

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

Injury No.: 97-495777

Employee: Larry Busby
Employer: D. C. Cycle Ltd.
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 3, 1997
Place and County of Accident: Springfield, Greene 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 March 24, 2008. The award and decision of Administrative Law Judge David L. Zerrer, issued March 24, 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 9th day of October 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Larry Busby

Injury No. 97-495777

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: D.C. Cycle Ltd.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: January 16, 2008

Checked by: DLZ

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: July 3, 1997
5. State location where accident occurred or occupational disease was contracted: Springfield, Greene 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? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Uninsured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant received leg fracture while working on motorcycle
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: Knee
14. Nature and extent of any permanent disability: 45% of the right lower extremity at the 160 week level
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? \$14,465.20
18. Employee's average weekly wages: \$268.15
19. Weekly compensation rate: \$178.77
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$14,465.20

6-2/7 weeks of temporary total disability (or temporary partial disability)--\$1,123.69

72 weeks of permanent partial disability from Employer --\$12,871.44

-0-weeks of disfigurement from Employer

22. Second Injury Fund liability: Yes No Open

-0- weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: \$14,465.20

Total: \$28,460.33

23. Future requirements awarded: None

Said payments to begin immediately 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: Ellen E. Morgan

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Larry Busby

Injury No. 97-495777

Dependents:

Before the

**DIVISION OF WORKERS'
COMPENSATION**

Employer: D.C. Cycle Ltd.

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Uninsured

Checked by: DLZ

On the 16th day of January, 2008, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, Ellen E. Morgan. The Employer appeared by its corporate representative, Donald Bennett. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General, Cara Harris. Health Care Provided, Cox Medical Center, appeared by

its attorney, Jason Shaffer.

The parties have entered into a stipulation as to certain facts which are not in dispute as follows, to wit: The alleged Employer's liability was uninsured; on the alleged injury date of July 3, 1997, Larry Busby was an employee of the Employer, D.C. Cycle Ltd.; the parties agree that on or about July 3, 1997, Claimant sustained an accident which arose out of the course of and scope of employment with D.C. Cycle Ltd.; the employment occurred in Greene County, Missouri, and Greene County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$268.15, sufficient to allow a compensation rate of \$178.77 for temporary total disability and permanent partial disability; no temporary benefits have been paid prior to the date of this hearing; no medical benefits have been paid prior to the date of this hearing; the Claimant's attorney requests approval of an attorney fee of 25% of the amount of any award; the amount of the Veteran's Administration lien for medical expenses, in the sum of \$13,461.00, was for reasonable and necessary medical treatment administered to the Claimant to cure and relieve the effects of his injuries of July 3, 1997; the amount of Cox Medical Center's medical fee dispute, in the sum of \$1,004.20, was for reasonable and necessary medical treatment administered to the Claimant to cure and relieve the effects of the injuries of July 3, 1997.

ISSUES

Whether on or about July 3, 1997, the Employer, D.C. Cycle Ltd., was operating subject to the Missouri Workers' Compensation law.

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

Whether the Employer is obligated to pay for past medical expense.

Any temporary total benefits owed to the Claimant.

The nature and extent of any permanent disabilities.

The liability of the Second Injury Fund for reimbursement of medical expenses incurred by the Claimant.

DISCUSSION

A legal file was adopted by the Administrative Law Judge consisting of the following documents, to wit: Claim for Compensation, filed with the Division July 28, 1998; Amended Claim for Compensation, filed with the Division August 17, 1998; Answer to Claim for Compensation, filed by the Employer November 1, 2001; Amended Answer to Claimant for Compensation, filed with the Division October 11, 2005; Answer to Claim for Compensation, filed by the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, through the Office of Attorney General, August 28, 1998; Notice of Services Provided & Request for Direct Payment, filed with the Division by Cox Medical Center.

Claimant introduced and there were admitted into evidence the following exhibits:

- A. Deposition of Donald Cornell Bennett Jr.
- B. Deposition of Dr. Robert Poetz
- C. Medical records of Veteran's Administration Hospital
- D. Medical bills of Cox medical Center and Veteran's Administration Hospital
- E. Medical records of Cox Medical Center
- F. Original Claim for Compensation, Amended Claim for Compensation, and Employer Answer to Claim for Compensation
- G. Business records of D.C. Cycle, Be-Back Motors, and Donald Bennett
- H. Correspondence from Division of Workers' Compensation dated September 3, 1998, August 25, 1998, August 17, 1998, and August 2, 1998
- I. Copy of subpoena (not offered)
- J. Copy of subpoena issued for Don Bennett and Chelly Bennett
- K. Correspondence of D.C. Cycle to Division of Workers' Compensation

Larry Busby, claimant herein, testified in his own behalf. Larry Busby worked for D.C. Cycle in 1997. He testified that his duties included working on motorcycles, assisting in the purchase and sale of used motorcycle parts, and from time to time working on cars.

Claimant testified that on July 3, 1997, he was working on a motorcycle as part of his regular work tasks, working on a faulty kick start mechanism. After working on the motorcycle for a period of time, Claimant tried to start the machine. Claimant stood on the kick starter and on the second attempt to start the machine, the kick starter malfunctioned causing the motorcycle to land on Claimant's right leg in the area of his knee. Claimant fell to the floor and Donald Bennett came out to the shop area to assist Claimant. Claimant was removed to the hospital by Donald Bennett in the personal vehicle of Donald Bennett.

Claimant was taken to Cox North Hospital. While at the emergency room, Claimant asked Donald Bennett if he had insurance and Claimant was told "No, you're pretty much on your own." Claimant was advised by medical staff at the emergency room that Claimant's right leg was fractured at the knee and that surgery would be necessary.

Claimant testified that he made arrangements for transfer to the Veteran's Administration Hospital in Columbia, Missouri, for further treatment. Claimant further testified that the emergency room staff indicated that Claimant would have to be transported by ambulance to Columbia. Arrangements were then made and Claimant was transported to the V.A. Hospital in Columbia, Missouri.

Claimant testified that he received surgery which included the placement of plates and screws in his leg and that he was inpatient at the V.A. Hospital for five or six days. Claimant returned to Springfield after his release from the V.A. Hospital and was off work for about 6 or 7 weeks before he returned to work with the assistance of crutches.

Claimant testified that Donald Bennett was the boss of D.C. Cycle and that Bennett approved all purchases and sales of used parts. Claimant further testified that Donald Bennett's spouse worked behind the sales counter from time to time as well as Ian Nax and Chris Passantino. He further testified that there was a bookkeeper named Hutchison who came into the store about one time per week.

Claimant testified that D.C. Cycle business consisted of one room used for parts and supplies inventory and another room which was a sales showroom. In addition, there was a storage room and the mechanics' shop area. Claimant further testified that there was a sales counter which contained a telephone and cash register. Claimant testified that employees used the sales counter to collect cash, ring up sales, and to get parts from the shelves behind the counter for the purpose of delivering parts to customers at the counter.

Claimant testified that Michelle Bennett (Chelly Bennett) worked as a counter person periodically, not every day but weekly. Donald Bennett, Michelle Bennett, Chris Passantino, and Ian Nax ran the counter and that if Donald Bennett was present at the store; he was always in charge of the counter. Claimant testified that he worked in the shop area for the most part but was behind and around the sales counter throughout the day for various reasons. Claimant further testified that, to his knowledge, the only office people at the Employer were Michelle Bennett, Donald Bennett, Chris Passantino, Ian Nax, and Claimant.

Claimant testified that he was always paid by check for his payroll and never paid by cash. Claimant further testified that he did not recall why his paycheck amount would not always match his payroll record. Claimant testified that he thought Michelle Bennett prepared the federal and state tax reports and W-2's.

Claimant testified concerning a 1998 injury to his right knee while Claimant was employed at Ozark Circuit, Inc. Claimant was treated with medication and placed on restricted duty for a period of time, after which Claimant's right knee condition resolved to level it was prior to the 1998 injury.

Claimant testified that because of his right knee condition, he cannot jump, run, bend his right knee, or flex his right knee. Prior to the accident of July 3, 1997, Claimant had no medical problem with his right knee and no restrictions on the use of that knee. Claimant further testified that he has constant pain in the right knee and that he takes medication during the day to relieve the pain. Claimant now drives a delivery truck for an occupation and Claimant states that getting in and out of the truck is harder because of his right knee pain. Claimant further testified that he is limited to lifting not more than 25 pounds.

Claimant testified that he was terminated from Ozark Circuit, Inc., and had to quit working at Prime Source because the jobs required heavy lifting which exacerbated the pain in Claimant's right knee.

Claimant testified that he received no temporary disability benefits while he was off work from July 3, 1997, through August 15, 1997, and that, to Claimant's knowledge, his medical treatment bills are still outstanding.

