JOYCE M. BOHLIN, Employee, v. ST. LOUIS COUNTY / NOPEMING NURSING HOME, SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 20, 2000

No. [REDACTED SSN]

HEADNOTES

ARISING OUT OF & IN THE COURSE OF. The employee failed to meet her burden of proving the injury "arose out of and in the course of" her employment, where the evidence established only that the employee was parked in the employer's parking lot and injured her back as she turned to exit her vehicle. On the facts of this case, in the absence of any evidence establishing some connection to the nature, obligations or incidents of the employee's particular employment, the compensation judge's findings must be reversed.

Reversed.

Determined by: Johnson, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: Gregory A. Bonovetz

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's finding that the employee sustained an injury arising out of and in the course of her employment. We reverse.

BACKGROUND

The facts in this case are undisputed. Joyce M. Bohlin, the employee, worked as a licensed practical nurse at the St. Louis County Nopeming Nursing Home. On June 26, 1998, the employee was scheduled to work from 11:00 p.m. to 7:00 a.m. The employee drove to work and parked her truck in the employee parking lot adjacent to the nursing home. Nursing home employees were instructed by the employer to park in that lot. The employee shut her vehicle off, engaged the parking brake and opened the driver's side door with her left hand. As she turned to exit the vehicle, she felt something "pinch" in her back. (T. 10-13.)

Initially, the employee's back was not painful. But, by the end of her shift at 7:00 a.m. the next morning, the employee testified she could barely move, so she went to St. Luke's Hospital emergency room for treatment.[1] (T. 11.) On July 2, 1998, the employee saw Dr. Richard M. Roach at Denfeld Occupational Medicine. On examination, Dr. Roach found tenderness and inflammation of the right sacroiliac ligament. The doctor prescribed medication and physical

[1] The St. Luke's Hospital records are not in evidence.

therapy. At some point the employee complained of pain down her right leg. An MRI scan was obtained that Dr. Roach concluded "demonstrate[d] no findings referable to the patient pain radiating down her right leg." The radicular symptoms eventually resolved, and the employee continued to take nonsteroidal anti-inflammatory medication and receive physical therapy. Dr. Roach last examined the employee on November 4, 1998, at which time she was still taking Indocin. Dr. Roach noted the employee was then able to do most of her work requirements but was unable to transfer patients or do heavy lifting. In a medical report dated November 10, 1998, directed to the employee's attorney, Dr. Roach stated "[t]he patient's sacroiliac problem started when she got out of her truck." Dr. Roach's November 10, 1998 report is the only medical evidence in the case other than the claimed medical bills. (Pet. Exs. 2, 3.)

The employee filed a claim petition seeking payment of $3,270.81 in medical expenses incurred for treatment of her back condition. The claimed medical expenses had been paid by the employer-sponsored health insurance carrier. The parties stipulated the medical care and treatment provided was reasonable and necessary. The case was heard by a compensation judge at the Office of Administrative Hearings. In a Findings and Order filed March 3, 2000, the compensation judge found there was no evidence suggesting the employee had a pre-existing low back condition prior to June 26, 1998, and found the incident of June 26, 1998 was an "unexplained," "neutral risk" injury. (Findings 6, 7.) The judge concluded the employee's injury was in the course of her employment because it occurred on the employer's premises, shortly before the start of the employee's work shift while the employee was in the process of attempting to report for work. Applying a positional-risk test, the judge also found the June 26, 1998 injury arose out of the employment. (Findings 8, 9.) Accordingly, the compensation judge ordered the self-insured employer to pay or reimburse the medical costs. The self-insured employer 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 (1992). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

A personal injury is defined as an "injury arising out of and in the course of employment." Minn. Stat. § 176.011, subd. 16. The "arising out of " requirement is a causation test although "not necessarily in the proximate cause sense." Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). For an injury to arise out of the

employment, there must be a causal connection between the employment and the injury. Lange v. Minneapolis-St. Paul Metro. Airport Comm'n, 257 Minn. 54, 99 N.W.2d 915, 21 W.C.D. 61 (1959). The requisite causal connection "exists if the employment, by reason of its nature, obligations or incidents may reasonably be found to be the source of the injury-producing hazard." Nelson v. City of St. Paul, 249 Minn. 53, 55, 81 N.W.2d 272, 275, 19 W.C.D. 120, 123 (1957). The burden of proving that a personal injury arose out of the employment is on the employee. Minn. Stat. § 176.021, subd. 1. The issue on appeal is whether the employee sustained that burden.

In the United States, and in Minnesota, the primary test for determining whether an injury arises out of the employment is the "increased risk" test. This test requires a showing that the "injury was caused by an increased risk to which the claimant, as distinct from the general public, was subjected by his or her employment." 1 A. Larson and L.K. Larson, Workers' Compensation Law, § 3.00 (1999). In Minnesota, the supreme court has stated, "[t]he 'arising out of' requirement refers to the causal connection between the employment and the injury. This requirement requires a showing of some hazard that increases the employee's exposure to injury beyond that of the general public." Kirchner v. County of Anoka, 339 N.W.2d 908, 911, 36 W.C.D. 335, 337 (Minn. 1983). The injury need not be peculiar to the employment, so long as the injury-producing risk or hazard has its origin or source in the employment. See Larson, § 3.00; Briemhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719, 15 W.C.D. 395 (1949).

The only evidence on the "arising out of " issue in this case is the testimony of the employee and the medical report of Dr. Roach. The employee testified her injury occurred as she was getting out of her truck which was parked on the employer's parking lot. The employee stated she turned off her engine, set the parking brake and then opened the driver's side door with her left hand. As she turned to exit the vehicle, she felt a pain in her back. The employee did not recall whether or not she actually stepped onto the parking lot prior to feeling the pain. However, she did testify she did not slip or fall on the parking lot. (T. 11-12, 15-17.) There is no evidence the parking lot was the cause of or contributed in any manner to the employee's injury. Dr. Roach did not identify any employment-related risk as the cause of the injury, but merely stated the employee's "sacroiliac problem started when she got out of her truck." (Pet. Ex. 3.)

The increased risk test requires the risk which causes the injury have its origin or source in the employment. In this case, the only connection between the employment and the injury was the fact that the employee's vehicle was parked on the employer's parking lot. It is clear from the employee's testimony, however, the parking lot was not the source of the injury-producing risk. There is no evidence the employee even set foot on the parking lot before her injury. The employee presented no evidence to prove she was subjected to any increased risk stemming from the employment. In fact, the employee failed to prove the employment was the source of any injury-producing risk or hazard whatever. Accordingly, under the increased risk test, the employee failed to prove her injury arose out of her employment. To prevail, therefore, the employee must establish compensability under a different test or theory.

In particular situations, some courts in the United States have applied a "positional risk" test. Under the positional risk test, an injury is compensable "if it would not have happened

but for the fact that the conditions or obligations of the employment put claimant in the position where he or she was injured." Larson, § 3.05. In other words, the injury occurred because the employment required the claimant to occupy what turned out to be a place of danger. This theory, according to Larson, supports compensation "in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations place the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." Larson, § 3.05.[2] The compensation judge here applied a positional risk test to conclude the employee's injury was one arising out of her employment.

The Minnesota Supreme Court has, on several occasions, been faced with the issue of whether an injury caused by a neutral risk was one arising out of the employment. These cases involve injuries which occurred both on and off the employment premises.

In cases involving a "neutral risk" occurring off the employment premises, the court has awarded compensation to employees under the so-called "street risk" doctrine.[3] In Bookman v. Lyle Culvert & Road Equip. Co., 153 Minn. 497, 190 N.W.984, 1 W.C.D. 213 (1922), the employee was struck by a car while crossing a street to deposit the employer's mail in a public mailbox, a duty required of her by the employer. The court held "an injury to an employee, engaged in his employer's service in a duty calling him upon the street, by what is usually called a street risk to which his work subjects him, arises as a matter of law out of his employment although others so employed, or the public using the streets, are subject to such risks." In Kennedy v. Thompson Lumber Co., 223 Minn. 277, 26 N.W.2d 459, 14 W.C.D. 353 (1947), the employee was injured while crossing a public street. Citing the liberal construction doctrine, the court found the employee, in his capacity as shop steward, was crossing the street for the purpose of telephoning the union to avert a threatened work stoppage. The court held the injury was a street risk and arose out of the employment. See also, Locke v. Steele County, 223 Minn. 464, 27 N.W.2d 285, 14 W.C.D. 370 (1947)("a risk is incidental to employment when it is connected with what an employee has to do in fulfilling his contract of service"); United Fire & Casualty Co. v. Maw, 510 N.W.2d 241 (Minn. Ct. App. 1994); Clausen v. Ryder Student Transp. Serv., 59 W.C.D.

