SOUTHERN DISTRICT DISTINGUISHES MILLER

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The case of *Pile vs. Lake Regional Health System* was filed by the Southern District on September 1, 2010. It is the first effort by the Appellate Courts to distinguish or reinterpret the Supreme Court decision of *Miller vs Missouri Highway and Transportation Commission*.

Keep in mind that *Mille*r was the outcome of the 2005 amendments which specifically abrogated the interpretation of the Workers' Compensation Act in *Bennett* in other decisions. The Supreme Court stated "Where the reasoning of *Bennett* applies here, Mr. Miller would be entitled to compensation because his injury, like that of the nurse in *Bennett* would not have occurred had he not been walking at work, even though nothing about the work caused the popping or the resulting medical condition and disability."

The nature of Mr. Miller's knee injury remained a mystery. In short, Mr. Miller was walking, felt a pop in his knee, felt pain in his knee and continued to feel that pain through the date of trial.

There was no determination as to what had caused the pop or what was causing the pain.

Supreme Court applied the provisions of §287.020.3(2)(b) in the following two step analysis:

1.) Was the hazard or risk giving rise to the injury related or unrelated to employment?

    If the activity giving rise to the accident and injury is integral to the performance of the worker's job, the risk of the activity is related to employment and there is no need to consider the second step, which is;

2.) Was the risk one to which the worker would have been **equally** [emphasis added] exposed in normal non-employment life?

The Supreme Court then held that the risk involved in *Miller* was walking, a risk to which the worker would have been exposed equally in non-employment life. The Court also found that "he was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so."

In *Pile*, the Missouri Court of Appeals, Southern District, found that the injury did not come from a hazard or risk unrelated to the employment to which workers would have

been equally exposed outside of the employment. Specifically, the Court found that "The risk or hazard to which the claimant was exposed due to her employment was the development of brittle bones in her foot due to tendonitis, which in turn was caused by the prolonged walking required by her job duties."

Because the Court found a clear nexus between the risk or hazard of the injury, the injury itself and her employment, the Court did not feel that it was even necessary to touch on the second prong of the analysis – whether the worker would have been equally exposed to the risk in normal non-employment life.

However, the Court capitalized on an omission by the Industrial Commission in reciting the correct standard under §287.020.3(2)(b). The Industrial Commission omitted the word "***equally***" in their Final Award. By omitting the word "equally" from their analysis, the Industrial Commission did not follow the "strict construction" standard of §208.800, and allowed the Court of Appeals to capitalize on this and to point out that claimant was on her feet at work 80% of the time, as opposed to only 50% of her time outside of work.

The quantification of time spent walking on the job and off was missing in the record in *Miller*, but inferred by Judge Teitelman in his Dissent.

What the Industrial Commission did not consider in its analysis in *Pile*, and ostensibly missing from the Southern District's analysis, was application of the "prevailing factor" standard on medical causation as set out in §287.020.3(1),(2).

Judge Scott's Dissent in *Pile* specifically takes issue with the majority opinion because it is based on facts found *by the Court of Appeals*, not by the Industrial Commission. This is beyond the standard of review for an Appellate Court.

Judge Scott correctly points out that the majority's "two step analysis" suffers from the same flaw as the Industrial Commission's analysis:

> "The principal opinion claims to distinguish *Miller* because the 'risk to claimant was not mere walking, but was instead the risk of tendonitis due to prolonged walking … the extent of time claimant was on her feet in the present case is important because her injury was caused by prolonged walking over a period of time.'"

Judge Scott noted that the principal opinion built its analysis largely on observations and statements from the "Factual and Procedural Background" section of the case. Among the points contained in that "Factual and Procedural Background" section were:

1.) Claimant was usually on her feet approximately 50% of the time she spent outside of work;

2.) Prior to the accident, claimant never had any problems with her right foot;

3.) After the injury, claimant was diagnosed with chronic tendonitis of the peroneal tendon, which was caused in part by calcifications in the tendon of her foot;

4.) Chronic tendonitis is consistent with prolonged walking over a period of time;

5.) A person who develops tendonitis usually has an abnormal foot motion or walking pattern over a prolonged period of time;

6.) Because claimant had calcium on her tendon, the act of walking could cause the bone to break and result in inflammation of the tendon or tendonitis.

Judge Scott noted in his Dissent that the Commission did not find any of the above.

Judge Scott noted that "whether claimant had a tendon condition, its cause or effect, or the relationship of any of these to claimant's injury are not discussed or even mentioned in the Award. Further, even if claimant had tendonitis, no medical evidence or record purported to link it to her working conditions or walking at work."

Judge Scott wrote: "Since the Commission did not find that claimant had tendonitis, or its cause, or link those to her work, or even discuss such issues or evidence, I do not think this Court can make its own findings, even if some evidence might support them, then use those as a basis to reverse the Commission."

It would appear that the Claim was filed as an accident rather than an occupational disease and the Appellate Court, whether making its own findings or not, believed that walking on the job caused the occupational disease and the extent of walking which was job related was such that it could not have been said that the worker was equally exposed to the risk of developing the occupational disease in normal non-employment life.

It is also important to note that the injury in ***Pile*** was not considered to be idiopathic but in fact was said to be chronic tendonitis which was directly related to walking.

It would therefore seem reasonable to assume that ***Miller*** would still apply to an idiopathic episode on the job. In other words, an injury or at least an event which involves a pop in the knee, an unexplained synscopal episode or fall particularly when there is no good explanation of the mechanism of injury which can somehow be related to a specific activity or condition at work.

Pile seemed to indicate that an injury is more likely to be held compensable if there is a specific hazard or risk, walking, standing, climbing, reaching overhead, etc. which is related to the employment; an explanation, by medical expert, as to why the injury would be related to the employment and evidence that the employee engaged in the activity which caused the condition to a greater extent during employment than normal non-employment life.

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