Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION

(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-137562

Employee: Travis Anderson, deceased

Dependents: Stephanie Anderson, widow; Skylar Anderson and Courtney Anderson, dependent children

Employer: Veracity Research Co.

Insurer: Westport Insurance Co.

Date of Accident: July 19, 2003

Place and County of Accident: Blue Springs, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 4, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Emily Fowler, issued April 4, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26TH day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

FINAL AWARD

Employee: Travis Anderson, deceased Injury No: 03-137562

Dependents: Stephanie Anderson, widow
Skylar Anderson, DOB 10/20/94
Courtney Anderson, DOB 9/15/96

Employer: Veracity Research Co.

Insurer: Westport Insurance Co.

Hearing Date: February 13, 2008

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

2. Was the injury or occupational disease compensable under Chapter 287? No

3. Was there an accident or incident of occupational disease under the Law? No

4. Date of alleged accident or onset of occupational disease: July 19, 2003

5. State location where accident occurred or occupational disease was contracted: Blue Springs, Jackson County, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? No

9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was driving and was involved in a fatal automobile accident.

12. Did accident or occupational disease cause death? Yes Date of death? July 19, 2003

13. Part(s) of body injured by accident or occupational disease: Death

14. Nature and extent of any permanent disability: Death

15. Compensation paid to-date for temporary disability: $.000

16. Value necessary medical aid paid to date by employer/insurer? $0.00

17. Value necessary medical aid not furnished by employer/insurer? $0.00

18. Value of burial costs ($5,000.00 alleged) $ 0.00

19. Employee's average weekly wages: $535.71

20. Weekly compensation rate: $357.04

21. Method wages computation: Stipulation

COMPENSATION PAYABLE

Benefits Currently Due:

Medical Expenses

Medical Already Incurred $0.00

Less credit for expenses already paid .... ($0.00)

Total Medical Owing $0.00

Temporary Disability

59 4/7s weeks (10/28/1998 to 12/201999) $0.00

Less credit for benefits already paid .... ($0.00)

Total TTD Owing $0.00

Costs of Recovery

Employee’s Attorney’s fees (25% of $9,131.35) $0.00

Deposition, postage and copy charges $0.00

Total Costs of Recovery $0.00

-

Total Benefits Due: $0.00

-

Ongoing Benefits

Medical Care $0.00

Temporary Disability from 12/21/1999 until employee reaches MMI $0.00

Total Ongoing Benefits $0.00

Total Award........$0.00

22. Second Injury Fund liability: N/A .... None

0 weeks of permanent partial disability from Second Injury Fund .... None

Uninsured medical/death benefits: .... None

Permanent total disability benefits from Second Injury Fund: .... None

-- weekly differential (--) payable by SIF for -- weeks beginning .... None

-- and, thereafter, for Claimant's lifetime. .... None

Total: $0.00

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Travis Anderson, deceased Injury No: 03-137562

Dependents: Stephanie Anderson, widow
Skylar Andersson, DOB 10/20/94
Courtney Anderson, DOB 9/15/96

Employer: Veracity Research Co.

Insurer: Westport Insurance Co.

Hearing Date: February 13, 2008

Briefs Filed: Checked by:

On February 13, 2008, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The claimant, Stephanie Anderson, widow of Travis Anderson, appeared in person and with counsel, Jerry Kenter. The employer appeared through Steven Quinn. TheSecond Injury Fund was not a party to the case. The primary issue the parties requested the Division to determine was whether or not the deceased suffered an accident arising out of and in the course of his employment. For the reasons noted below, I find that Travis Anderson did not sustain a compensable accident on July 19, 2003.

STIPULATIONS

The parties stipulated that:

1. On or about July 19, 2003 ("the injury date"), Employer was working subject to Missouri's Workers' Compensation law with its liability fully insured by Westport Insurance Co.;

2. Travis Anderson was its employee working subject to the law in Blue Springs, Jackson County, Missouri;

3. The employer was of the alleged injury and a claim was within the time allowed by the law; and

4. Employer provided no medical care.

ISSUES

The parties requested the Division to determine:

1. Whether Travis Anderson sustained an accident arising out of and in the course of his employment?

2. The extent to which the employer may raise defenses as its answer to claim for compensation was not timely filed.

3. Whether claimant must reimburse witness Barbara Todd $197.10 for expenses reasonably incurred producing herself for a deposition at the request of claimant.

