical improvement (MMI) and assessed no permanent disability. *Id.* Dr. Hyers noted that Employee's main concern was developing chronic asthma like her mother, but he assured her that would not happen as a result of the exposure *Id.*

Employee also underwent a variety of other treatment related to the alleged injuries sustained in the loose dog incident in Dr. Runde's office. But the nature and extent of that treatment and disability is not at issue in this appeal.

Dr. Volarich evaluated Employee at the request of her attorney on July 21, 2014. TR. 751-769. Dr. Volarich took a history from Employee, reviewed medical records and performed a physical evaluation. Dr. Volarich diagnosed upper airways and pulmonary irritation with a residual non-productive cough.

He related this to the May 8, 2009, ant spray exposure and provided a 5% permanent partial disability (PPD) rating of the body as a whole (BAW).

Dr. Volarich provided additional diagnoses and ratings for conditions associated with the fall in Dr. Runde's office. Similarly, Employee also underwent a variety of other treatment related to the alleged injuries sustained in the loose dog incident in Dr. Runde's office. But, the nature and extent of that treatment and disability is not at issue in this appeal.

Procedural History

Employee initially sought workers' compensation benefits for the ant spray exposure, and ultimately sought benefits for injuries sustained during the second incident in Dr. Runde's office as a part of the same claim. An Administrative Law Judge (ALJ) awarded lifetime weekly benefits for the loose-dog fall at the doctor's office, finding it "part of [the] May 8, 2009 work accident"—ant spray exposure—because it was the "natural and probable consequences of" the ant spray exposure. L.F. 39. Employer appealed that Award to the Labor and Industrial Relations Commission (Commission), and the Commission reversed and denied benefits relating to the fall at the doctor's office. L.F. 45-51.

The Commission held that the second incident (loose dog) was not compensable as part of the original injury (ant spray exposure). "[T]he unfortunate mishap though taking place in the doctor's office, was not part of

the course of any medical treatment employee was undergoing due to her ant spray exposure and did not arise out of any risk source inherent in her employment." L.F. 48. The Commission further found that Employee's May 8, 2009 respiratory exposure resulted in no permanent disability. Employee appealed the Commission's decision.

The Western District reversed the Commission, and this Court granted transfer.

STANDARD OF REVIEW

Section 287.495.1 sets forth this Court's standard of review in appeals from the Commission:

"The court on appeal, shall review only questions of law and may modify, reverse, remand for hearing, 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 record to warrant the making of the award."[1]

"Decisions involving statutory interpretation, however, are reviewed de novo." *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 338 (Mo. 2017).

Because Employee's injury occurred after August 28, 2005, the provisions of the Chapter 287 are to be strictly construed. § 287.800. Section 287.800 requires that "any reviewing courts shall construe the provisions of this [workers' compensation] chapter strictly." Strict construction means that "the statute can be given no broader an application than is warranted by its

[1] All citations to the Revised Statutes of Missouri are to RSMo 2000 as updated through the 2013 cumulative supplement, unless otherwise indicated.

plain and unambiguous terms." *Pennewell v. Hannibal Reg'l Hosp.*, 390 S.W.3d 919, 923 (Mo. App. 2013). "The legislature is presumed to have intended what the statute says, and if the language used is clear, there is no room for construction beyond the plain meaning of the law." *Shaw v. Mega Indus., Corp.*, 406 S.W.3d 466, 469 (Mo. App. 2013).

ARGUMENT

I. The Commission correctly denied benefits for secondary injuries caused by a doctor attempting to divert a loose dog at medical treatment because they were not caused by work under Chapter 287, in that they did not arise out of a risk source related to work or the medical treatment. (Responding to Employee's Points Relied on I, II, and III.)

Missouri's Workers' Compensation Law provides compensation for *workplace* injuries. *Chapter 287 et seq*. An injury must "arise out of and in the course of" employment. § 287.020.3(2), RSMo. This means that (a) a workplace accident must be "the prevailing factor in causing the injury;" *and* (b) the injury must "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." *Id*. As this Court has said before, Missouri law limits recovery to injuries that are actually caused by work – as opposed to injuries that happen to occur where you are required to be for work. *See Miller v. Missouri Highway and Trans. Comm.*, 287 S.W.3d 671, 674 (Mo. banc 2009); *see also Johme v. St. John's Mercy Healthcare,* 366 S.W.3d 504, 511 (Mo. banc. 2012). Here, the Commission correctly found that Employee failed to prove a sufficient causal connection between her employment and injuries that she sustained as a result of a doctor kicking at a loose dog.

