

FINAL AWARD ALLOWING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-139887

Employee: William Burnfin  
Employer: J & J Drive Away, Inc.  
Insurer: Uninsured  
Date of Accident: March 2, 2005  
Place and County of Accident: State of Texas

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 14, 2008. The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued April 14, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 16th day of January 2009.

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

## AWARD

Employee: **William Burnfin** Injury No.: **05-139887**

Employer: **J & J Drive Away, Inc.**

Insurer: **Uninsured**

Hearing Date: **March 10, 2008** Checked by: **NGA**

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? **Yes.**
2. Was the injury or occupational disease compensable under Chapter 287? **Yes.**
3. Was there an accident or incident of occupational disease under the Law? **Yes.**
4. Date of accident or onset of occupational disease: **March 2, 2005.**
5. State location where accident occurred or occupational disease was contracted: **State of Texas.**
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? **Yes.**
9. Was claim for compensation filed within time required by Law? **Yes.**
10. Was employer insured by above insurer? **Employer is not insured.**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was injured removing a truck tire.
12. Did accident or occupational disease cause death? **No** Date of death? **N/A**
13. Part(s) of body injured by accident or occupational disease: **Back and body as a whole.**
14. Nature and extent of any permanent disability: **14% body as a whole.**
15. Compensation paid to-date for temporary disability: **None**
16. Value necessary medical aid paid to date by employer/insurer? **None**
17. Value necessary medical aid not furnished by employer/insurer? **\$1,032.15**
18. Employee's average weekly wages: **N/A**

19. Weekly compensation rate: **\$354.05 for permanent partial disability by agreement.**

20. Method wages computation: **By stipulation.**

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: **The agreed Medicare Lien:** **\$1,032.15**

**56 weeks of permanent partial disability from Employer x \$354.05 = 19,826.80**

22. Second Injury Fund liability: **N/A**

**TOTAL: \$20,858.95**

23. Future requirements awarded: **None**

Said payments to begin **March 3, 2005** and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of **25%** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: **Thomas Stein.**

### **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: **William Burnfin**

Injury No.: **05-139887**

Employer: **J & J Drive Away, Inc.**

Insurer: **Uninsured**

Hearing Date: **March 10, 2008**

Checked by: **NGA**

**Prior to presenting evidence, the parties stipulated the following issues were to be determined by this hearing:**

- 1. Was the claimant an employee of J & J Drive Away, Inc.?**
- 2. Was the claimant a statutory employee of J & J Drive Away, Inc.?**
- 3. What is the nature and extent of the Claimant's disability?**

**The parties agreed that on March 5, 2005, J & J Drive Away, Inc. was an employer operating under the provisions of the Missouri Workers' Compensation Law. J & J Drive Away, Inc. did not carry any Workers' Compensation Insurance.**

**The parties further agreed that on March 2, 2005, the claimant sustained an injury in Mount Pleasant, Texas while performing work as a truck driver. J & J Drive Away, Inc. had notice of the injury and a proper claim for compensation had been timely filed.**

**The parties also agreed that the correct rate of compensation for permanent partial disability is \$354.05 per**

week. No compensation has been provided. The claimant is not asking for any temporary total disability. No medical treatment has been provided. The only medical treatment the claimant is requesting is for \$1,032.15 to satisfy a Medicaid lien for an MRI.

The claimant testified in person. He is 51 years old. I found him to be a believable witness.

The claimant said in December 2004, he was living in Chillicothe, Missouri. From Chillicothe, he completed a job application (Claimant's Exhibit H) and faxed it to J & J Drive Away, Inc. The employer then telephoned him at home and offered him a job, which he accepted. The employer then faxed him additional documents to sign including a "Contract Hauler's Agreement" (Employer's Exhibit 1). Claimant signed them and faxed back to the Employer in Kansas from a truck stop in Chillicothe, Missouri.

John O'Dwyer testified for the employer. He is the president of J & J Drive Away, Inc. I find Mr. O'Dwyer to be a believable witness.

He described the business of J & J Drive Away, Inc. as being that of a truck broker. He said that a truck broker would transport a truck owned by someone else from Point A to Point B. They would move the truck tractor but would never transport cargo. J & J Drive Away, Inc. would relocate 6000 truck tractors a year. The company would employ 150 different drivers to relocate these truck tractors. He claimed that all of these drivers were independent contractors and not employees.

The company had all of the drivers, inclusive of Mr. Burnfin, sign a document that his relationship with the company was that of an independent contractor and not of an employee-employer. I do not find that this was determinative.

The driver would telephone the company's dispatcher who would advise the driver of what truck tractors were available and where they were located and where they needed to be transported to. The driver had the choice whether to accept the offer to move the trucks or whether to decline and would not be punished or fired if the driver declined to accept the job. The claimant said that he always accepted every offer available and never declined a trip.

