Missouri Court of Appeals

Southern District

Division Two

GARY BOOTHE, JR.,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	No. SD36408
	)	Filed: December 29, 2020
DISH NETWORK, INC.,	)	
	)	
Employer-Respondent.	)	

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

REVERSED AND REMANDED

Gary Boothe (Boothe), an installer for DISH Network, Inc. (Employer), was injured in a single-car accident in the DISH van he was driving on the way to his first job of the day. Boothe choked on a breakfast sandwich, blacked out, and crashed into a short pillar on the side of the highway. Employer denied coverage for Boothe's injuries on the basis that Boothe failed to show his injuries arose "out of and in the course of his employment" under § 287.020.3(2).[1] The Labor and Industrial Relations Commission (Commission) agreed, concluding that the "risk source" of Boothe's injuries was his "decision to eat breakfast while driving" – a "risk unrelated to the employment" to which Boothe "would

[1] All statutory references are to RSMo (2016).

have been equally exposed outside of and unrelated to the employment in normal nonemployment life." § 287.020.3(2)(b).

Boothe presents four points on appeal, the third of which is dispositive. Point 3 contends the Commission misapplied the law in concluding that Boothe's injuries did not arise out of and in the course of employment because the "risk source directly leading to Boothe's injuries [was] the inherent road and driving conditions of his employment[.]" For the reasons that follow, we agree. We therefore reverse and remand for further proceedings consistent with this opinion.

Standard of Review

On appeal, this Court reviews decisions by the Commission to ensure they are "supported by competent and substantial evidence[.]" MO. CONST. art. V, § 18. The Commission's decision will only be disturbed if: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award. § 287.495.1.

Decisions involving statutory interpretation, however, are reviewed *de novo*. ***Spradling v. SSM Health Care St. Louis***, 313 S.W.3d 683, 686 (Mo. banc 2010). "When the relevant 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." ***Miller v. Missouri Highway & Transp. Comm'n***, 287 S.W.3d 671, 672 (Mo. banc 2009). Further, the workers' compensation laws are to be strictly construed. § 287.800.1; ***Robinson v. Loxcreen Co., Inc.***, 571 S.W.3d 247, 249 (Mo. App. 2019). "The provisions of a legislative act must be construed and considered together and, if possible, all provisions must be harmonized and every clause given some meaning." ***Wollard v. City of Kansas***

City, 831 S.W.2d 200, 203 (Mo. banc 1992). "The legislature is presumed not to enact meaningless provisions." ***Id***.; ***Dickemann v. Costco Wholesale Corp.***, 550 S.W.3d 65, 68 (Mo. banc 2018). As the workers' compensation claimant, Boothe bore the burden of proof to show that his injury was compensable. *See* ***Johme v. St. John's Mercy Healthcare***, 366 S.W.3d 504, 509 (Mo. banc 2012).

Factual and Procedural Background

The relevant facts are not in dispute. Boothe worked as a service technician and had been with Employer since 2006. Boothe drove a company van to make service calls. After work, he took the van to his home near Licking, Missouri. His service territory was bordered by four towns: St. Clair; Potosi; Iberia; and Richland. Other than Interstate 44, Boothe drove on two-lane state highways and county roads leading to customers' homes. Boothe drove and worked this route by himself.

Boothe worked Sundays through Wednesdays. On those days, Employer required Boothe to check in between 7:10 and 7:15 a.m. to obtain his route for the day, including a list of equipment required for the different jobs of the day. Boothe then had fifteen minutes to load the van with required equipment. Employer expected Boothe to leave his home by 7:35 a.m. so that he could arrive at his first assignment near 8:00 a.m.

On the morning of Sunday, July 23, 2017, Boothe checked his work schedule at 7:15 a.m. as normal and learned that his first appointment was in Plato, Missouri, approximately 30-45 minutes away on Highway 32. Boothe started driving around 7:26 a.m. After traveling about six miles from home, Boothe stopped at a convenience store and purchased two packs of cigarettes, a soda, and a breakfast sandwich. Boothe left the store around 7:41 a.m. and was about 23-24 miles from Plato. At 7:47 a.m., within a mile after continuing his trip toward Plato, Boothe choked on his breakfast sandwich, blacked

out, and crashed into a short pillar that lined a residential driveway near the side of Highway 32. Inside the van, Boothe's body impacted a pole located in the center of the van. Boothe sustained injuries primarily to his back and neck.[2]

Employer had a safety rule prohibiting an employee from eating or drinking while driving. Boothe knew about this safety rule. Employer had given Boothe a warning in November 2014 against distracted driving, including eating while driving.

Boothe filed a workers' compensation claim seeking compensation for past and future medical treatment and disability. Insofar as relevant here, the Administrative Law Judge (ALJ) determined that: (1) the van accident was the prevailing factor in causing Boothe's injuries; (2) the "risk source … was having to travel on a rural highway on a strict timeline in a DISH van"; and (3) Boothe, therefore, established his injuries arose out of and in the course of his employment. The ALJ awarded benefits, subject to a 30% penalty, based upon Boothe's violation of a safety rule by eating his breakfast while driving to his first appointment. Employer appealed to the Commission, challenging only the ALJ's "risk source" determination. In a split 2-1 decision, the Commission reversed the ALJ award. The Commission determined that "the risk source, or the action that posed this inherent risk of injury in this matter was [Boothe's] decision to eat breakfast while driving." The Commission further determined that this risk was unrelated to his employment, finding "[t]here was no aspect of [Boothe's] work that required him to eat breakfast while driving. In fact, [E]mployer prohibited [him] from eating and drinking while driving." The

[2] According to medical records, Boothe suffered "cervical-thoracic injury, lumbar strain, concussion, [and] right flank and chest contusions" as the result of his single-van accident.

Commission therefore concluded that Boothe did not establish his injuries arose out of and in the course of employment and denied Boothe's claim. This appeal followed.

Discussion and Decision

Under Missouri workers' compensation law, an employer "shall be liable, irrespective of negligence, to furnish compensation … for *personal injury* ... of the employee by *accident ... arising out of and in the course of the employee's employment*." § 287.120.1 (italics added). The terms "injury" and "personal injuries" are defined to mean "violence to the physical structure of the body[.]" § 287.020.3(5). "Accident" is defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." § 287.020.2. Further, for an injury to be compensable, it must arise "out of and in the course of ... employment pursuant to section 287.020.3(2)." ***Johme***, 366 S.W.3d at 509. Section 287.020.3(2) provides that:

> 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.

Id. (italics added).[3] "[I]t is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is only compensable if it is shown to have resulted from a hazard or risk to which the

[3] "'**The prevailing factor**' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." § 287.020.3(1) (bold emphasis in original).

employee would not be equally exposed in 'normal nonemployment life.'" ***Johme***, 366 S.W.3d at 511.

Here, Employer did not challenge the ALJ's determination that Boothe satisfied the first requirement under subsection (a) of § 287.020.3(2). To be clear, Boothe established that the *accident* – the van accident – is the prevailing factor in causing his *injuries* – to his neck and back – the same resulting medical conditions and disability for which he sought compensation. *See* ***id***. The issue on appeal is instead confined to the application of subsection (b) of § 287.020.3(2). *See* ***Johme***, 366 S.W.3d at 510. Under this framework, we turn to the legal issue presented by Boothe's third point.

Point 3 contends that the Commission misapplied § 287.020.3(2)(b) in concluding Boothe's injuries did not arise out of and in the course of his employment. According to Boothe, the "risk source directly leading to [his] injuries [was] the inherent road and driving conditions of his employment[.]"[4] Based on this premise, Boothe argues that the Commission misapplied the law in concluding that the "risk source" was his "decision to eat breakfast while driving." We agree.

"For an injury to be deemed to arise out of and in the course of the employment under section 287.020.3(2)(b), the claimant employee must show a *causal connection* between the injury at issue and the employee's work activity." ***Johme***, 366 S.W.3d at 510 (italics added); ***Gleason v. Treasurer of State of Missouri–Custodian of Second Injury Fund***, 455 S.W.3d 494, 499 (Mo. App. 2015). In determining the "causal connection," this Court has applied a two-part test. ***Gleason***, 455 S.W.3d at 499. This test "first requires

[4] Boothe's point lists such conditions to include "the narrow highway, tight work schedule, proximity of the concrete pillar to the highway" and the pole in the van "that Boothe impacted."

identification of the risk source of a claimant's injury, that is, identification of the *activity that caused the injury*, and then requires a comparison of that risk source or activity to normal nonemployment life." ***Id***. (italics in original).

With respect to the first test of identifying the risk source, we agree with Boothe that the "activity that caused the injury" to Boothe's back and neck was driving and crashing the van. While choking caused the van accident, the van accident caused Boothe's injuries. A similar issue involving driving was raised in ***Taylor v. Contract Freighters, Inc.***, 315 S.W.3d 379 (Mo. App. 2010). There, the claimant coughed and his 18-wheeler went off the road causing his injuries. ***Id***. at 380-81. The Commission denied benefits, but this Court reversed. ***Id***. at 383. As an initial matter, this Court found that coughing did not cause the claimant's injuries:

> The injury, as defined by section 287.020.3(5), was the "violence to the physical structure of the body." The cough did not cause the physical violence to the body structure. Furthermore, an accident is defined as an "unexpected traumatic event or unusual strain identifiable by time and place of occurrence ... caused by a specific event during a single work shift." Section 287.020.2. The cough was not an unexpected traumatic event or unusual strain identifiable by time and place of occurrence. The truck accident was the unexpected traumatic event. The truck accident caused the violence to the body structure.

Id. at 381. We reach the same conclusion here. Choking did not cause Boothe's injuries to his back and neck. The van accident was the unexpected traumatic event. The van accident caused "the violence to the body structure." ***Id***.; *see* §§ 287.020.2, 287.020.3(5).[5] We find further support for our conclusion in leading cases from our Supreme Court

[5] The ***Taylor*** court went on to determine that "there was no evidence that [the claimant's] cough was an idiopathic condition as defined under the workers' compensation law" to render his claim not compensable. ***Taylor***, 315 S.W.3d at 381; § 287.020.3(3). There is no claim here that Boothe suffered from an idiopathic condition.

identifying the "risk source" as the immediate cause of injury. *See, e.g.*, ***Johme***, 366 S.W.3d at 511 (while making coffee at work, the "risk source," that is to say, the activity that caused the injury, was "turning and twisting [an] ankle and falling off [the claimant's] shoe"); ***Miller***, 287 S.W.3d at 674 (while walking toward a work truck on the job, the "risk source" was "walking on an even road surface"); *see also* ***Annayeva v. SAB of TSD of City of St. Louis***, 597 S.W.3d 196, 200 (Mo. banc 2020) (identifying risk of slipping in hallway at school where the claimant taught); ***Schoen v. Mid-Missouri Mental Health Ctr.***, 597 S.W.3d 657, 660 (Mo. banc 2020) (identifying walking-related risk of accidental tripping).

With respect to the second test, comparing the "risk source or activity" of driving "to normal nonemployment life[,]" we conclude Boothe established he was not equally exposed to driving risks in nonemployment life. *See* ***Gleason***, 455 S.W.3d at 499; *see, e.g.*, ***Taylor***, 315 S.W.3d at 380-81 (as an "over-the-road trucker" injured in an accident while driving on the job, his injuries did not come "from a hazard or risk unrelated to the employment to which [the claimant] was equally exposed outside of and unrelated to the employment in normal non-employment life"). Here, there is no dispute that Boothe drives extensively as part of his employment. *See, e.g.*, ***Taylor***, 315 S.W.3d at 381. Further, the undisputed evidence on the issue was that on Boothe's days off, he does not maintain the travel schedule that he has on the job, and he is often home pursuing his hobby of restoring old cars. Because Boothe showed he was not equally exposed to driving risks in his nonemployment life, he established the requisite "causal connection between the injury at issue and the employee's work activity." ***Johme***, 366 S.W.3d at 510.

Thus, by satisfying both requirements of the two-part test, Boothe established that his injuries do "not come from a hazard or risk unrelated to the employment to which [he]

would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." § 287.020.3(2)(b). We are mindful that because workers' compensation laws must be strictly construed, so must be this exclusion. *See* § 287.800.1; ***Johme***, 366 S.W.3d at 510. Because Boothe satisfied both subsections (a) and (b) of § 287.020.3(2), Boothe met his burden of showing that his injuries arose "out of and in the course of" his employment. ***Id***.

Employer nevertheless argues that a "violation of a company rule, such as doing prohibited work or engaging in an activity personal to the employee may be such conduct as to take an employee outside the course of employment[,]" relying on ***Fowler v. Baalmann, Inc.***, 234 S.W.2d 11 (Mo. banc 1950). This argument lacks merit for two reasons.

First, Employer's reliance on ***Fowler*** is misplaced. In ***Fowler***, the employer specifically prohibited the employee, an instructor pilot, from flying a plane the night of a scheduled flight due to bad weather in the forecast. ***Id***. at 16. The employee, however, disobeyed and was killed when he flew the plane in a rainstorm. ***Id***. Our Supreme Court affirmed the denial of benefits, holding that the employee committed a voluntary act because the "prohibition which the employer laid down in this case (the direct order cancelling the flight) goes deeper into the relationship of the parties than any mere rule, for it severed utterly and terminated completely the employer-employee relationship for the day." ***Id***. at 17. The Court went on to clarify "these facts do <u>not</u> present an instance of the failure of [the employee] to obey any reasonable rule adopted by [the employer]." ***Id***. (emphasis added). Here, this case is not only factually distinguishable from ***Fowler***, but presents the very issue the ***Fowler*** court did not decide – the failure of an employee to obey

a "reasonable rule adopted" by an employer, such as the safety rule prohibiting eating while driving.

Second, violation of a safety rule is specifically addressed in § 287.120.5. That subsection of the statute states:

> Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

Id. "Section 287.120.5 permits the commission to reduce a claimant's compensation award by at least twenty-five percent, but not more than fifty percent, if the claimant's work-related injury was caused by his or her failure to obey any reasonable work safety rule adopted by the employer." ***Greer v. SYSCO Food Services***, 475 S.W.3d 655, 672 (Mo. banc 2015). Employer's general argument that Boothe's violation of the safety rule takes him outside the course of employment would render § 287.120.5 meaningless. "The legislature is presumed not to enact meaningless provisions." ***Wollard***, 831 S.W.2d at 203; ***Dickemann***, 550 S.W.3d at 68; *see also* § 287.120.1 (employer's liability exists "irrespective of negligence" by employee).[6]

[6] In a related argument, Employer asserted that "[t]hough there was a violation of a safety rule, that is not why the risk source was personal, not arising from work." Employer clarified that it is primarily arguing that the risk source did not "arise out of" Boothe's employment because the risk was unrelated to his work; "that his work did not cause him to need to eat a breakfast sandwich or to have choked on it." As previously established, the activity that caused Boothe's injuries was not choking, but driving and crashing into the concrete pillar.

In sum, the Commission misapplied the law by identifying the risk source – the activity that caused Boothe's injuries – as his decision to eat breakfast while driving. *See, e.g.*, ***Johme***, 366 S.W.3d at 511 (Commission erred in focusing on claimant's activity of making coffee; "evidence did not link her act of making coffee as the cause of her injury"). Boothe satisfied his burden of showing his injuries arose out of and in the course of his employment. § 287.020.3(2); ***Johme***, 366 S.W.3d at 509. The Commission misapplied the law in concluding otherwise. Point 3 is granted. The Commission's final award denying compensation is reversed, and the cause is remanded to the Commission for further proceedings consistent with this opinion.