FINDINGS

Claimant introduced testimony from Stephanie Anderson, Stephen Buckley, P.E., and Vidal Alexander.

Claimant presented the following exhibits, all of which were admitted into evidence without objection other than exhibits K & N which were admitted over objection:

Exhibit A – Report of Injury
Exhibit B – Answer to Claim for Compensation

Exhibit C – Motion for Default Award
Exhibit D – Marriage License Loyde Anderson & Brenda Wells
Exhibit E – Funeral expenses
Exhibit F - 5/24/07 Deposition of Barbara Todd
Exhibit G - Answer to Claim for Compensation w/attachments
Exhibit H - VRC Investigator Exam
Exhibit I - Accident report w/records
Exhibit J - CV of Stephen P. Buckley
Exhibit K - Report of Stephen P. Buckley 2/9/08
Exhibit L - Photographs
Exhibit M - Deposition of Dale Alexander
Exhibit N - DVD

Although the employer did not call any live witnesses, it did present the following exhibits, all of which were admitted into evidence without objection other than objections contained within the depositions

Exhibit 1 – Deposition of Leonard Johnson
Exhibit 2 – Deposition of Carol Hyer
Exhibit 3 – Deposition of Melissa Stump
Exhibit 4 – Deposition of Richard Dec
Exhibit 5 – Deposition of Anthony Johnson
Exhibit 6 - Deposition of Martin Traski
Exhibit 7 - Deposition of Lance Foster
Exhibit 8 - Deposition of John Vasiliades

TESTIMONY OF WIDOW

The widow of deceased employee Travis Anderson was the first witness to testify. She testifiedas to the marital status of she and the deceased as well as the fact that two children were born of that marriage: Skylar Anderson born October 20, 1994 and Courtney Anderson born September 15, 1996. She also testified that Mr. Anderson was in the United States military before beginning work for Veracity Research Company (hereafter VRC), the employer in the present action. Mrs. Anderson testified that her husband had irregular hours while working VRC and would leave at different times in the morning but normally would arrive home, when working in town, between 5 and 6 p.m. During the period of time surrounding the date of this accident, July 19, 2003, the Anderson's were living in Wichita, Kansas with Travis' grandmother. During the summer Mrs. Anderson testified that she would stay with her family in the State of Missouri. Mrs. Anderson candidly admitted that she had no knowledge regarding her husband's job duties for VRC and that he was very secretive about his job. In fact, on cross examination, Mrs. Anderson testified that her husband would become somewhat defensive if she asked any questions about the specifics of the work that he was performing.

Mrs. Anderson testified that during the week preceding Mr. Anderson's trip to Kansas City and ultimate death in an auto accident that she was staying with family in the State of Missouri and accordingly was not at home in Wichita when Mr. Anderson left for Kansas City. The last conversation Mrs. Anderson had with her husband was on Wednesday, July 16, 2003 while he was traveling from Wichita to Kansas City. Mr. Anderson indicated that he was going to be working in the Blue Springs or Independence, Missouri area. The substance of their conversation was general marital talk about the weather and their daughters.

On cross-examination Mrs. Anderson reiterated that her husband was indeed very secretive about the work that he was performing. In fact, while Mrs. Anderson testified on direct examination that her husband applied for a job as a Kansas State Trooper before going to work for VRC, she did not even learn of this until going through some of his documents after his death. Mrs. Anderson admitted that her husband never discussed his hours of work for VRC and even when he was working in town, if he was going to be out late he would never tell her what he was going to do or where he would be.

