KENNETH G. CAMPBELL, Employee/Appellant, v. GRAHAM TIRE CO. and FARMLAND INS. COS., Employer-Insurer, and MN DEP'T OF ECON. SEC., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 4, 1999

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF. Where the compensation judge expressly concluded that the employee was injured on the employer's premises at 5:15 p.m., and where the employee's normal working hours were from 8:00 a.m. to 5:30 p.m., and where there was no evidence that the employee was free to leave work prior to 5:30 p.m., the compensation judge erred in concluding that the employee's injury was not "in the course of" his employment, notwithstanding the fact that the employee had completed his scheduled work by 4:50 p.m. and notwithstanding the fact that his injury while performing free labor on his step daughter's car with the permission of the employer was reasonably not an injury "arising out of" employment.

ARISING OUT OF & IN THE COURSE OF - SUBSTANTIAL EVIDENCE. Where the employee had essentially completed his work in the employer's shop at about 4:50 p.m. in a work day that regularly ended about 5:30 p.m., and where he was injured at about 5:15 p.m. on the employer's premises while, with the employer's permission, performing free labor on his stepdaughter's car, the employee's activities at the time of his injury were not dominantly motivated by a desire to serve the employer and were not ones "necessary to life, comfort, or convenience," and the compensation judge's conclusion that the injury was not one arising out of the employee's work for the employer was not clearly erroneous and unsupported by substantial evidence.

Affirmed in part and reversed in part.

Determined by Wheeler, C.J., Hefte, J. and Pederson, J.
Compensation Judge: William R. Johnson

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's conclusion that the employee's injury did not arise out of and in the course of his employment. We reverse on the in-the-course of issue but affirm on the arising-out-of issue and affirm the denial of benefits on that basis.

BACKGROUND

In October of 1997, Kenneth Campbell was employed as a Service Manager at Graham Tire Co., which was in business both to sell tires and to perform basic engine repairs, oil changes, and other automotive services. As Service Manager, Mr. Campbell was responsible for supervising the service area, taking service appointments, distributing work among service technicians, ordering parts, etc. Having been originally hired as a service technician himself, he also participated sometimes in some of the more physical service tasks, such as tire mounting and minor repair work, apparently on a daily basis. It was Graham Tire's written policy that employees were permitted to "work on personal vehicles . . . on non-company time, Monday evenings with the manager or shop foreman[']s approval and presence in the shop at the time that the work is being done." In practice, this policy was evidently extended also to days of the week other than Monday. Parts necessary for any repair work done on personal vehicles under this arrangement could be purchased from Graham Tire at cost plus 10%. Graham Tire was normally open to the public from 8:00 a.m. to 5:30 p.m., but employees were frequently required to stay on beyond 5:30 to stock tires and to perform other tasks. Mr. Campbell was paid on a salaried rather than an hourly basis.

On Tuesday October 28, 1997, apparently about mid afternoon, Mr. Campbell's stepdaughter, Amy Lyons, came to Graham Tire with a vehicle requiring repair. Mr. Campbell instructed Ms. Lyons to leave the vehicle for him to repair free of labor charges that evening. At some point during the day, Graham Tire employees were asked to stay on after 5:30 to move some tires from a storage facility to the retail store. Mr. Campbell's scheduled work at Graham Tire was completed late in the afternoon, and Mr. Campbell asked his superior, Store Manager Kevin Kidder, if he could be late to the tire-moving project in order to do the repair on Ms. Lyons' car. Mr. Kidder consented, and Mr. Campbell subsequently began work on Ms. Lyons' car. Mr. Campbell diagnosed the car's problem as a rattling pulley on the engine, and he ordered a replacement part from Arnold Motors. At about 5:15 p.m., while working at removing the rattling pulley from the engine of the car, which was on the hoist above him at the time, Mr. Campbell dropped a wrench. When he bent over to retrieve the wrench, he felt something "pop" in his low back.[1] He did not note any significant pain at the time, however, and continued his work on Ms. Lyons' car.

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[1] It was Graham Tire and its insurer's position at hearing that this incident occurred shortly after 5:30. Even while concluding that it did not occur in the course of Mr. Campbell's employment, Judge Johnson found expressly, in the context of his four-page Finding 3, that the incident occurred "around 5:15 p.m." Graham Tire and its insurer did not cross-appeal from Finding 3, which ultimately provided that Mr. Campbell's injury did not arise out of or occur in the course of his employment. They have, however, continued to assert in their brief that the injury may have occurred after 5:30 p.m. Noting that they were arguably uncompelled legally to appeal from the time-of-injury detail of Finding 5 in order to preserve the issue, in that they were not aggrieved by the overall finding's ultimate conclusion, cf. Gibbons v. Weyerhaeuser, 482 N.W.2d 480, 482-83, 46 W.C.D. 392, 396 (Minn. 1992), we adopt the specific finding as to time of day on our own motion only as supported by substantial evidence (see Footnote 3).