A. **Employee failed to demonstrate either part of the causal test for compensability outlined in Section 287.020.3(2), RSMo.**

First, Employee's March 8, 2009 work accident was not the prevailing factor in causing her later doctor's office injuries. "'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and the disability." §287.020.3(1). Because the dog-tripping incident did not occur at work or while working, Employee relies on backdooring her claim through her ant-spray exposure. But this chain of causal inferences—working as a nurse led to ant spray exposure, led to being in a doctor's office, led to being tripped by a doctor diverting a dog—establishes only a tenuous "but-for" work-connection that this Court has consistently rejected as insufficient under Chapter 287. *See Miller,* 287 S.W.3d at 674; *Snowbarger v. MFA Cent. Coop.,* 349 S.W.2d 224, 227 (Mo. banc 1961); § 287.020.2, RSMo ("An injury is not compensable because work was a triggering or precipitating factor"). Instead, the "prevailing factor" in causing Employee's injuries was a fall caused by an unrelated risk source—a loose dog and a doctor's attempt to divert it.

Second, loose dogs are precisely the kind of idiosyncratic "hazard or risk" that workers are "equally exposed" to outside of work in normal nonemployment life. § 287.020.3(2), RSMo. Here, just as in *Johme,* no evidence showed that Employee was not equally exposed to the cause of her injury—a loose dog—because she was receiving authorized medical treatment than she

would have been when she was in her "normal nonemployment life." *See Johme v. St. John's Mercy Healthcare,* 366 S.W.3d 504, 511 (Mo. 2012). Thus, Employee has failed to establish her work as the cause of her injuries and disability under Chapter 287.

B. The Commission's denial is consistent with existing case law because Employee's secondary injuries were not caused by work, the original injury, or its medical treatment.

Employee relies on cases decided before two substantive revisions of Chapter 287's causation standards,[2] but even these support rather than undermine the Commission's denial. Prior cases awarding benefits for secondary injuries sustained at authorized treatment all involved injuries that were directly caused by the medical treatment itself.[3] Accordingly, the injuries arose out of the treatment for the work injury, and thus were the "natural and

[2] Chapter 287 was amended in 1993 to require a claimant's employment to be a substantial factor in causing an injury for compensability. *See* § 287.020.3(2), RSMo 1994. An injury was no longer compensable merely because work was a triggering or precipitating factor. *Id.* Chapter 287 was later amended with even more strict, or limiting causation standards prior to Employee's injuries in 2005. *See Infra* p. 18.

[3] *See Lahue v. Missouri State Treas.,* 820 S.W.2d 561 (Mo. App. W.D. 1991) (secondary orthopedic injuries sustained while actually undergoing whirlpool therapy for the prior injury); *Wilson v. Emery Bird Thayer Co.* , 403 S.W.2d 953 (Mo. App. 1966)(secondary injury directly caused by being placed in traction for the prior injury)*; Meinczinger v. Harrah's Casino,* 367 S.W.3d 666 (Mo App. E.D. 2012) (orthopedic injury sustained while undergoing physical therapy the prior orthopedic injury); *Manley v. American Packing Co.,* 253 S.W.2d 165 (Mo. 1952) (subsequent death directly caused by medical treatment traceable to the prior injury).

probable consequences" of the underlying work injury. By contrast, Employee's injuries here were caused by a source unrelated to medical treatment—another patient's loose dog—while merely present for treatment; they were not caused by the medical treatment or the work injury itself.

i. **The risk of being tripped by a doctor kicking a loose dog is not related to being treated for a respiratory exposure.**

There is a clear causal connection between medical treatment and injuries sustained as a direct result of the risks inherent in treatment itself. But, there is no similar connection between treatment for respiratory exposure and being tripped by a doctor attempting to divert a dog. This freak occurrence has no more in common with respiratory treatment than if the dog had instead bitten Employee, or a random act of terror occurred during treatment. Certainly then, this unlikely and extraordinary secondary fall at the doctor's office is neither a "natural" or "probable" consequence of the prior exposure.