This being said, Mr. Anderson did try to contact his wife when he was out on the road. Mrs. Anderson testified that she is a stay at home mom and accordingly was available to receive Mr. Anderson's calls throughout the day. Mrs. Anderson testified that Mr. Anderson never called her after 5:00 p.m. while engaged in surveillance. Mrs. Anderson testified that she knew no details regarding the work that Mr. Anderson would be performing in the Kansas City area. In fact, Mrs. Anderson testified that other than the fact that she knew he was going to be doing his job with VRC and that he would be in the Blue Springs, Missouri area, she knew absolutely nothing else about what he was going to be doing or what his plans were while in the Kansas City metropolitan area. She also indicated that she never called her husband while he was in the Kansas City area. The only conversation she had with him was as he was traveling to the Kansas City area on Wednesday, July 16. Mrs. Anderson admitted that she had absolutely no personal knowledge as to what Travis was doing or where he was going at the time of his death and that she has not heard this information from any other source. In short, Mrs. Anderson only knew that Mr. Anderson had come to the Kansas City area on business but had no information regarding the details of his activities or hours of his work once he arrived.

On redirect examination Mrs. Anderson did indicate that occasionally Mr. Anderson would receive a call from VRC asking him to go out on business during evening hours. Under re-cross she admitted that this only happened a couple of times but that any time it happened he would take his camera and laptop with him.

TESTIMONY OF STEPHEN BUCKLEY

The next witness called on behalf of Mr. Anderson was Stephen P. Buckley, a professional engineer with a background in mechanical engineering. His ultimate conclusion was that speed was the proximate cause of the automobile accident resulting in Mr. Anderson's death. His report does indicate that other factors implicated are alcohol, darkness and road curve design. However, the employer did not raise a statutory defense of intoxication. The employer has presented evidence regarding intoxication but it was offered for the purpose of establishing that Mr. Anderson had removed himself from the course and scope of his employment and was engaged in personal endeavors at the time of the accident

TESTIMONY OF DALE ALEXANDER

The final witness presented by the claimant in this matter was Dale Alexander, a co-worker of Mr. Anderson at VRC. At the time of Mr. Anderson's death, Anderson and Alexander performed the exact same tasks. Mr. Anderson's attorney attempted to establish with Mr. Alexander that surveillance could occur at any time of the day or night. Mr. Alexander agreed although on cross examination clarified that testimony by indicating that the normal hours of surveillance operations are 6 a.m. to 2 p.m and that if the investigator is going to go beyond that time period, the investigator must obtain approval from a supervisor. The plaintiff presented no evidence that any such authorization was either requested or received. Mr. Anderson's attorney also inquired of Mr. Alexander regarding the VRC investigator's exam and its cell phone policy. Mr. Alexander testified in his deposition, which was also offered into evidence by the claimant, that the cell phone of the employer requires that the employee take their cell phone with them on vacation as well.

On cross examination of Mr. Alexander it was established that Mr. Anderson and Mr. Alexander would consistently utilize certain tools of the trade in order to perform their job as investigators. Those tools of the trade included their laptop computer, a clipboard, a camcorder, extra tapes for the camcorder, their cell phone, a cell phone charger and a cell phone earpiece. Mr. Alexander testified that an investigator could not perform his job without each of these items. However, it was established on cross examination with Mr. Alexander and through the deposition testimony of Anthony Johnson at pages 19 and 20, that the following items were found in Travis Anderson's hotel room and accordingly were not with him at the time of the accident:

- Dell laptop computer;
- Metal clip board;
- Sony handy camcorder;
- Tapes for camcorder;

Nokia cell phone;
- Charger for cell phone;
- Earpiece for cell phone.

Mr. Alexander again testified that if those items were not in Mr. Anderson's possession that he could not have been performing his job as a surveillance expert.

Mr. Alexander took over surveillance of Ryan Jones, the person who Travis Anderson had been assigned to watch. Mr. Alexander had a very distinct recollection of Mr. Jones as Mr. Alexander was discovered while conducting surveillance and Mr. Jones became confrontational and combative. Mr. Alexander testified that at no time was he instructed to engage in any surveillance of Mr. Jones after the normal 6 a.m. to 2 p.m. surveillance hours.

Finally, Mr. Alexander testified that the company policy is clear that under no circumstances is an investigator to engage in surveillance while drinking or with alcohol in his system.

The employer introduced depositions from the following individuals:

- Leonard Johnson a clinical laboratory scientist with Children's Mercy Toxicology Lab;
- Carol Hyer a retired property room attendant for the Blue Springs Police Department;
- Officer Melissa Stump of the Blue Springs Police Department;
- Officer Richard Dec of the Blue Springs Police Department;
- Detective Anthony Johnson of the Blue Springs Police Department;
- Detective Martin Traski of the Blue Springs Police Department;
- Lance Foster President of VRC; and
- John Vasiliades, Ph.D a toxicologist.

The representatives of the Blue Springs Police Department collectively testified regarding the 17 page police report offered at their various depositions. The various members of the police department had different roles in the investigation of the scene of the accident and the preparation of the report. Maybe the most relevant aspect of the report is the property collected from Mr. Anderson's hotel room which has been previously outlined in these findings indicating that Mr. Anderson had none of the tools of his trade with him at the time of his accident, including his cell phone. This combined with Mr. Anderson's level of intoxication, as testified to by Leonard Johnson and Dr. Vasiliades as .221 blood alcohol content combined to establish that Mr. Anderson could not have been performing his duties for VRC at the time of his accident.

Conclusions of law

A. Late answer does not preclude employer from defending case

The claimant filed a claim alleging an accidental injury resulting in death which occurred on July 19, 2003. The division acknowledged the claim on January 28, 2004. The employer filed its answer on July 28, 2005. As such, the employer filed its answer more than 15 days after the date the division acknowledged the claim. The claimant's attorney argues that because the answer was filed out of time, the employer/insurer admit that a compensable accident occurred. This is an incorrect interpretation of the regulations and caselaw.

The regulations which govern the filing of a claim and answer (that were in effect in 2003 at the time the claim was filed) are located in the Rules of the Department of Labor and Industrial Relations, Division 50-Division of Workers' Compensation, Chapter 2-Procedure. Subsection (12) of 8 C.S.R. 50-2.010 provides that upon receipt of a claim for compensation, the division shall forward a copy to the employer and/or insurer and within 15 days of the date of the division's acknowledgment of the claim, the employer and/or insurer shall file an answer to the claim for compensation. Subsection (13) of 8 C.S.R. 50-2.010 provides that unless the answer to the claim is filed within 15 days from the date the division acknowledges receipt of the claim, the statements of fact in the claim shall be taken as admitted.

In support of its position that employer has admitted that a compensable accident occurred, claimant cites Lumbard-Bock v. Winchell's Donut Shop, 939. S.W.2d 456 (Mo.App. 1996). In Lumbard-Bock, the claimant filed a claim alleging that she injured her back while replacing a cola dispenser at Winchell's. In the portion of the claim asking how the injury occurred, she responded "While employee was lifting a coke container at work, she felt something pop in her back necessitating disc surgery." Lumbard-Bock , 939 S.W.2d at 457. The claim was filed but Winchell's did not file an answer until almost three years later. At the final hearing, Winchell's raised the defense that the claimant did not provide timely notice of her injury. It is important to point out that a main issue in Lumbard-Bock was whether the claimant was injured at home when lifting up her purse, or whether she was injured at work.

The ALJ ruled that although the Answer was not timely filed, he was free to determine legal issues, including whether the claimant's injury arose out of and in the course of her employment. After reviewing the evidence, he found that claimant was not injured on the job and he denied compensation. The Commission affirmed and the case was appealed. The Court of Appeals ruled that if the employer failed to timely file an answer, it was deemed to have admitted the facts stated in Lombard-Bock's claim, including both her statement of facts regarding how the injury occurred – that she felt something pop in her back while lifting a cola container at work-and her statement of causation-that this pop necessitated the disc surgery. Lumbard-Bock 939 S.W.2d at 458. The Court ruled that in light of these admissions, the Commission was bound by law to assume that the claimed work accident occurred and was at least partially responsible for her back injury. Lumbard-Bock, 939 S.W.2d at 458, 459. Thus, the case was remanded to the Commission for a determination as to what percentage of her disability was attributable to the admitted work accident taking into account evidence of her prior injury at home.

It is important to note that the court in Lumbard-Bock held that the failure to file a timely answer cannot result in the admission of legal conclusions contained in the pleading. 939 S.W.2d at 457, 458. It cited the case of Jackson v. Midwest Youngstown Industries, 849 S.W.2d 709 (Mo.App. 1993) in support. In Jackson, the claimant was a salesperson who was injured while at the post office picking up a personal package and mailing a sympathy card to a prospective customer. As she was returning to her car, she fell and injured her right knee. A claim was filed, but the employer filed a late answer. The Commission denied benefits to the claimant on the grounds that her injuries did not arise out of and in the course of employment. On appeal, the claimant argued that the Commission acted in excess of its authority by adjudicating the issue whether the claimant's injuries arose out of and in the course of her employment because the employer's answer was not timely filed. The claimant argued that her allegation that her injuries arose out of and in the course of her employment must be taken as admitted pursuant to 8 C.S.R. 50-2.101(12) and (13). The court in Jackson cited Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo.App. 1978) which held that an employer's failure to file an answer within the time permitted resulted in the admission of "facts of the accident" pursuant to 8 C.S.R. 50-2.012(13). Hendricks, 570 S.W.2d at 707. The court also noted that whether an injury arises out of and in the course of employment is ultimately a question of law. Jackson, 849 S.W.2d at 711; McClain v. Welsh Co., 748 S.W.2d 720, 724 (Mo.App. 1988). The court in Jackson held that the provision in 8 C.S.R. 50-2.101(13) which says "statements" in a claim shall be admitted for failure to timely file an answer does not include an admission of the legal question whether claimant's injury arose out of or in the course of claimant's employment. Jackson, 849 S.W.2d at 711. As such, even though the employer failed to timely file its answer, the Commission should still determine whether claimant's injuries arose out of or in the course of employment. Jackson, 849 S.W.2d at 711.

In the present case, the claim for compensation filed on behalf of the deceased alleges:

> The employee, while in the course and scope of his employment, was suddenly, violently, and unexpectedly caused to leave the roadway while in his vehicle, plowing through a chain link fence, directly resulting in his death

The facts alleged, which are admitted by the late answer, are that the decedent:

1. was suddenly, violently, and unexpectedly caused to leave the roadway
2. while in his vehicle,
3. plowing through a chain link fence,

4. directly resulting in his death

The legal conclusions, which are not admitted by the late answer are:

1. That decedent was an employee;
2. That he was acting in the course and scope of his employment.

Based on the above, it is clear that the failure of the employer to file a timely answer means that the employer has admitted that Mr. Anderson was involved in a car accident on the date alleged in the claim. However, the late filing of the answer does not constitute an admission that this accident occurred within the course and scope of his employment with the employer. As such, the employer will be permitted to raise compensability as a defense and present evidence on this issue.

- **Injuries while traveling for an employer are not automatically compensable.**

Claimant has also contended that merely by virtue of being out of his hometown on the date of the injury, that the decedent's death should be covered by Workers' Compensation. This is insufficient to prove that a compensable accident occurred. The claimant bears the burden of proving all material elements of the claim to a reasonable probability. See White v. Henderson Implement Co., 879 S.W.2d 575 (Mo.App. W.D. 1994); Beyer v. Howard Construction Co., 736 S.W.2d 78 (Mo.App. S.D. 1987). Therefore, she must prove that an accident arose out of and in the course and scope of employment. Clayton v. Langco Tool & Plastics, Inc., 221 S.W.3d 490, (Mo.App. S.D. 2007). Claimant's argument that the accident necessarily arises out of and in the course of employment merely by virtue of traveling on behalf of his employer was resolved in Tanner v. Crest Foam Corp., 2004 WL 306087 (Mo.App. S.D.). Gregory Tanner was a territory sales manager for employer. His job was to sell carpet pad to retailers within an assigned sales territory. Tanner's sales territory consisted of eastern Missouri north of Cape Girardeau and southern Illinois. Most of employee's customers were in St. Louis. His primary duty was developing the market for employer's product in the St. Louis area. He had been requested to move to St. Louis in early 1997. He and his family were planning to make that move. On the morning of December 2, 1996, employee made telephone calls from his residence in Jackson, Missouri. He left his residence at approximately 9:30 a.m. He told his wife he was going to the Fredericktown and Farmington area to make calls. He was dressed in a dress shirt, coat, and tie when he left the residence.

At approximately 1:30 p.m., employee was killed in a one-vehicle accident on ZZ Highway near Glen Allen, Missouri. A passenger in his vehicle, was also killed in the accident. Toxicology reports revealed that at the time of employee's death, his blood alcohol content was 0.162 percent, more than twice the current legal limit for operating a motor vehicle, and the passenger's blood alcohol content was 0.333 percent. As the Court pointed out, "The offense of driving with excessive blood alcohol content occurs when a person operates a vehicle with 0.08 percent alcohol in his or her blood. § 577.012.1, RSMo 2000." Id.

The commission's final award allowed compensation and stated:

Employee set his own hours, his vehicle was his office, and he was required to make at least eight customer calls a day.

It is not unreasonable that he had and was in the process of making calls within his sales territory on December 2, 1996,

when he was killed in an automobile accident. While it is true that employee and his passenger, Mr. Mims, consumed

alcohol prior to the accident, it does not negate the fact that employee was traveling in his sales territory at the time of his

death.

The Commission agrees that a traveling salesman's mere presence in his sales area, when the accident or injury

occurs,
does not, in itself, entail that the employee was working in the course and scope of his employment.

The Court of Appeals then pointed out that the Commission's award then stated there were other "objective indicia" pointing to the fact that employee was within the course and scope of his employment. The "objective indicia" the commission relied on included that employee was required to make at least eight customer calls a day; that employee indicated to his spouse when he left home the morning of the accident that he was going to call on customers; that there was "sufficient evidence ellipses to conclude that employee had called on at least one customer in Bollinger County" before the accident; and employee left his home dressed in a white shirt and tie. The Commission's award states, "When these facts are combined, they lead the Commission to conclude that employee left work [sic] that day to call on customers. Employee had not deviated from the area where employer permitted him to call on current and potential clients."

The employer in Tanner contended that employee failed to prove this his death arose out of and in the course of his employment. Specifically, employer and insurer contended "the time, location and circumstances of the accident establish[ed] that no purpose of the employer was being served, and no benefit to the employer was being conferred, when [employee], while intoxicated, drove his personal automobile off of Highway ZZ and was killed."

After a review of the evidence, the Court of Appeals held that the Commission's award was clearly contrary to the overwhelming weight of the evidence. The Court found that while there was evidence that employee indicated he was going to the Fredericktown/Farmington area to call on customers, and that one could get to that area from the location where the accident occurred, the evidence adduced disclosed that was not the customary and usual route employee would have expected to follow to get to that area. The Court of Appeals held:

The overwhelming weight of the evidence received by the commission requires the conclusion that although the accident
in this case occurred in employee's sales territory, it occurred during an alcohol-related social dalliance by employee
with Mr. Mims; that at the time of the accident, employee was engaging in pleasure purely his own. There was not
sufficient competent evidence in the record to warrant the making of the award. Employer and insurer incurred no liability
under The Workers' Compensation Law.

The facts in the present case, while similar to those in Tanner, are even stronger in establishing that Travis Anderson was killed "during an alcohol-related social dalliance … [and] was engaging in pleasure purely his own." In Tanner:

The employer did not establish set hours for employee
The employer did not set a work schedule for him.
Employee was expected to make eight "calls" per day
Employee used his personal vehicle to call on customers.
Employee carried carpet pad samples, his brief case, a cell phone, and paper work in his vehicle at all times, even when he used the vehicle for non-work-related purposes.

In the present case, we have the following facts:

The employer had established hours of surveillance – 6 am until 2 pm, and the accident occurred at 12:19 a.m.
The employer did set a specific work schedule unless special permission was obtained to extend those hours (and no evidence was presented that the decedent had that permission)
When Anderson was working, he carried with him in his car

Dell laptop computer;
Metal clip board;

Sony handy camcorder;
Tapes for camcorder;
Nokia cell phone;
Charger for cell phone;
Earpiece for cell phone.

He had none of these items with him at the time of his accident.