The invoice on the replacement part that Mr. Campbell had ordered from Arnold Motors was printed at 5:18 p.m., and the part was delivered shortly thereafter to Graham Tire, a short distance away. The part did not, however, match the defective part, and Mr. Campbell called several other parts suppliers to see if they stocked the correct item. Apparently about 5:40 p.m., Brad Cone, the manager at a NAPA parts store, came in to Graham Tire. Mr. Campbell explained the problem to Mr. Cone, and Mr. Cone took the defective part back to NAPA to try to match it. At 6:00 p.m., an invoice for the correct replacement part was printed out at NAPA, and Mr. Cone returned immediately thereafter to Graham Tire with the part. About that same time, Mr. Campbell answered a telephone call to Graham Tire, from a customer requesting emergency assistance with repairing the tire of a tractor that was blocking a road. A short while after that, Mr. Kidder evidently returned to Graham Tire from the tire warehouse to get a flashlight, and Mr. Campbell informed him of the emergency request. An employee other than Mr. Campbell was dispatched to do the job, and Mr. Kidder returned to the tire warehouse. Mr. Campbell returned to working on Ms. Lyons' car and completed the entire job just before 6:30 p.m.

Subsequent to October 28, 1997, Mr. Campbell developed increasingly severe low back pain traceable to his bending down to pick up the wrench while repairing his stepdaughter's car, and treatment ultimately included surgery for a herniated disc. On December 19, 1997, after informing Mr. Kidder of his ability to return to work, Mr. Campbell was advised that he was terminated for allegedly being repeatedly rude to customers. On December 24, 1997, Mr. Campbell filed a Claim Petition, alleging entitlement to ongoing temporary total disability and various medical benefits based on a work injury at Graham Tire on October 28, 1997. Mr. Campbell was forty-three years old on the date of his alleged work injury and was earning an average weekly wage of $526.92.

The matter came on for hearing on August 26, 1998, before Compensation Judge William R. Johnson. Issues at hearing included whether Mr. Campbell had sustained an injury to his low back on October 28, 1997, arising out of and in the course of his employment with Graham Tire. By Findings and Order filed October 26, 1998, Judge Johnson concluded that Mr. Campbell had sustained an injury to his low back on the date and time alleged but that it had not been an injury arising out of and in the course of his employment. Mr. Campbell appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (1996). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229

N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Id.

DECISION

The supreme court has indicated that "[t]he phrase 'arising out of' refers to the causal connection between employment and the injury whereas the phrase 'in the course of' refers to time, place, and circumstances of the accident." Voight v. Rettinger Transp., Inc., 306 N.W.2d 133, 136, 33 W.C.D. 625, 630 (Minn. 1981). Judge Johnson, in the present case, concluded that Mr. Campbell's low back injury on October 28, 1997, occurred neither in the course of Mr. Campbell's employment with Graham Tire nor arising out of that employment. We disagree with Judge Johnson's conclusion that the injury did not occur "in the course of" Mr. Campbell's employment, but we agree that the injury was not one "arising out of" that employment, and we affirm the denial of benefits on that basis.

In the Course Of

Under the facts of this case, the time-and-place issue as to whether Mr. Campbell's low back injury occurred "in the course of" his employment with Graham Tire is clearer and perhaps simpler than the issue as to whether that injury was one "arising out of" his employment. That the injury occurred at the place of Mr. Campbell's employment is uncontested. The issue as to whether the injury occurred during the hours of Mr. Campbell's work for Graham Tire is somewhat more complicated, and Judge Johnson's findings on the issue are not without ambiguity. At the beginning of his four-page Finding 3,[2] Judge Johnson found that Mr. Campbell "admits he sustained his injury after normal work hours." In his Reply Brief, Mr. Campbell contends that this is an incorrect statement of his testimony. It is true as a matter of record that, aside from the tire-moving project planned for after closing, Mr. Campbell's scheduled work for the day had been completed prior to his commencing work on his stepdaughter's car, and it is also a matter of record that he was paid on a salaried rather than an hourly basis, thus perhaps permitting a more flexible work schedule. It is also a matter of record, however, that Graham Tire was normally open for business from 8:00 a.m. until 5:30 p.m. We find persuasive Mr. Campbell's argument that, notwithstanding his salaried pay basis, as Service Manager he was not normally free to leave work until at least 5:30 p.m. and, implicitly, was not free to leave work prior to that time on the date of the injury at issue. Since, by Judge Johnson's finding, "[t]he employee injured himself around 5:15 p.m.," and given that Mr. Campbell was presumably obligated to stay at work each day until