[2] Larson divides the risks causing injury to an employee into three categories: (1) risks distinctly associated with the employment; (2) risks personal to the claimant; and (3) neutral risks. See Larson, § 4.00. The first category of risks comprise all of those types of injuries and occupational diseases that result from a hazard of the employment. These risks, Larson states, "fall readily within the increased risk test." Larson, § 7.10. The second category of risks are those totally unrelated to the employment because they are distinctly personal to the employee. Such risks are not compensable. Examples of personal risks are injury or death from natural causes or an assault by a sworn enemy of the employee motivated by personal animosity. The third category, "neutral risks" includes risks that are neither distinctly employment related nor distinctly personal in nature. Examples of neutral risks, according to Larson, are stray bullets, lightning or enemy bombs. Larson, § 4.03.

[3] "If the employment occasions the employee's use of the street, the risks of the street are the risks of the employment." Larson, § 6.04.

463 (W.C.C.A. 1999). In contrast, in Gibberd, the employee's death occurred on a public street as the result of a random assault. The court held the injury was not compensable because the risk was "totally unrelated to the employment activity on the [employer's] premises," and did not, therefore, arise out of and in the course of the employment. Gibberd at 783, 40 W.C.D. at 1054.

In the present case, the employee was not on a public street at the time of the injury. Nor was there any evidence the employee's injury was caused by a street risk or hazard. Accordingly, the street-risk doctrine is inapplicable in this case.

Other cases have raised the issue of the compensability of an injury to an employee caused by a neutral risk that occurred on the work premises. In these cases, Minnesota courts have applied the increased risk test, not a positional risk test. In State ex rel. Peoples Coal & Ice Co. v. District Court of Ramsey County, 129 Minn. 502, 153 N.W. 119, 17B W.C.D. 179 (1915), an ice delivery man was struck by lightning. The court affirmed an award of compensation because the employee's exposure to the risk of lightning was greater, as a result of his employment, than the normal risk to the general public and the "employment necessarily accentuated the natural hazard from lightning." See also, Lickfett v. Jorgenson, 179 Minn. 321, 229 N.W. 138, 6 W.C.D. 128 (1930). In Aumon v. Breckenridge Telephone Co., 188 Minn. 256, 246 N.W. 889, 7 W.C.D. 349 (1933), the employee was hit by a stray bullet while on the work premises. The court concluded the injury did not arise out of the employment because the risk was not peculiar to the work or "inhering in or incident to the employment, as distinguished from a risk or hazard to which all are equally exposed." In Foley v. Honeywell, Inc., 488 N.W.2d 268 (Minn. 1992), the employee was a victim of an assault in the employer's parking ramp. The court concluded the injury arose out of the employment because "the risk to her arising from any unsafe conditions in the ramp was associated with her employment, and her injury followed 'as a natural incident of the work'."

In each of the cases cited above, the risk causing the injury to the employee was specifically identifiable. That is, the specific cause of injury, such as an automobile, lightning or an assault, is readily apparent. Further, the risk of being struck by lightning, a stray bullet or a car or the risk of a random assault is truly neutral in that each is clearly neither a risk inherent in the employment nor a risk personal to the employee. In these rare cases, in which the injury-producing risk is truly neutral, application of the positional risk doctrine may have merit.[4] This is not such a case, however. Here, the employee neither identified any particular risk or hazard nor presented evidence as to the cause of her injury. Whatever the injury-producing risk in this case, the employee failed to prove an employment-related neutral risk. Accordingly, the "neutral risk" test is not applicable.

The final category of cases in which some courts have applied a positional risk test are those in which the specific circumstances of the injury are unknown.[5] The most common

[4] In such cases, either the employer or the employee must bear the loss. The fact that the neutral risk injury occurred while the employee was engaged in work-related activities might, as a matter of policy, suggest the employer bear the loss.