Employee argues that medical treatment encompasses more than just hands on treatment, but this distinction is a red herring. Employee's Brief, p. 21. Even if Employee was in the scope of her treatment when the injuries occurred, her injuries were actually caused by a completely unrelated risk source–a random loose dog and the doctor's reaction to it. Again, this risk source has no connection to treatment for respiratory exposure other than randomly occurring while present for it; they did not arise out of it.

While Employee cites *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 563 (Mo. App. W.D. 1991) for the proposition that Chapter 287's causation standards can be ignored for injuries sustained at—but not caused by—authorized medical treatment, a fair reading of *Lahue* instead contradicts her assertion: Ms. Lahue's injuries *were* actually caused by a risk source related to the receipt of medical treatment.

Contrary to Employee's implication that Ms. Lahue spontaneously fell off a chair—with no further risk relation to the medical treatment—while simply present at therapy, the opinion actually states that Ms. Lahue sustained her injuries *while undergoing* whirlpool therapy. *Lahue,* at 562. Thus, the risk-source connection between injuries sustained from falling from a chair with one leg awkwardly in a whirlpool (while already in a compromised state from prior orthopedic injury) and the orthopedic injury being treated is clear and direct; whereas, the connection here between respiratory treatment and Employee being tripped by a doctor chasing a dog is instead just unfortunate happenstance. This connection is simply not enough for Employee to meet her burden under Chapter 287.

ii. A but-for causal connection to employment alone is insufficient for recovery under Chapter 287.

Because Employee relies on the ant-spray exposure to connect her secondary leg injury to the workplace, she relies primarily on cases analyzing secondary injuries, like *Lahue*. Again, in those cases, a secondary injury

resulted from the medical treatment for the primary injury, so the workplace accident causing the primary injury was more arguably a substantial or even prevailing factor in causing the secondary injury.

Unlike in *Lahue,* or any other existing case awarding compensation for secondary injuries, Employee here has only identified a "but for" causal connection between her injuries and her employment. Employee would not have sustained her injuries "but for" being directed to medical treatment at this location at this time. However, this is insufficient to establish causation under workers' compensation. *See Miller* v. *Missouri Highway and Trans. Comm.*, 287 S.W.3d 671 (Mo. banc 2009) (holding that a knee injury that would not have occurred but for walking at work was nevertheless not compensable because it was not actually caused by work); *see also* § 287.020.2 ("an injury is not compensable because work was a triggering or precipitating factor"). As this Court held in *Miller*, the mere fact that Employee was directed to be at the place where the injury occurred is insufficient to establish work as the cause under 287.020.2, .3, and .10, and thus make the injury compensable. *Miller,* at 674.

iii. But-for causation has already been rejected as insufficient in secondary injury cases.

The so-called "natural consequences doctrine" also does not allow courts to water down the "prevailing factor" test into a but-for test. In *Bear v. Anson Implement, Inc.*, 976 S.W.2d 553, 555 (Mo. App. W.D. 1998), the Western

District Court of Appeals endorsed the following quote from this Court as "representing the Missouri Supreme Court's intent to limit recovery for secondary injuries that are causally connected to a primary injury:"

> It should not…be necessarily concluded that anything happening to an injured workman in the course of a visit to the doctor is compensable. There should be…a showing…that **the nature of the primary injury** contributed to the subsequent injury in some way other than merely occasioning the journey during which harm from a totally unrelated source occurred.

Id. at 557 (quoting *Snowbarger v. MFA Cent. Coop.,* 349 S.W.2d 224, 227 (Mo. banc 1961)) (emphasis added).

Employee plainly failed to make this Court's required showing of a further causal connection. Just as the medical treatment in *Bear* merely occasioned the journey during which harm from an unrelated source occurred, Employee's treatment for ant spray exposure here merely occasioned the opportunity for injury from a completely unrelated source – someone attempting to divert a loose dog from a place you should never find a loose dog – to occur. *Bear,* 976 S.W.2d at 557. Nothing about the nature of an ant spray exposure or its treatment contributed to the subsequent injury.