[2] Most of the several different factual conclusions material to Judge Johnson's decision are dispersed within the single four-page context of Finding 3, which is more accurately an explanatory memorandum of applied law. Review of Judge Johnson's decision is complicated by the fact that specific facts basic and material to the decision are not more separately and deliberately established prior to their integration into an explanatory legal analysis.

at least 5:30 p.m., if not later, it was inconsistent and unreasonable for the Judge Johnson to conclude that Mr. Campbell was not "in the course of" his employment at the time of his injury on October 28, 1997. Therefore we reverse on this issue.[3]

Arising out Of

The issue as to whether Mr. Campbell's low back injury "arose out of" his employment is one requiring a more subjective analysis. While acknowledging that he was performing free labor on his stepdaughter's car at the time of his injury, the employee argued at hearing that such activity nevertheless arose out of his employment, essentially in that, at the time of his injury, he was doing the same kind of work as he was paid to do, and his exercising Graham Tire's permission to do that work for free was retaining customers and building goodwill for Graham Tire. It was Judge Johnson's conclusion that "the legal fiction of benefit to the employer based on increased employee-employer goodwill has largely been written out of the law by the repeal [in July 1983] of the 'liberal construction doctrine.'"[4] On that conclusion the judge found that "the employee has not shown a sufficient benefit to the employer from his working on his stepdaughter's car to justify extending workers' compensation coverage to such activities." We are not persuaded that it was either legally erroneous or factually unreasonable for Judge Johnson to draw this conclusion.

On the "arising-out-of" issue, Mr. Campbell argues essentially from three case law precedents, the first of which is Koktavy v. City of New Prague, 246 Minn. 550, 75 N.W.2d 774, 19 W.C.D. 297 (Minn. 1956). In Koktavy, a volunteer fireman's injury while setting off fireworks at a public savings bond rally was held to be one arising out of his employment as a fireman, although his work was at the request of the mayor and only with the consent of the fire chief, and although his work entailed the setting instead of the putting out of fires. The court in

[3] Notwithstanding Mr. Kidder's testimony that Mr. Campbell's injury may have occurred just after 5:30 p.m. instead of fifteen minutes prior thereto, we note that there is also substantial evidence to support the 5:15 finding--not just in Mr. Campbell's own testimony but also in the documentation of his replacement part orders with Arnold Motors and NAPA. Moreover, it remains a matter of record that the tire-moving work had been scheduled for all employees, including Mr. Campbell, to commence after 5:30 p.m. on the date at issue. Further still, Minnesota workers' compensation law allows certain reasonable flexibility as to what defines the beginning and the ending of an employee's work day. See, e.g., Hill v. Terrazzo Machine & Supply Co., 157 N.W.2d 374 (Minn. 1968).

[4] Prior to the enactment of Minn. Stat. § 176.001 (1983), effective July 1, 1983, the common law rule of "liberal construction" was applied to favor the interests of employees in all workers' compensation matters, on the premise that the Act "is highly remedial and humanitarian in purpose." See, e.g., Koktavy v. City of New Prague, 246 Minn. 550, 75 N.W.2d 774, 19 W.C.D. 297 (1956); Fisher v. Fisher, 226 Minn. 171, 32 N.W.2d 424, 15 W.C.D. 259 (1948); Hill v. Terrazzo Machine & Supply Co., 279 Minn. 428, 157 N.W.2d 374, 24 W.C.D. 511 (1968).

that case held,

> While generally the extent of an employer's business is determined by the nature of the business itself, an employer may enlarge or extend the scope of the employment, and, therefore, when an employee performs services in consequence of the existence of the employer-employee relationship and as incidental to such employment, he is within the protection of the Workers' Compensation Act.

Koktavy, 246 Minn. at 555, 75 N.W.2d at 778, 19 W.C.D. at 302. Judge Johnson distinguished Koktavy on grounds that, in the present case, "it was not the employer who expanded the scope of the employment, but the employee." Mr. Campbell argues that, by expressly permitting him to work on his stepdaughter's car, Graham Tire did "enlarge the scope" of his work activities. As Judge Johnson noted accurately, however, the employee in Koktavy was "asked" to perform the public fireworks duty, whereas Graham Tire only acquiesced in the employee's work for his stepdaughter. While it does appear that the Koktavy employee's immediate superior, the fire chief, similarly only "agreed to" rather than required Koktavy's service at the display, the mayor who requested the work was an active official of the same community that actually paid that employee's wages by their taxes. Even absent any consideration for the doctrine of liberal construction, it would be far more compelling to construe the direct beneficiary of Mr. Koktavy's injuring work, the whole town of New Prague, as an umbrella that included the New Prague fire department than it would be to construe the direct beneficiary of Mr. Campbell's injuring work, Ms. Lyons, as an umbrella that included Graham Tire. Given the express application of the liberal construction doctrine in Koktavy and the statutory inapplicability of it in the present case, the two cases are even more clearly distinguishable.

