RHONDA CLARK, Claimant-Respondent,

v.

DAIRY FARMERS OF AMERICA, Employer-Appellant.

No. SD34826.

Court of Appeals of Missouri, Southern District, Division One.

Filed January 25, 2018.

Appeal from the Labor and Industrial Relations Commission.

Affirmed.

MARY W. SHEFFIELD, P.J. — OPINION AUTHOR, GARY W. LYNCH, J. — CONCURS, and DON E. BURRELL, J. — DISSENTS IN SEPARATE OPINION.

MARY W. SHEFFIELD, P.J.

This appeal involves a workers' compensation claim filed by Rhonda Clark ("Claimant") against Dairy Farmers of America, Inc. ("Employer"). The Labor and Industrial Relations Commission ("the Commission") awarded compensation, and Employer appeals. Employer contends that the Commission erroneously applied the term "accident" as it appears under sections 287.020[1] and 287.120 of The Workers' Compensation Law in determining Claimant suffered a compensable injury by accident. Within the same point on appeal, Employer additionally asserts that the Commission erred under section 287.495.1 because the facts found do not support the award. We disagree with the arguments Employer raises and affirm the award of the Commission.

Factual and Procedural Background

Claimant began work in cheese production for Employer in May 2011. The next month, she suffered a fractured rib while performing her work duties. Claimant's job involved "turning down the ends" of a cheese mixture in large metal vats. Each vat "is like a huge table" with a mixer in the top. While the mixture cured, Claimant had to keep it from turning "hard, like a block of cheese," at the edges of the vats. That required using a shovel to bring in "the ends so that the mixer part could get all parts of the cheese." Claimant did that job eight hours a day, five days a week.

While shoveling the cheese mixture during a normal workday, Claimant felt a painful pop in the right side of her ribcage and stopped working because she was unable to lift her arm. The following day, Claimant visited the emergency room and diagnostic testing revealed not only a fractured rib but also a lytic lesion[2] on the bone "pretty close" to the spot where the fracture occurred. Further tests revealed that the lesion was Langerhans Cell Histiocytosis ("LCH"), a rare malignancy which can weaken a bone "to the point that it can fail under a force that is less than

normal." Claimant subsequently underwent radiation therapy, improved, and is no longer undergoing treatment.

Claimant reported her injury to the Division of Workers' Compensation. In the hearing, the administrative law judge ("ALJ") reviewed evidence regarding medical causation of the fracture. Claimant's doctor, Dr. Mullins, expressed the opinion that the force of Claimant's work was the prevailing cause of the fracture. He opined that "the type of work she did, utilizing a shovel, . . . [was] sufficient enough to cause a rib fracture."[3]

The ALJ denied compensation. Claimant appealed, and after review, the Commission reversed the ALJ's decision. The Commission concluded that Claimant "suffered a compensable injury by accident" and concluded Employer was responsible for past medical expenses and permanent partial disability benefits.

Specifically, the Commission held that Claimant satisfied each of the statutory criteria for an accident as set forth under Chapter 287, that the accident was the prevailing factor causing Claimant's injury, and that the injury arose out of and in the course of Claimant's employment. In determining whether Claimant suffered an accident for purposes of the statute, the Commission found the testimony of Dr. Mullins to be most persuasive. This appeal followed.

Standard of Review

"In reviewing a workers' compensation final award, `we review the findings and award of the Commission rather than those of the ALJ.'" *Pruett v. Federal Mogul Corp.*, 365 S.W.3d 296, 303 (Mo. App. S.D. 2012) (quoting *Birdsong v. Waste Mgmt.*, 147 S.W.3d 132, 137 (Mo. App. S.D. 2004)). This Court reviews decisions by the Commission to ensure they are "supported by competent and substantial evidence." Mo. Const. art. V, § 18 *quoted in White v. ConAgra Packaged Foods, LLC,* No. SC 96041, 2017 WL 6460352, at *2 (Mo. banc Dec. 19, 2017). Under section 287.495.1, 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. *White,* 2017 WL 6460352, at *2.

"[W]e defer to the Commission on issues involving the credibility of witnesses and the weight to be given to their testimony." *Pruett,* 365 S.W.3d at 304 (quoting *Pavia v. Smitty's Supermkt.*, 118 S.W.3d 228, 234 (Mo. App. S.D. 2003)). In contrast, "[d]ecisions involving statutory interpretation . . . are reviewed *de novo.*" *White,* 2017 WL 6460352, at *2. The determination of whether an incident was a compensable accident under the Workers' Compensation Law is a question of law that appellate courts review *de novo. Hedrick v. Big O. Tires,* 522 S.W.3d 919, 921 (Mo. App. S.D. 2017).