Employee points to the fact that it was the authorized treating physician who actually tripped her, but this is irrelevant because the doctor was not actually performing any treatment for the work injury by attempting to divert

the dog.[4] Kicking a dog is not a part of any known treatment modality for a respiratory exposure. If Employer had instead denied treatment here from the outset, and the exact same unusual and unlikely incident had occurred at unauthorized treatment, it would not have been any more or less a "natural and probable consequence" of ant spray exposure.[5] The risk source was not the doctor himself, as Employee asserts, or any treatment Employee was undergoing for her work injury, but rather the risk source was the freak occurrence of a dog getting loose in an office setting.

iv. **Employee's injuries are not compensable despite occurring at treatment because they did not arise from a work-related risk source.**

This risk-source distinction is dispositive because this Court has made it clear that the focus for compensability in workers' compensation is on the risk source of an injury rather than just where an Employee happens to be, or even

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[4] This is why Employee's citation to medical malpractice secondary injury cases entirely misses the point. The potential tort actions here, if any, would certainly not include medical malpractice. Further, any conceivable tort action here could be fully plead without referencing Employee's employment, her ant spray exposure, or its treatment. Employer would not be a potential party to any of them.

[5] Multiple cases in the secondary injury line actually involve compensation for injuries sustained at **unauthorized** medical treatment for a work injury. *See Wilson v. Emery,* 403 S.W.2d 953, 954 (Mo. App. 1966); *Martin v. Town and Country Supermarkets,* 220 S.W.3d 836, 844 (Mo. App. S.D. 2007). Like every other case awarding benefits for injuries sustained at medical treatment, both of the injuries in such cases were actually caused by the medical treatment itself. *Id.*

what they were doing at the time the injury was sustained. *See Johme v. St. John's Mercy Healthcare,* 366 S.W.3d 504, 511 (Mo. banc. 2012) (holding that the proper focus for compensability is not on what an employee was doing at the time of an injury, but instead the risk source of the injury). *See also* § 287.020.3 (an injury under Chapter 287 is defined as one that has arisen out of employment). This Court denied benefits in *Johme* because the risk source of Ms. Johme's injury had no causal connection to her work other than the fact that it occurred while she was working. *Johme,* at 511. It occurred at work, but it did not arise out of work. *Id.*

Here, while Employee's injuries from her fall arguably occurred at treatment, they did not *arise out of* the treatment. Thus, they are not the "natural and probable consequence" of the prior respiratory exposure and are not compensable.

C. The 2005 amendments to Chapter 287 that apply to Employee's claim further support the Commission's denial.

Although Employee's challenge fails even under this State's original secondary injury jurisprudence, the legislature has subsequently adopted even stricter causation standards for work injuries.[6] *See* § 287.020.3. With the 2005 revision, the legislature explicitly expressed their intent to reject and abrogate

[6]Chapter 287 now imposes a significantly higher causation burden on claimants than existed at common law. *See Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations,* 277 S.W.3d 670, 684 (Mo. 2009) (Teitleman, J. dissenting).

any earlier case law interpretations of the newly modified causation standard and definitions. *See* §287.020.10. Accordingly, not every secondary injury that could previously be characterized as a "legitimate consequence" of a prior injury is necessarily compensable under the current version of the statute. Here, Employee failed to strictly meet either of the prongs of the causal standards introduced by the 2005 amendments in Section 287.020.3(2), RSMo. *See supra* pp. 13-14. Thus, the Commission correctly denied her claim for injuries that weren't actually caused by her work as a nurse.

i. **Chapter 287's strict construction mandate prohibits expansion of the "natural consequences" doctrine beyond the terms of the statute.**

Employee attempts to circumvent the statute by relying on the broadest possible interpretation of a case decided nearly seventy years ago. Employee's Brief p. 34-35 (*citing Manley v. American Packing Co.,* 253 S.W.2d 165 (Mo. 1952)). But this case was decided prior to multiple revisions of Chapter 287 and when the workers' compensation law was to be viewed "liberally…with a view to the public welfare." § 287.800 RSMo. 2000. Since 2005, the law is now to be construed "strictly" and "impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." § 287.800. Because the "natural consequences" standard does not actually appear anywhere in the controlling statutes, Employee is requesting that this

Court dramatically expand a judicially created doctrine that arguably already violates the tenants of strict construction required by Section 287.800.