Mr. Campbell argues second from the case of Penke v. Everbloom Underglass (Sun Prairie, Inc., slip op. (W.C.C.A. Dec. 26, 1984). In that case, benefits had been awarded to a gardener who lived on the property on which he worked, who injured himself while washing his clothes in his employer's washer, during work hours and with his employer's permission, preparatory to joining the employer for dinner, at her invitation. In affirming the compensation judge's award in Penke, this court quoted the supreme court's statement in Scheppman v. T & E Service, Inc., 287 Minn. 183, 177 N.W.2d 306, 25 W.C.D. 138 (1970), that "[w]e have held that acts of an employee necessary to life, comfort, or convenience while at work, although personal to him and not technically acts of service, are incidental to the services, and an injury arising while in the performance of such acts is compensable." Scheppman, 287 Minn. at 185, 177 N.W.2d at 308, 25 W.C.D. at 139 (emphasis added). Mr. Campbell argues that "[t]he Employer ultimately has control over the Employee's activities during the working day" and that "[i]f the Employer allows an employee to engage in activities which may be personal to him during the work day, the Employer has thus expanded the scope of workers' compensation coverage through the control exercised by the Employer." We conclude, however, that, whereas washing clothes may well be construed as an act "necessary to life, comfort, or convenience," fixing the automobile of one's nondependent stepdaughter can hardly be construed as such an act. Moreover, that act in Penke

was one specifically undertaken to accommodate a particular and personal invitation by the employer that precipitated the mere permission to use the washer. We find Penke quite easily distinguishable from the present case.

Mr. Campbell argues finally from the case of Sandmeyer v. City of Bemidji, 281 Minn. 217, 161 N.W.2d 318, 24 W.C.D. 622 (1968). In that case, benefits had been awarded for an off-duty police officer who accidentally killed himself while engaged in approved but unofficial and unpaid target practice, partly for personal motives. In affirming the award, the court indicated that

> the statute does not require a showing that the activity giving rise to the injury was motivated solely by the employment relationship. It is enough if the desire to serve the employer's purposes was the dominant motive. Oestreich v. Lakeside Cemetery Assn., 229 Minn. 209, 38 N.W.2d 193[, 16 W.C.D. 26 (1949)]. The commission's finding that such a motive was uppermost in this case is, as we have seen, amply supported by the evidence.

Sandmeyer, 281 Minn. at 221, 161 N.W.2d at 320-21, 24 W.C.D. at 626-27 (emphasis added). Without citing other authority, Mr. Campbell contends that, in order to create a scope of coverage, it is enough that the activity of injury is "substantially related" to the employer's purposes. We presume that his reference is to the principle that an employee need not prove that his accident or exposure in the work place was the sole cause of his disability, only an appreciable or substantial contributing cause. See Roman v. Minneapolis Street Ry. Co., 268 Minn. 367, 129 N.W.2d 550, 23 W.C.D. 573 (1964); Salmon v. Wheelbrator Frye, 409 N.W.2d 495, 497-98, 40 W.C.D. 117, 122 (Minn. 1987). This principle, however, is a principle applicable to causation issues, or at best in-the-course-of issues, not arising-out-of-issues. In the present case, neither causation nor, any longer, time and date of the injury is at issue. Mr. Campbell argues also under Sandmeyer that "the Employee was working on a vehicle for a customer" "during working hours in an effort to remedy a mechanical problem" and that "[t]his description, in and of itself, satisfies the Employer's dominant purposes." Judge Johnson in effect concluded, however, that Mr. Campbell's "desire to serve the employer's purposes"[5] was not the dominant motive in his undertaking to repair his stepdaughter's car. We are not persuaded that that conclusion by the judge was unreasonable.[6]

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[5] Sandmeyer, 281 Minn. at 221, 161 N.W.2d at 320-21, 24 W.C.D. at 626.