Despite the fact that Tanner was in his territory, in the car he used to call on customers, which car was contained his carpet pad samples, his brief case, a cell phone, and paper work, the Court of Appeals found that claimant was not in the course and scope of his employment at the time of his death.

At the time of Anderson's death he had the following aggravating factors which support that he was not acting on behalf of his employer:

His BAC was higher than Tanner's - 0.221 v. 0.162 had a higher (Dr. Vasiliades testified that Anderson had 11 drinks
in his system at the time of his death. Anderson had none of the tools of his trade with him v. Tanner who had all of the
tools of his trade with him. Anderson was out a full 10 hours after he should have called off surveillance for the day
VRC has a company policy against the consumption of alcohol while on the job; Dale Alexander, who took over surveillance of Anderson's subject, testified that there was never a request to engage in extra hours surveillance.

No affirmative evidence has been presented that the decedent was working at the time of the accident nor is there evidence that he was on his way to get something to eat merely because restaurants were in the vicinity of the accident site. Further, even assuming that the decedent was on his way to get something to eat, this assumption does nothing to demonstrate that he was in the course and scope of his employment or that the activity of dining was remotely temporally related to the afternoon's work activities. Perhaps the decedent was on his way to get something to eat because he was intoxicated, having consumed a minimum of eleven drinks prior to the accident. Perhaps he was on his way to a tavern. He could have had any number of non-work-related purposes for traveling in early morning hours. But pure speculation and conjecture is required to conclude that he was engaging in work on behalfof his employer. There is no evidence, as suggested by claimant, that Anderson was on his way to get something to eat when he was involved in his fatal one car auto accident. To the contrary, the overwhelming weight of the evidence shows that he was not engaged in work for his employer: he had none of the tools of the trade in his car that are required when conducting surveillance, having left those in his hotel room; employees are limited to conducting surveillance work only until 2:00 p.m. absent the receipt of special permission of which there is no evidence; the accident occurred 10 hours later after his normal quitting time.; there was no evidence that he had been authorized or requested to work past normal working hours; and, there is undisputed evidence that Anderson was highly intoxicated at the time of the accident. In short, all evidence adduced supports the position of the employer that Anderson did not sustain injury arising out of and in the course of his employment.

The claimant has argued that the decedent was required to have the cell phone on at all times and that this supports a finding of a compensable accident. However, the cell phone was not in Anderson's possession at the time of his fatal accident. The Blue Springs Police Department found the cell phone, the charger and the cell phone's earpiece back in his hotel room, which further demonstrates that he was not engaged in any employment-related activity at the time of the accident. Claimant has also attempted to argue that the employer did not show that the decedent was NOT authorized to work late. By so arguing, claimant has inappropriately placed the burden on the employer to prove the negative when claimant has yet to make a prima facie showing that the decedent was in the course and scope of employment.

As discussed above, the claimant has the burden of proving all elements of the claim and she has failed to do so. The scant circumstantial evidence that the claimant relies upon to support her argument is insufficient to demonstrate that the accident arose out of and in the course and scope of employment. There is simply no evidence that the decedent

was engaged in any work activity or was even contemplating such at the time of the accident. In short, all of the evidence adduced supports the position of the employer that Anderson was not acting in the course and scope of his employment at the time of his death. Conversely, claimant has produced no evidence to suggest that Anderson was acting on behalf of his employer, other than the mere fact that Anderson was on assignment away from his home. The claimant therefore has failed to meet her burden of proof.

CONCLUSION

By virtue of having filed its answer late, employer and insurer are bound to the factual allegations contained within the Claim for Compensation, but they are not bound by any legal conclusions that may be contained therein. Whether Travis Anderson suffered injury arising out of and in the course of his employment is a legal issue which may be considered by this court despite the late answer. Upon a review of all the facts and circumstances, this court finds that claimant failed to meet the requisite burden that the fatal injury sustained by Travis Anderson in the early morning hours of July 19, 2003 arose out of and in the course of his employment. No benefits are awarded.

Date: ____________________________ Made by: ____________________________

Emily Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

____

Jeff Buker
Director
Division of Workers' Compensation