JEFFREY W. BATES, C.J. – OPINION AUTHOR

DANIEL E. SCOTT, P.J. – CONCURS IN SEPARATE CONCURRING OPINION

DON E. BURRELL, J. – DISSENTS IN SEPARATE OPINION

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CONCURRING OPINION

Advocacy predictably leads to parsing risk sources ever more finely; *e.g.*, "walking down steps while wearing work boots and carrying a work-required helmet,"[1] or the distinction between making coffee vs. doing so with a large commercial coffee-maker.[2] Although we split coarser hairs here, and reasonable minds still can differ, I think the majority opinion makes the accurate choice.[3]

Driving, whether or not one also is eating, poses the risk of crash-related injuries. By contrast, eating poses similar risks only when one also drives or undertakes other crash-risk activity. The *sine qua non* for Boothe's claimed injuries, therefore, was driving, not eating. *See* ***Taylor v. Contract Freighters, Inc.***, 315 S.W.3d 379 (Mo.App. 2010), discussed in the principal opinion. I concur.

DANIEL E. SCOTT, P.J. – CONCURRING OPINION AUTHOR

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[1] ***Pope v. Gateway to W. Harley Davidson***, 404 S.W.3d 315, 320 (Mo.App. 2012).

[2] ***Johme v. St. John's Mercy Healthcare***, No. ED96497 & dissenting opinion (Mo.App. Oct. 25, 2011), prior to transfer and superseding supreme-court opinion, 366 S.W.3d 504 (Mo. banc 2012).

[3] I would think differently had Boothe choked to death or claimed choke-related injuries.

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APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

DISSENTING OPINION

I respectfully dissent. For reasons consistent with those set forth by the Commission in its "**FINAL AWARD DENYING COMPENSATION**[,]" I conclude that Gary Boothe ("Boothe") was not entitled to receive workers compensation benefits because the source of risk that caused his injuries was eating a breakfast sandwich – "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." *See* section 287.020.3(2)(b).[1]

As noted in the principal opinion, the relevant facts are not in dispute. Boothe was eating a breakfast sandwich while driving to his first job of the day. Boothe choked on the sandwich and lost consciousness. Without a conscious driver to control it, Boothe's work

[1] All statutory references are to RSMo 2016.

van left the roadway, and Boothe suffered additional physical injuries when the van crashed into a short pillar located on the side of the highway.

As the claimant, Boothe bore the burden of proving that his injuries were compensable. *See* ***Johme v. St. John's Mercy Healthcare***, 366 S.W.3d 504, 509 (Mo. banc 2012). DISH Network, Inc. ("Employer") contested the ALJ's decision to award benefits solely on the ground that Boothe's injuries did not arise "out of" his employment. In other words, Employer did not deny that Boothe's injuries occurred *while* he was at work or that the accident was the primary cause of his injuries. *See* section 287.020.3(2)(a). Employer claimed only that eating the breakfast sandwich was unrelated to Boothe's employment and was a risk to which he "would have been equally exposed outside of and unrelated to the employment in normal nonemployment life" – a contention that, if true, would foreclose an award of benefits. *See* section 287.020.3(2)(b).

I reject the principal opinion's conclusion that the "risk source directly leading to Boothe's injuries [was] the inherent road and driving conditions of his employment[.]" Boothe characterized such conditions as including "the narrow highway, tight work schedule, proximity of the concrete pillar to the highway" and the pole in the van "that Boothe impacted." With the possible exception of a "narrow highway," this list strikes me as rather specific hazards that are not "inherent" to driving; I would identify such inherent hazards as dangerous roadway conditions and negligent (or reckless) drivers. In any event, "eating" would not make it onto either list.

Finally, I also disagree with the principal opinion's assertion that "[w]hile choking caused the van accident, the van accident caused Boothe's injuries." In my view, this artificially splits the chain of events that produced Boothe's various injuries. As the

principal opinion correctly notes, the terms **"injury"** and **"personal injuries"** are defined in the workers compensation code to mean "violence to the physical structure of the body[.]" Section 287.020.3(5). **"**[**A**]**ccident"** is defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." Section 287.020.2. In my view, those conditions were met when the unexpected, specific act of choking on the breakfast sandwich created an objective symptom of "blacking out." That blackout resulted in the now-uncontrolled van leaving the roadway, and Boothe suffered additional personal injuries when the van came to a sudden stop by crashing into the pillar.

For all of these reasons, I would affirm the Commission's decision denying compensation.

DON E. BURRELL, J. – DISSENTING OPINION AUTHOR