[6] See also Olson v. Trinity Lodge No. 282, A. F. & A. M., 226 Minn. 141, 146, 32 N.W.2d 255, 258, 15 W.C.D. 251, 257 (1948), where the supreme court stated,

> If a movement on the part of an employe[e] is undertaken from a mixture of motives, the major motive or dominant purpose thereof, as a general rule, controls in determining whether an injury sustained in the course of such movement arises out of and in the course of his employment. . . . . An act is incidental to the

In his appeal from the "in the course of" portion of Judge Johnson's conclusion, Mr. Campbell argues fairly extensively from the Scheppman case cited above. We have already reversed Judge Johnson's decision on the in-the-course-of issue in Mr. Campbell's favor. However, to the extent that Mr. Campbell's in-the-course-of argument from Scheppman also touches on the arising-out-of issue, we will address it here in conclusion on the latter.

In Scheppman, the employee had been injured by carbon monoxide poisoning while working on his own car, with the employer's permission, in the service station in which he was employed. Mr. Scheppman had begun his work on his car an hour before his regular work hours ended, but his injury had occurred at least an hour after the end of his regular work hours. In a decision issued several years prior to statutory repeal of the liberal construction doctrine, the supreme court reversed the compensation judge's award of benefits to Mr. Scheppman, on grounds that his injury did not occur during the hours of his service to the employer and so did not occur in the course of his employment. In so holding, however, the supreme court reiterated, as also quoted above, that "acts of an employee necessary to life, comfort, or convenience while at work, although personal to him and not technically acts of service, are incidental to the service, and an injury arising while in the performance of such acts is compensable." Scheppman, 287 Minn. at 185, 177 N.W.2d at 308, 25 W.C.D. at 139. Then the court went on to acknowledge that "[c]ourts have extended this rule to say that an employee's personal work done with the employer's permission is incident to employment and therefore compensable" and that "[t]he commission has relied on several cases involving situations similar to the instant case," citing in follow-up two cases from other jurisdictions, Nebraska and New Hampshire. The court stated near its conclusion as follows:

> As we view the facts and circumstances here, it makes no difference that permission to use the employer's premises and tools to repair his car may be considered a part of [Mr. Scheppman's] compensation. This alone does not bring the injury within the scope of the Workmen's Compensation Act. The injury still has to occur during the hours of his service for his employer . . . . From then on, [Mr. Scheppman] was working for himself.

Scheppman, 287 Minn. at 186, 177 N.W.2d at 308, 25 W.C.D. at 141 (emphasis added). Although the employee here was ultimately denied benefits, this language in Scheppman raises a troublesome issue with regard to the case before us, particularly given the similarity of the factual situations. We conclude, however, that Judge Johnson's decision was neither clearly erroneous nor factually unreasonable even in light of Scheppman.

Initially, we must establish that the Scheppman court's statement that "[f]rom then on" - - i.e., after the end of his normal work day - - Mr. Scheppman was no longer working in the

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> employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.

course of his employment does not affirmatively declare, even by dicta, that his injury prior to that time was one arising out of his employment. Perhaps more importantly, the court's earlier observation that courts in other jurisdictions have extended coverage for personal acts "necessary to life, comfort, or convenience" to coverage for personal work done with the employer's permission falls well short of establishing such a liberalizing extension of the rule in Minnesota. Nor do we find any express holding of such an extension in any other Minnesota case. It is our conclusion that the determination as to whether Mr. Campbell's injury arose out of his employment activities remained a factual one, within the reasonable purview of the compensation judge, under applicable law not including such an extension.

In Finding 2, where he articulated the legal standard that he would be applying, Judge Johnson established that "[i]t is recognized in Minnesota that work-connected . . . injuries that occur on the premises during working time while the employee is attending to personal needs or comforts" may be compensable. As examples of personal activities that do not remove an employee from coverage while he is working for his employer, Judge Johnson listed "getting a drink of water, smoking, going to the washroom, and various other brief break activities to relieve personal discomfort" (emphasis added). In his concluding paragraph in Finding 2, after indicating that "Minnesota is much less willing to extend" coverage to an employee injured while performing actual work for his own benefit, Judge Johnson identified various employee-benefitting extensions described in Larson's Workers' Compensation Law as compensable, apparently in other jurisdictions, including activities performed with "employer permission or acquiescence." In the context of his lengthy Finding 3, however, Judge Johnson ultimately indicates his conclusion that the 1983 repeal of the "liberal construction" doctrine substantially limits such extensions. We conclude that that legal observation by Judge Johnson is accurate and that it was not unreasonable for him to conclude pursuant to it that Mr. Campbell "has not shown a sufficient benefit to the employer from his working on his stepdaughter's car to justify extending workers' compensation coverage to such activit[y]." Therefore we affirm Judge Johnson's denial of benefits. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.