The drivers furnished their own equipment. They determined which route they would take. If the drivers needed assistance to get a truck started, they were to get that assistance themselves. They were not told who to hire or where to purchase fuel. They were given a card which they could make cash withdrawals and charge fuel. The drivers were not reimbursed for meals or lodging. The drivers provided their own transportation to the truck pickup location and from the drop-off location. The drivers were allowed to work for other competing companies at the same time that they were drivers for J & J Drive Away, Inc.

The drivers were paid so much per mile. Sometimes they would hook up to two other trucks on the back of the truck they were driving. If they pulled another truck or two, they were paid a higher amount for each mile driven. The company did not withhold taxes or Social Security. J & J Drive Away, Inc. did not provide the claimant with sick pay, health insurance or provide retirement benefits.

Although the term "independent contractor" is not specifically defined in Missouri Workers' Compensation Law, the courts look at various facts and circumstances on a case-by-case basis to determine whether or not a particular worker qualifies for "employee" status or "independent contractor status." *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo. App. W.D. 1979). An independent contractor generally is one who contracts to work according to his or her own methods. *Vaseleou v. St. Louis Realty & Securities*, 130 S.W. 2d 538 (Mo. 1939). The key factor in determining whether or not a worker is an independent contractor or an employee is the amount of control the employer can (and does) exercise over the worker in question. *White v. Dallas & Mavis Forwarding Co., Inc.*, 857 S.W. 2d 278 (Mo. App. W.D. 1993). The more control an employer exerts over a worker in question, the more likely the worker will be deemed an "employee" rather than an independent contractor.

In addition to control, Missouri courts will look to other factors to determine whether a worker should be deemed an independent contractor or an employee. These factors include whether the worker provided tools, equipment, material, and/or supplies or whether the worker must provide his own; whether the contract is for a specific piece of work, whether the work is paid hourly or by the job, whether the work is supervised, whether the worker in question can hire assistants, and whether the work is part of the regular business of the employer. *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W. 909 (Mo. 1935). An additional fact that the courts consider is whether or not the employer can summarily discharge the worker in question. White at 278.

In this case, J & J Drive Away, Inc. had minimal control over Claimant. Claimant generally initiated contact with J & J Drive Away, Inc. calling in to request loads. Claimant was not under an exclusive contact with J & J Drive Away, Inc. and, although Claimant never worked for anyone else, he would have been fully within his right to do, if he had. When driving loads, Claimant chose his own route and purchased gas, equipment and other supplies from whatever vendor he chose. Claimant also was free to turn down a load without the risk of being terminated.

Additionally, J & J Drive Away, Inc. did not provide Claimant with equipment and supplies, rather Claimant purchased such equipment and supplies on his own. Claimant could hire workers to help him without permission from J & J Drive Away, Inc. and did so from time-to-time to break tires and tow trucks. Claimant had full discretion as to who to hire to perform such services and did not have to clear who he hired with J & J Drive Away, Inc. Claimant paid for such services himself. Claimant drove his personal truck and, in fact, was driving his personal truck on the particular haul Claimant was on when he allegedly injured his back. Also noteworthy is that Claimant was essentially paid by the mile, not the hour, he did not have social security taxes taken out of his paychecks, and he did not receive any kind of benefits, insurance or otherwise from J & J Drive Away, Inc. Claimant purchased his own occupational accident injury insurance. All of these factors lead to the conclusion that at the time of his alleged accident Claimant was an independent contractor, not an employee of J & J Drive Away, Inc.

Clearly, J & J Drive Away, Inc. did not exercise much control over Mr. Burnfin. Even the Claimant does not argue that he was an ordinary employee of J & J Drive Away, Inc. In his brief, he concedes that he was an independent contractor, not an ordinary employee.

However it is still possible that J & J Drive Away, Inc. might be liable under the Missouri Workers' Compensation Act. Mr. Burnfin might be a statutory employee as defined by Section 287.040.1 RSMo. There are three prerequisites to establishing a statutory employer relationship under this section. They are: (1) The work to be performed is pursuant to a contract; (2) the injury occurred on or about the premises of the alleged statutory employer; and (3) the alleged employee was performing work which was in the usual course of business of the employer; *State ex rel. MW Builders, Inc. v Midkiff*, 222 S.W. 3d 267, 272 (Mo banc 2007).

As to the first element: There was a written contract between J & J Drive Away, Inc. and Mr. Burnfin. This set out what duties Mr. Burnfin was to perform and what his compensation was to be. The first element is satisfied.

As to the third element: The claimant was injured while removing a tire from a truck of one of the employer's customers. He was removing the tire to prepare the truck to be transported to another location. This is the only service that J & J Drive Away, Inc. provided. It was the only service for its existence. The third element is satisfied.

As to the second element: The issue as to whether the truck the Claimant was working on, was it considered to be part of J & J Drive Away, Inc.'s premises? The premises of a statutory employer to which the Workers' Compensation Law extends its jurisdiction, includes any place under the exclusive control of the employer where the employer's usual business is being conducted. The exclusive control that is required is such control for the premise by the statutory employer that the general public does not have a right to use the premise. The premises includes any place where in the usual operation of a statutory employer's business, it is necessary for those workers whom the statutory employer has hired to do the work to be located while performing their work

for the statutory employer.

Although a statutory employer's premises includes the permanent site of the statutory employer's business, as well as, property owned by the statutory employer which it operates and which is under its exclusive and complete control, a statutory employer's premises are not restricted to property it owns or leases.

It is the exclusive physical control of the premises or the right to do so which is determinative. *Nagle v. Drew*, 409 S.W. 2d 264 (Mo. App. 1966). Thus, a statutory employer's premise includes locations that may be exclusively controlled by the statutory employer on a temporary basis as needed to accomplish the necessary work. Such premises may include a truck or a trailer which is in the process of being unloaded or transported. *Seeley v. Anchor Fence Co.*, 96 S.W. 3d 809 (Mo. App. S.D. 2002); *Wilson v. C.C. Southern, Inc.*, 140 S.W. 3d 115 (Mo. Ct. App. W.D. 2004).

Here the owner of the truck had given control of the truck to J & J Drive Away, Inc. in order that it would have the truck transported to a different location. J & J Drive Away, Inc. had the right to then have whoever it wished drive the truck. The general public did not have the right to access the truck in any manner. The general public was excluded from using the truck. It was under the exclusive control of J & J Drive Away, Inc.

The purpose of Workers' Compensation is to make industry bear the burden of compensating employees for injuries arising out of the scope and course of employment. *West v. Posten Constr. Co.*, 804 S.W. 2d 743, 746 (Mo. banc 1991). The fundamental purpose of the law is to put on the industry the losses sustained by employers arising out of and in the course of employment. *Wolfgeher v. Wagner Cartage Serv. Inc.*, 646 S.W. 2d 781 (Mo. banc 1983).

One purpose of 287.040.1 RSMo. is to prevent an employer from evading, avoiding, eluding, circumventing or otherwise relieving itself of Workers' Compensation liability by hiring independent contractors to perform the usual and ordinary work which its own employees would otherwise perform. *West v. Posten*, 804 S.W. 2d, 743 (Mo. 1991); *McGuire v. Tenneco, Inc.*, 756 S.W. 2d 532 (Mo. 1988); *Busselle v. Wal-Mart*, 37 S.W.3d 839 (Mo. App. S.D. 2001). The real roles and relationships of the parties must be recognized and applied as they relate to this purpose. *Miller v. McDonnell Douglas Corp.*, 896 S.W. 2d 734 (Mo. App. E.D. 1995); *Wilson v. Unistrut Service Co.*, 858 S.W. 2d 729 (Mo. App. W.D. 1993).

The employer had a large number of people (150) performing its sole service of transporting trucks. The employer had applicants for employment sign documents stating they were independent contractors but they were performing the usual and ordinary work of the employer. J & J Drive Away, Inc. was operating as one would expect an employer would but attempting to evade many of the obligations and expenses that an employer would incur, not just Workers' Compensation.

I find and believe from the evidence that Mr. Burnfin was a statutory employee of J & J Drive Away, Inc.

The claimant testified that he is now in constant pain in his back. He can't push a lawn mower. He can't sit or stand for long periods of time. He no longer drives a truck because of his back pain.

The claimant submitted the report of Dr. David D. Timmerman who rated the claimant at 35% body as a whole. The employer submitted the report of Dr. Edward J. Prostic, M.D., who rated the claimant with having a permanent partial disability of 7% body as a whole.

The claimant stepped in a hole while employed at a subsequent employer and aggravated his back pain. He did not mention this to either rating doctor. He said that it mainly sprained his ankle. He had no additional back treatment as a result of this incident and said that his back has returned to the condition it was prior to stepping in the hole.

I find and believe from the evidence that on March 2, 2005 the claimant sustained an injury to his back and body as a whole by accident arising out of and in the course of his employment with J & J Drive Away, Inc.

**I find and believe from the evidence that the employee has sustained a permanent partial disability in the amount of 14% of the body as a whole.**

**I order and direct J & J Drive Away, Inc. to pay the claimant the sum of \$354.05 per week for 56 weeks for a total of \$19,826.80.**

**There is an agreed lien from Medicaid for a lumbar MRI in the amount of \$1,032.15 which the employer is ordered to pay.**

**Thomas Stein is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided the Claimant.**

Date: April 14, 2008

Made by: /s/ Nelson G. Allen  
*Nelson G. Allen,*  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ Jeffrey W. Buker  
*Jeffrey W. Buker, Director*  
*Division of Workers' Compensation*