Analysis

The crux of Employer's argument is that Claimant did not suffer an accident under the statute. In its point relied on, Employer contends:

> The Labor and Industrial Relations Commission erred by determining that [Claimant] "suffered a compensable injury by accident," because

> there was no accident as the Workers' Compensation Act defines it, but the Commission misapplied the Act and therefore the facts that it found do not support the award, an error reviewable under § 287.495.1, in that the Commission found that the injury itself was the "unexpected traumatic event" that constitutes the first element of an accident under § 287.020.2, so that [Claimant] could not have had the accident until she had the injury but conversely could not have had the injury until she had the accident.

"Under section 287.120.1, a claimant seeking workers' compensation benefits first must show that the `personal injury' of an employee was caused by an `accident.'" *White,* 2017 WL 6460352, at *2. "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." § 287.020.3(1). An accident "for purposes of section 287.120.1 is: (a) `an unexpected traumatic event or an unusual strain;' (b) `identifiable by time and place of occurrence;' (c) `producing . . . objective symptoms of an injury;' and (d) `caused by a specific event during a single work shift.'"[4] *White,* 2017 WL 6460352, at *2 (quoting § 287.020.2) (emphasis omitted). "Injury" means any "violence to the physical structure of the body[.]" § 287.020.3(5). Finally, a claimant must also show the injury "[arose] out of and in the course of the employee's employment[.]" § 287.120.1.

Employer asserts the Commission erred in determining that Claimant's rib fracture, manifested by the pop, was both the "injury" and the "accident," when the two terms must actually correspond to different things. "An injury, for purposes of workers' compensation, has its own definition which is not identical to the definition of an accident." *Hedrick,* 522 S.W.3d at 925. In applying the statute, courts must not "blur together the meanings of `accident' and `injury.'" *Id.*

When addressing whether Claimant suffered an accident rather than a repetitive injury, the Commission reasoned:

> Although there is some evidence to suggest that [Claimant's] repetitive work activity of shoveling curds exposed her to a risk of repetitive trauma, [Claimant's] expert, Dr. Mullins, focused on the specific event of June 20, 2011, in rendering his opinion in this matter. Accordingly, we will consider whether employee satisfied the statutory test for an "accident[.]"

The Commission stated, "[w]e have found that on June 20, 2011, during employee's work shift, she suffered an unexpected pop in her chest accompanied by symptoms of an injury including pain and an inability to raise her right arm."

The Supreme Court of Missouri's recent holding in *White v. Conagra* demonstrates that the Commission does not need to specifically pinpoint the accident and the injury for its decision to be upheld. *White,* 2017 WL 6460352, at *3. The Court explained:

> Even though the Commission failed to identify accurately the "accident" (i.e., the unusual strain on White due to the extraordinary heat) and the "injury" (i.e., death resulting from ischemia-induced arrhythmia), it accurately identified the key issue in this case, i.e., whether the accident was the prevailing factor in causing the injury. On this central factual question, the Commission was presented with competing expert opinions. This is precisely the type of conflict the Commission is empowered to resolve.

Id.

Similarly, the Commission in the instant case carefully evaluated the relevant facts and competing expert opinions. Even if it did not specifically identify the exact accident and injury, it did identify the key issue and relied upon Dr. Mullins' testimony to determine that the accident was the prevailing factor in causing the injury. "We will not reverse the Commission's decision if it `reaches the right result even if it gave a wrong or insufficient reason for its ruling.'" *Hedrick,* 522 S.W.3d at 921-22 (quoting *Ellis v. Mo. State Treasurer,* 302 S.W.3d 217, 220 (Mo. App. S.D. 2009)). While the Commission did not explicitly delineate what was the respective "accident" and what was the "injury," the Commission could properly determine that Claimant's act of shoveling and forcefully pressing her chest against the vat constituted the accident. As a result she suffered the injury of a rib fracture, manifested by the pop. Construing the Commission's decision to mean that the precise injury was the "unexpected pop" is unduly restrictive.

Employer mischaracterizes the Commission's decision by claiming it held there was an accident because it found the rib fracture was an unexpected traumatic event. The Commission found that there was an accident, but nowhere in its decision did it state which category this particular incident falls under in order to qualify as an accident. Employer claims that an unexpected traumatic event is a "prerequisite" to finding an accident, but courts have reiterated that an accident may be an "unexpected traumatic event" *or* an "unusual strain." *Young v. Boone Electric Coop.,* 462 S.W.3d 783, 792 (Mo. App. W.D. 2015). Although the Commission used the word "unexpected" once when referring to the popping sound of the rib fracture, the use of that word alone is not determinative as to whether the incident qualifies as an unexpected traumatic event or an unusual strain under the statute. An event may fall into both categories, but "it is compensable if it falls under a single category." *Id.* at 793. Here it is an "unusual strain."