[5] See Larson, § 7.04.

examples are unexplained falls at work on a level surface or unexplained deaths at work. Larson, § 7.04. In Minnesota, while there are a number of cases involving "unexplained accidents," the supreme court has not addressed the issue of the compensability of an injury, the cause of which is truly unknown. In Stenberg v. Raymond Co-operative Creamery, 209 Minn. 366, 296 N.W. 498, 11 W.C.D. 415 (1941), for example, the employee fell at work, due to either a "tricky knee" or a "weak heart," conditions personal to the employee. As he fell, the employee struck his head on an iron typewriter stand, then fell face first on the concrete floor, causing a skull fracture resulting in his death. The court reasoned that although the weak knee or defective heart may have caused the fall, striking his head on the stand or floor was the cause of the employee's death. Thus, the injury "had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." Id. at 501, 11 W.C.D. at 420. See also, Barlau v. Minneapolis-Moline Power Implement Co., 214 Minn. 564, 9 N.W.2d 6, 12 W.C.D. 531 (1943). In O'Rourke v. North Star Chemicals, Inc., 281 N.W.2d 192, 31 W.C.D. 672 (Minn. 1979), the employee was found lying face down in a boxcar from which he had been removing bauxite. No one observed the accident. Medical evidence supported the conclusion the employee suffered a cerebral hemorrhage causing him to fall into the boxcar, resulting in death by suffocation from inhaling bauxite. The court noted the employee's "fall itself was caused by an idiopathic condition not shown to have any relation to his employment." Id. at 194, 40 W.C.D. at 675. However, since the employment placed the employee in a position which aggravated the effect of his fall, the court held his resultant death was causally related to and arose out of his employment.

Whether an injury caused by an unexplained accident is compensable is not an issue in this case. Here, the employee neither identified any risk nor presented any evidence as to the cause of her injury. The only medical testimony on the "arising out of" issue was Dr. Rouch's statement that the employee's "problem started when she got out of her truck." A failure to prove the cause of an injury does not make the injury unknown.[6]

The supreme court, in reviewing the compensability of different types of personal injuries, has consistently used the increased risk test as the test of whether there exists a causal relationship between the employment and the injury. To prove a Gillette injury, the employee must provide medical evidence of a causal connection between the ensuing disability and his or her ordinary work activities. Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200, 21 W.C.D. 105 (1960); Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994). Similarly, the courts have required specific evidence of a work connection to prove a stress-induced heart attack or ulcer is a compensable injury. See Egeland v. City of Minneapolis, 344 N.W.2d 597, 36 W.C.D. 465 (Minn. 1984); Aker v. State of Minnesota, 282 N.W.2d 533, 32 W.C.D. 50 (Minn. 1979). To prevail in an occupational disease case, the employee must prove a direct causal connection between the conditions under which the work is performed and the disease. Gray v. City of St. Paul, 250 Minn. 220, 84 N.W.2d 606, 20 W.C.D. 5 (1957). Even a disease of unknown origin may be a compensable personal injury provided there exists evidence of a causal

[6] Had the employee or a medical expert linked the employee's injury to the act of twisting while exiting the vehicle, the injury would not be unexplained. In such case, however, the arising out of issue would be decided on the increased risk test, not a positional risk or neutral risk test.

relationship between the disease and the employment. Boldt v. Jostens, Inc., 261 N.W.2d 92, 30 W.C.D. 178 (Minn. 1977).

The employee here presented evidence only that her injury occurred while her vehicle was parked on the employer's parking lot. The compensation judge found the injury was, therefore, compensable under a positional risk doctrine. Were this the law, every injury would be presumptively compensable so long as it occurred at work. Under such a standard, all an injured employee need prove is that the injury occurred while the employee was on the work premises. The employer would then be obligated to introduce evidence to rebut the presumption of compensability. Such a result would remove from the employee proof of the "arising out of and in the course of" requirement of Minn. Stat. § 176.011, subd. 16, and place the burden of proof on the employer. This is contrary to Minn. Stat. § 176.021, subd. 1 and 1a, which places on the employee the obligation to prove, by a preponderance of the evidence, that the injury arose out of and in the course of the employment.

The compensation judge found controlling the case of Duchene v. Aqua City Irrigation, 58 W.C.D. 223 (W.C.C.A. 1998). We do not agree. The Duchene case does not support the unqualified application of a positional risk test. Rather, whether there exists the requisite causal connection between the work activities and the disability is a question of fact. See Otto v. Midwest of Cannon Falls, 59 W.C.D. 25 (W.C.C.A. 1999); Rondeau v. Metropolitan Council, 58 W.C.D. 338, 342 (W.C.C.A. 1998). As the supreme court observed in Gibberd: "We have recognized that no one comprehensive definition can be fashioned to fit all cases and that each case must to a great extent 'stand on its facts.'" Id, at 780, 40 W.C.D. at 1047.