Employee further cites *Pace v. City of St. Joseph,* 367, S.W.3d 137, 147 (Mo. App. W.D. 2012) as more recently adopting nearly seventy-year-old liberal construction case law for the proposition that 287.020.3 can just be disregarded once any minor compensable injury has been identified. *See* Employee's Brief, p. 33-37.[7] To the extent these cases can be interpreted as support for Employee's assertion, they should be explicitly overruled as inconsistent with the strict construction mandate of 287.800. This is because Section 287.020.3 is effectively nullified (and the legislature's intent circumvented) if its causation standards can be disregarded for all tangentially related injuries, conditions, or disabilities once any *de minimis* compensable injury has been identified.[8] This was plainly not the intent of the legislature in providing

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[7] *See also Tillotson v. St. Joseph Medical Center,* 347 S.W.3d 511, 517, 522 (Mo. App. W.D. 2011)("Once a compensable injury is found, the inquiry turns to the calculation of compensation or benefits to be awarded")(awarding disability and medical treatment related to a total knee replacement caused by preexisting degenerative arthritis as a part of claim for a work injury that was only the prevailing factor in causing a partial meniscus tear). *But Cf. Gordon v. City of Ellisville,* 268 S.W. 3d 454 (Mo. App. E.D. 2008)(denying compensation for disability and treatment related to preexisting rotator cuff tear because work was not the prevailing factor in causing the medical condition, despite Employer's prior provision of authorized treatment for the shoulder in question after an acute injury at work).

[8] Contrary to Employee's assertion, the Commission actually found that there was no compensable injury here at all. *See infra,* p. 20-21. However, this should not actually matter for the resolution of Points I-III under a correct application of the plain language of post-2005 version of the statute

heightened causation standards for compensation and a strict construction mandate.

The result of such a misapplication of the law here would be that Employer could potentially have to pay lifetime benefits for injuries caused by a completely unforeseeable and unrelated-to-work risk source, as a "natural and probable consequence" of an ant spray exposure that required treatment limited to medication and a respiratory inhaler. This was precisely the type of result the legislature was attempting to avoid with the 2005 amendments, and the Commission's denial should be upheld.

II. The Commission was correct in finding that Employee sustained no permanent disability from her exposure to ant spray. (Responding to Employee's fourth point relied on).

To obtain disability benefits, Employee must prove she has permanent disability resulting from a compensable injury. As the Commission found, Employee failed to prove any permanent disability from her May 8, 2009, exposure to ant spray. Employee was initially returned to work immediately without limitations after a single Emergency Room visit three days after the exposure. TR. 211-a. When she was later sent to Dr. Runde for additional evaluation, he opined he would expect no permanent disability as a result of the May 8, 2009, exposure. TR. 93. Employee finally saw Dr. Hyers, a pulmonary expert, who confirmed she had no permanent disability from the exposure. While Employee's own IME doctor, Dr. Volarich, opined she

sustained a 5% PPD to the BAW from the ant spray exposure, TR. 765, the Commission was not persuaded by Dr. Volarich's opinion.

The determination of the extent of disability is within the exclusive providence of the Commission. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 51, 52 (Mo. App. W.D. 2007). Further, the Commission is not bound by a medical expert's opinion regarding disability, because disability is not solely a medical question. *Id.* The Commission is free to find credible and believe one expert opinion over another and this Court must defer to the Commission's findings. *Totten v. Treasurer,* 116 S.W.3d 624, 627 (Mo. App. E.D. 2003). The Commission ultimately credited the opinions of Dr. Runde and Dr. Hyers over that of Dr. Volarich in denying compensation, which it is allowed to do.

The question before this Court regarding this finding of the Commission is not one of de novo review. Rather, this Court should affirm the decision of the Commission on this factual issue so long as the Commission's determination is based on substantial and competent evidence and is not against the overwhelming weight of the evidence. *Thompson v. Treasurer*, 545 S.W.3d 890, 893 (Mo. App. E.D. 2018). The opinion of the front-line treating physician and the only pulmonologist to provide an opinion is certainly substantial and competent evidence upon which to base a denial of benefits. Accordingly, there is no basis to overturn the decision of the Commission that Employee sustained no permanent disability from the ant spray exposure.

CONCLUSION

Employer respectfully asks that this Court affirm the Commission's Award denying all further benefits to Employee.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify:

1. That attached brief contains 4,858 words as determined by Microsoft Word 2010 software in compliance with the limitations contained in Supreme Court Rule 84.06;

2. That it contains the signature and required information in compliance with Rule 55.03;

3. That a true and correct copy of the foregoing was filed through the eFiling system on this 31st day of December, 2019, to:

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