In *Young,* the Western District thoroughly addressed the statutory interpretation of the two categories constituting an "accident" under the Workers' Compensation Law. 462 S.W.3d at 791-96. The claimant in the case, Young, worked as an electrical lineman for his employer. One workday, in the normal course of his work, Young stepped onto a high platform to access a heavy reel of wire on a truck. *Id.* at 787. He pulled himself up onto the platform using two handles installed for workers to help them keep their balance, and as he was pulling himself up, he felt a pop in his right shoulder. *Id.* After that, he could not raise his arm. His doctor later testified that it was a tear in his shoulder. *Id.* The Commission awarded compensation and the employer appealed, arguing that the Commission erred because Young failed to prove that an accident had in fact occurred under the statute. *Id.* at 790.

Noting that the issue was one of first impression, the Court identified the question of the case as whether Young suffered an accident:

> Section 287.020.2 defines "accident" 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. . . ." We are asked to decide whether

Young suffered "an unexpected traumatic event or unusual strain." *Young,* 462 S.W.3d at 792. Applying the term to the facts, the Court elaborated that under a

plain reading of the statutory language,

> the "pop" was not the injury itself, but rather merely a tangible manifestation to employee of a problem inside his shoulder. We are convinced that the employee suffered an accident, because despite the fact employee had pulled himself up onto the truck many times before, *this time* he felt a pop in his shoulder, and *this time* he was unable to lift his arm afterward. We believe that these facts constitute the "unexpected traumatic event or unusual strain" required under the law. We conclude that employee suffered an accident for purposes of § 287.020.2.

Id.

Under *Young,* an unusual strain is "an unordinary act of excessive physical or mental tension, difficult exertion, or a violent or overtaxing effort[.]" *Id.* at 793 (emphasis removed). Young suffered an unusual strain in the regular course of his work when he pulled his weight up to the high platform because he "plainly sustained an act of excessive physical tension" and had to balance his body using the two handles. *Id.* Employer argued that Young should not recover because this manner of getting into his truck was a routine procedure and Young did not establish that his accident was *caused by* an unusual strain. *Id.* at 794. The Court dismissed both of these arguments. "[R]epeated unusual strain does not make it usual; it merely makes it repeated." *Id.* The statute's definition of "accident" does not require "something distinguishable from and in addition to routine work, such as a precursor event (e.g. a rabid dog on the chase) or an external force (e.g. a slip and fall)." *Id.*

The facts in this case, as found by the Commission, are highly analogous. Claimant fractured her rib on a "normal day" while performing her everyday work duty of turning down the cheese ends. To perform the work, Claimant would stand, leaning against the vat, and use a shovel to pull down the edges of the cheese mixture. To put the shovel into the mixture, she would reach her arms up and over the edge, and then reach down. At five feet, two and a half inches tall, Claimant was the shortest worker in the plant, and the vat pressed against her chest and rib cage while she worked. It was an awkward position. Claimant is left-handed, but explained that "trying to do it left-handed wasn't possible." The shovel weighed approximately 35 to 40 pounds when fully loaded. According to Claimant, "[i]t took a lot" of force to stir the mixture. It was more physical force than she had ever utilized before, and she had not done anything similar to it outside of work.

She explained that on the day of the event in question, "When I went to shove the shovel in there it was fine, but when I pulled it back there was a pop, and after that I wasn't able to lift my arm." She was precariously balanced with her chest and ribs against the vat, and was pulling back with weight on the shovel when she both felt and heard the loud pop underneath her arm. These facts indicate Claimant sustained an act of physical tension as she was shoveling the mixture and underwent an unusual strain which fractured her rib.

Employer argues that shoveling the mixture was the usual task Claimant carried out every day, so the work activity cannot constitute an unexpected traumatic event or unusual strain. Being routine does not preclude a finding of an accident. Despite the fact that Claimant had done this job many times before, *this* action, *this time,* was unusual because *this time* she felt and heard a pop in her chest, and *this time* she could not raise her right arm. We believe the Commission could properly find that Claimant suffered an unusual strain as required under the law.

The facts found by the Commission support the award.

The Commission did not err in determining that Claimant suffered a compensable injury by accident, and the Commission's decision was supported by competent and substantial evidence.

Conclusion

The Commission's award is affirmed.

GARY W. LYNCH, J. — CONCURS.

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

DON E. BURRELL, J.

I respectfully dissent for the reasons stated by Judge Ahuja in his dissenting opinion in *Young v. Boone Elec. Coop.,* which I cannot improve upon. 462 S.W.3d 783, 798-809 (Mo. App. W.D. 2015).

[1] All statutory references are to RSMo Supp. 2005.

[2] A lytic lesion is a type of tumor that erodes the underlying bone.

[3] The ALJ considered competing expert opinions from two additional doctors. Dr. Parmet concluded that Claimant's work activities were not the prevailing cause of the injury. He submitted that "[i]f the tumor had not existed and partly destroyed her rib then the fracture would not have occurred." Dr. Costly was noncommittal, stating that a combination of the shoveling movement and the LCH caused Claimant's injury, but that he was unable to identify which was the prevailing factor.

[4] The discrete issue on appeal is whether Claimant suffered an unexpected traumatic event or an unusual strain. Employer does not contest that the other requisite elements of an accident were satisfied.