

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

Injury No.: 03-088829

Employee: Alice Burton, deceased
Substitute Claimant: Larry Burton, widower
Employer: Grapevine Restaurant or Vickie Randolph
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 2, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued October 2, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Alice Burton, deceased, substituted by Injury No. 03-088829
Larry Burton

Dependents: N/A

Employer: Grapevine Restaurant or Vickie Randolph

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Insurer: Uninsured

Hearing Date: 7/2/13

Checked by: MEH

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 accident or onset of occupational disease: 8/9/03
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? N/A
10. Was employer insured by above insurer? UNINSURED
11. Describe work employee was doing and how accident occurred or occupational disease contracted/A
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: NONE
16. Value necessary medical aid paid to date by employer/insurer? NONE

Employee: Alice Burton, deceased, substituted by
Larry Burton

Injury No. 03-088829

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$165.00
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: NONE

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:

Weekly differential (N/A) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: NONE

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

JENNIFER NEWMAN

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Alice Burton deceased, substituted by Larry Burton Injury No. 03-088829
Dependents: N/A
Employer: Grapevine Restaurant or Vickie Randolph
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Uninsured
Hearing Date: 7/2/13 Checked by: MEH

The parties appeared before the undersigned administrative law judge on July 2, 2013, for a final hearing. The claimant appeared in person represented by Jennifer Newman. The employer appeared represented by Steve Privette. The Second Injury Fund appeared represented Cara Harris. Injury No. 03-088829 and Injury No. 03-144842 were tried at the same hearing, for judicial economy and convenience of the parties. Separate awards are issued in each case.

The parties stipulated to the following facts: The employer's liability was fully uninsured. On the alleged injury dates of May 31, 2003, and August 9, 2003, Alice Burton was an employee of the employer. The parties agree that on or about August 9, 2003, the employee sustained a slip and fall which arose out of and in the course and scope of employment. This employment occurred in Howell County, Missouri. The employee notified the employer of her August 9, 2003, injury as required by Section 287.420 RSMo. The parties disagree that notice of a May 31, 2003, injury was given. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of both dates the employee's average weekly wage was sufficient to allow a compensation rate of \$165.00 for temporary total and permanent

partial disability compensation. No temporary disability benefits have been paid. The employer has paid no medical benefits. The attorney fee being sought is 25%.

ISSUES:

1. Whether the employer was operating subject to the Missouri Workers' Compensation Law.
2. Whether the employee was working subject to the Missouri Workers' Compensation Law.
3. Whether the accident caused the injuries and disabilities for which benefits are being claimed.
4. Whether the employer is obligated to pay past medical expenses.
5. The nature and extent of permanent disabilities.
6. The liability of the Second Injury Fund for unpaid medical bills.
7. Whether a safety penalty should be assessed against the employee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Subsequent to the 2003 the claimant passed away from causes unrelated to her alleged workers' compensation injuries. Her husband, Larry Burton, has been substituted as claimant. Objections to Exhibit F were taken under advisement and are overruled.

Larry Burton testified. He testified that on May 31, 2003, and August 9, 2003, his wife was employed at Grapevine Restaurant in Mountain View, Missouri. He said that on August 9, 2003, she fell in the restaurant and was taken directly to the emergency room. He said that she had no problems with her head, neck, hand or face before the accident.

He said that he often ate at the restaurant before August 2003 when he would go there to see his wife. He said he observed two waitresses, and the owner, Vickie Randolph, would run the cash register. He said that he also saw two cooks and a dishwasher. Both in May and August of 2003 he recalled seeing 5 or 6 people.

On cross examination he said that he did not work at the employer and was not aware of the relationship of anyone there. He did not know when anyone was hired or what they were

paid. He did not go there before or after his wife worked there. The only injury that his wife sustained, that he was aware of, was the slip and fall in the kitchen.

Jessica Burton, the employee's daughter, testified. She said that in 2003 she worked at the Grapevine Restaurant as a dishwasher. She was 14 in 2003. She said that she worked there along with another part-time dishwasher. She also said that there was another cook, as well as Beth Randolph waitressed, Beth Duncan waitressed, as well as two other girls named Jessica and Beth. The owner would sometimes help waitress.

Vickie Randolph testified. She was the owner of Grapevine Restaurant. She said that she had 3 employees; Kerry Pruitt, Katherine Stark, and Alice Burton. Employment records for these three were admitted into evidence. She said that she had no other employees between May and August of 2003. She said that the employee would bring her daughter Jessica to work with her at times and she helped her mother wash dishes. She said she would not have employed her because she was too young. Beth Randolph is her daughter-in-law. She would come into the restaurant with her two year old daughter. She would occasionally serve coffee. She was not employed and was not paid. Beth Brooks, her niece, was not a regular employee, and only filled in the night the employee fell, on August 9, 2003, so that Ms. Randolph could have the night off to go to dinner for her birthday. This was the only time Beth Brooks worked there. She said that Misty Bay was later employed there. Martha Bay is Misty's mother. She was never employed there. She does not know who Beth Duncan is.

Ms. Randolph said that the employee never told her about any repetitive motion injury. On August 9, 2003, she was not at the restaurant. The employee slipped and fell on grease in the kitchen. She had taken up the non slip mats to clean them before she was finished cooking. Ms. Randolph said that she had a posted safety rule that the mats were to be kept down at all times.

Her daughter in law, Beth Randolph, came to the restaurant and took the employee to the emergency room after she fell. She thinks that she paid some medical bills resulting from the injury totaling about \$350 to \$400.

The employee had an x-ray of her arm which was negative. Cervical x-rays showed degenerative changes at C5-6 and C4-5. A CT scan of her head was negative. A bone scan of her wrist was negative. She was treated by Dr. Roberts who gave her a wrist brace. Dr. Walker, an orthopedist, saw her in October 2003. He diagnosed bilateral carpal tunnel syndrome and recommended wrist splints.

Dr. Shane Bennoch examined the employee on March 1, 2005. He testified by deposition. She complained of neck pain and severe pain in her hands that comes and goes. He diagnosed a fall at work with trauma to the head, neck and left elbow; persistent neck pain secondary to the fall; bilateral carpal tunnel syndrome; and mild degenerative changes to C4-5 and C5-6. He found her at maximum medical improvement for the head and left elbow but not the carpal tunnel. He found that the accident of August 9, 2003, as well as the frequent repetitive movements required by her job in the preceding six months, was the substantial cause of the employee's traumatic neck injury with subsequent headaches and her bilateral carpal tunnel syndrome. He imposed ratings of 25% of the right wrist due to carpal tunnel syndrome, 25% of the left wrist due to carpal tunnel syndrome, and 10% of the body as a whole referable to the cervical spine due to persistent neck pain and headaches. He also reviewed medical expenses totaling \$4,956.34, which he found fair, reasonable, and customary. He also testified that these were necessary to cure and relieve the employee of the effects of her work injury.

After carefully considering all of the evidence, I find that there is insufficient evidence to support a finding that the employer had five or more employees, on either May 31, 2003, or August 9, 2003, and was therefore subject to the Missouri Workers' Compensation Law. Even

counting Beth Brooks, who was filling in for the owner the night of the fall, there is only evidence to conclude there were four actual employees at the time. I do not find that Jessica Burton, daughter of the employee, should be counted when she came to work with her mother at age 14 and helped her mother wash some dishes. She was not an employee hired by the employer. I also do not find that the others referred to by Larry Burton and Jessica Burton can conclusively be found to be employees at the time of the employee's employment.

As a result of this ruling, all other issues are moot.

Made by: _____
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation