MINNESOTA SUPREME COURT DECISION
December 2013

Dykhoff v. Xcel Energy, A12-2324 (December 26, 2013)
Compensation Judge: Peggy A. Brenden
WCCA Panel: Hall, Milun, Stofferahn
Dissenting: J.J. Page, Lillehaug, and Stras

Chief Justice Lorie Gildea, writing for the majority, reversed the WCCA and reinstated the compensation judge's decision. The Supreme Court of Minnesota found substantial evidence in the record supported the judge's finding the employee failed to prove her injury arose out of her employment.

The compensation judge found the employee failed to establish she was at any increased risk of falling due to the condition of the floor when she fell. The employee normally wore jeans and casual clothes to work at her worksite in Maple Grove. On the date of her injury, she wore a dress shirt and pants with two-inch heels to a meeting at her employer's headquarters in Minneapolis under an instruction from her employer for her to "dress up." As the employee walked to the conference room, she fell and landed on her buttocks on a marble floor in a hallway. She felt a pop in her left knee when it dislocated because of the fall. The compensation judge found the floor where the employee fell was highly polished, clean, dry and flat, but not slippery. She found the employee was not walking fast and did not trip before the fall. The compensation judge found the employee did not prove her employment exposed her to a condition that placed her at an increased risk of injury beyond what she would experience in her non-work life.

"Arising Out Of"

The parties stipulated to almost all of the facts, including the fact the injury occurred "in the course of" employment. The only issue before the Court was whether the injury "arose out of" the employment. The phrase "'arising out of' means that there must be some causal connection between the injury and the employment." Citing *Nelson v. City of St. Paul*, 81 N.W.2d 272, 275 (Minn. 1957), the court reiterated an injury arises out of employment where it has its origin with a hazard or risk connected with the employment and flows therefrom as a natural incident of the exposure occasioned by the nature of the work. The employee argued she fell because the floor on which she walked was slippery. The compensation judge found as a factual matter there was nothing hazardous about the floor on which the employee walked when she fell. The Court found the judge's decision supported by substantial evidence in the form of testimony from Xcel Energy's Facility Operations Manager, the fact the employee walked across the floor without incident immediately prior to the fall, and the uncontroverted evidence the floor was clean and dry.

Work-Connection Test Rejected

Notwithstanding the compensation judge's finding, the employee argued her injury was compensable because her "employment placed her in a particular place at a particular time

exposing her to a neutral risk… existing on [Xcel's] premises." Citing precedent going back 80 years, the Court said it would not make the employer "an insurer against all accidents that might befall an employe[e] in his employment." Auman. Further the Court noted the employee's argument, contrary to statute, collapsed the "arising out of" requirement into the "in the course of" requirement. Therefore, it expressly rejected the work-connection test from *Bohlin* because it failed to give effect to the plain language of Minn. Stat. § 176.021, which requires the employee to demonstrate an injury "arises out of *and* in the course of" employment. The work-connection test allows a court to "balance the two factors against each other in a fashion that could relieve the employee of the burden of proof on one element if there is strong evidence of the other element."

The Court found the compensation judge's fact-finding was not clearly erroneous and the judge applied the correct legal test, therefore it affirmed the trial court's decision.

Justice Alan Page, joined by Justice David Stras, dissented stating he would have applied the positional risk test and found the injury compensable. He wrote the Court's decision will "upset the apple cart that is our delicately balanced workers' compensation system[,]" and the decision to deny the employee's claim is based on a "flawed conclusion that she must show her workplace exposed her to an increased risk of injury." He argued the conclusion:

> "… is not grounded in our case law, is contrary to the plain language of Minn. Stat. § 176.021, subd. 1 (2012), defies fundamental principles of fairness, and will significantly reduce employees' ability to recover workers' compensation benefits in the State of Minnesota for the larger category of workplace injuries in which the source of the injury is largely unknown."

Justice Page argued the Court violated the canons of statutory construction by applying the increased risk test to *all* types of "personal injury" under Minn. Stat. § 176.021, subd. 1 (2012). He stated had the Legislature intended the additional increased risk burden apply to *all* types of personal injury, "it knew how to and could have easily done so."

He also noted jurisdictions applying the increased risk doctrine differ whether the employee must show the risk is unique to the employment and listed numerous occasions where the Supreme Court of Minnesota awarded benefits to employees without regard to any showing the employment subjected the employee to an increased risk of injury. He described the Court's decision as palpably ironic and stated, "the only reasonable explanation" he could glean for the contradictory ruling is the Court deems the employee "an underserving plaintiff because she work shoes with two-inch heels to work the day she was injured." He wrote such considerations "have no place in the no-fault workers' compensation system" which holds employers liable to pay compensation "'in every case of personal injury… without regard to the question of negligence'" under Minn. Stat. § 176.021, subd. 1.

Justice David Lillehaug, joined by Justice David Stras, dissented stating would have found a compensable work injury via a different route than Justice Page. Justice Lillehaug agreed with the majority that the balancing test applied by the WCCA contravenes the Court's precedent as the requirements of Minn. Stat. § 176.021, subd. 1 are distinct, each of which must be satisfied. He further agreed with the majority that the "arising out of" requirement cases require some

causal connection between the injury and employment and that the "arising out of" requirement can be satisfied even when the injury is causally connected to a condition in the workplace not obviously hazardous. *Kirchner v. County. Of Anoka*, 339 N.W.2d 908 (Minn. 1983).

Justice Lillehaug even agreed the facts were largely undisputed, which required a de novo review to apply the law to the facts. He highlighted the fact the employee did not trip on anything, but rather slipped on the floor and her shoes left V-shaped scuff marks at the point where she fell.

Justice Lillehaug found the undisputed facts establish as a matter of law the requisite causal connection between the employment and the injury and such analysis on the question of law requires no deference to the fact-finder. He noted the majority's application of the "arising out of" requirement to the facts is unduly limiting and is inconsistent with *Nelson*, *Foley*, and *Kirchner*. He stated, "[h]ad the majority applied the undisputed facts to the law of these cases, it could have saved for another day (with the benefit of full briefing) the issue of whether Minnesota should join the growing number of jurisdictions that have adopted the 'positional risk doctrine.'" He further observed "nothing prevents the Legislature from considering whether the 'positional risk doctrine' should be codified, including whether the 'increased risk doctrine' should be limited to occupational-disease injuries…"