To establish the necessary work-connection, the employee must prove the injury both "arose out of" the employment and "in the course of" the employment. The phrase arising "in the course of" employment refers to the "time, place *and circumstances* of the incident causing the injury." Gibberd, id. (emphasis added). Thus, a compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. Larson, ch. 20 (1999). An activity is "in the course of employment" if it occurs while the employee is fulfilling work duties or is engaged in activities reasonably incidental to his or her particular employment. See Rondeau at 344; Larson, § 21.06.

Although the "arising out of " and "in the course of" requirements express two different concepts, in practice these requirements are not independent, but "are elements of 'a single test of work-connection.'" United Fire & Cas. Co. at 243 (citing A. Larson, Workmen's Compensation for Occupational Injuries & Death, § 29.00 (1993)). Larson notes that in any given case, a certain minimum level of work-connection must be established. Thus, if the "course" test is weak but the "arising" test is strong, the necessary minimum quantum of work-connection will be met, as it is also if the "arising" test is weak and the "course" factor is strong. But if both the "course" and "arising" elements are weak, the minimum connection to the employment will not be met. Larson, § 29.01.

Larson observes that in a case involving a "borderline course-of employment activity," such as personal comfort or going to and from work, or a case with a weak "arising" element" such as a positional risk case or unexplained fall or other neutral risk case, the causal connection is weak since the injury either does not involve the direct performance of job duties, or the source of the injury is not distinctly associated with employment conditions as such, but is tied to the employment only by the fact that the employment placed the employee in the position where he or she was injured. Larson, § 29.01.

An example of this kind of work-connection test can be seen in the Gibberd case, which involved both a weak "arising out of" element (a random shooting/assault neither clearly personal or work-related) and a weak "in the course of" element (returning to work after an off-premises meal break). Given such circumstances, the supreme court declined to find the injury compensable since "there exists nothing but the most attenuated nexus between the incident and the employment." Gibberd at 783, 40 W.C.D. at 1054. In Duchene, although the "arising out of" element was weak (unexplained knee injury),[7] the "course" connection was strong. Meal breaks on the work premises fall within the personal comfort doctrine, and have long been recognized as an activity reasonably incident to, and part of, the work day, therefore, a "work activity." See, e.g., Gibberd at 781-82, 40 W.C.D. 105-052; Larson §§ 21.01, 21.02. In Duchene, the employee was engaged in an activity recognized, by case law, as incidental to the employment (an on premises lunch break), at the time of his employment (the middle of the work day during paid work time), on the work site (a remote work site where the employee's presence was required as part of his work activities.) Thus, "on the facts of [the] case," the court concluded a sufficient minimal work connection had been established. Duchene at 232-33.

Here, however, the only connection to the employment is the fact that the injury occurred while the employee was in her car, parked on the employer's parking lot, shortly before the start of her work shift. The mechanism of the injury is unknown. The sole medical evidence is Dr. Rouch's statement that the "problem started when she got out of her truck." The employee failed to establish any risk or hazard arising from the nature, obligations or incidents of the employment. The "arising out of" element is, therefore, extremely weak.

The "in the course of" element is also weak. Although the requirements of time and space are met, the "circumstances" provide only "the most attenuated nexus" between the injury and the employment. The compensation judge found "the employee was in the process of attempting to report for work," and concluded she was, therefore, engaged in "an activity incident to her employment." We disagree. The employee's activities at the point of injury are akin to activities incident to coming to or going from work. As a general rule, injuries sustained while coming to or going from work are not compensable. Swanson v. Fairway Foods, 439 N.W.2d 722, 41 W.C.D. 1010 (Minn. 1989). When a line is drawn, there are always cases very close to each side of the line. No absolute rule can be derived, since there are too many factual variables that could affect the result. See Larson, § 13.01[1]. Here, nothing about the employee's activities distinguish them from activities engaged in by the general public that drives to work. The vehicle

[7] In Duchene, the employee's medical opinion evidence, although extremely limited, did indicate the knee injury was causally related to the employment.

must be parked and exited from before reporting to or beginning work. In this case, there is nothing that connects the employee's activities at the time of the injury to the requirements, duties or incidents of her particular employment. In the absence of some "minimal nexus to the employment," we can only conclude that the employee failed to establish that her injury "arose out of and in the course of" her employment. The award of benefits must, accordingly, be reversed.