Claimant testified that Ian Nax worked for the Employer prior to July 3, 1997, on an as needed basis during vacations and times when the work load was heavier or someone was out. Claimant testified that he did not know for sure when Ian Nax was present working at the Employer.

On cross-examination Claimant admitted that he did not remember asking for or receiving cash advances, but it was possible that he did receive advances on his paycheck from time to time and those advances could have been taken out of his pay after calculating his tax withholdings. Claimant testified that Ian Nax worked at least one day each week and sometimes more, but Claimant could not say any specific days that he remembered Nax working. Claimant also admitted that he did not know how much Nax was paid or if he was paid any compensation by the Employer.

Claimant admitted that he saw Michelle Bennett working at Employer but that he does not remember ever seeing a paycheck for Michelle Bennett. Claimant further admitted that he was not privy to the Employer's financial records. Claimant admitted that he was not aware of how many hours Michelle Bennett worked, but it would have been part time hours.

Claimant admitted that he received a settlement of 15% of the right knee from his 1998 injury at Ozark Circuit and that the settlement occurred in September 2002. Claimant also admitted that he had a back injury in November 2003 for which he received a settlement of 5% of the body as a whole.

Claimant admitted that he did not know how Shirley Hutchison was paid or if she was paid, but Claimant saw the bookkeeping records on the desk from time to time.

On cross-examination by the Second Injury Fund Claimant admitted that on July 3, 1997, Donald Bennett told Claimant that he had insurance but that if Claimant used it, it would take months before any benefit would be paid. Claimant further admitted that Donald Bennett told Claimant that he did not want to use his insurance for this accident. Claimant admitted that he does not know who gave the Cox Medical Center information about the accident or how to bill for the treatment received at Cox.

Timothy Michael Nielsen testified on behalf of Claimant. Mr. Nielsen testified that he knows the Claimant and knows Donald Bennett and Michelle Bennett. Mr. Nielsen further testified that he was aware of Claimant's injury in July 1997. Mr. Nielsen testified that he visited D.C. Cycle from time to time as a customer and had done so for a long time. Mr. Nielsen further testified that he saw Michelle Bennett at D.C. Cycle from time to time in 1997 but that he did not see her in the store every time he was there. Mr. Nielsen testified that he observed Michelle Bennett answering the telephone at D.C. Cycle but that he was not aware of any specific sales duties which Michelle Bennett performed. Mr. Nielsen also testified that he saw Ian Nax and Claimant working at the store from time to time. Mr. Nielsen further testified that he does not recall seeing a bookkeeper at the store when he was present.

On cross-examination by the Second Injury Fund, Mr. Nielsen admitted that his business relationship with D. C. Cycles was as a customer.

Dr. Robert Poetz testified on behalf of Claimant by deposition. Dr. Poetz testified that he performed an Independent Medical Evaluation on the Claimant on December 16, 2004. Dr. Poetz testified that prior to the examination, he examined treatment records of the Claimant concerning treatment administered on the day of the accident and thereafter. Dr. Poetz further testified that he took a history from the Claimant and performed a physical examination. Dr. Poetz identified his report as Deposition Exhibit 2 which showed a diagnosis of a markedly comminuted fracture of the proximal tibia with extension into the lateral tibial plateau which was repaired by internal fixation using plates and screws.

Dr. Poetz opined that Claimant should be restricted from prolonged standing, walking kneeling, and squatting, as well as avoiding activities which exacerbate Claimant's symptoms. Dr. Poetz further opined that Claimant should continue to use warm moist packs on his knee and to exercise range of motion of the knee. In addition, Dr. Poetz

opined that Claimant would require ongoing use of non-steroidal anti-inflammatory medications. Dr. Poetz opined that if Claimant's symptoms persist there should be a repeat MRI of the right knee followed by appropriate treatment indicated by the MRI.

Dr. Poetz assessed Claimant's permanent disability at 45% of the right lower extremity at the 160-week level, such disability being directly resultant from the July 3, 1997, injury.

Claimant introduced Claimant Exhibit A, deposition of Donald Bennett. The exhibit was admitted provisionally at the hearing. Donald Bennett testified at the hearing in person. The deposition marked as Exhibit A, was used to impeach the direct testimony of Donald Bennett. Claimant's Exhibit A is hereby admitted into evidence for the sole purpose of impeachment of the witness, Donald Bennett.

Claimant introduced, and there was admitted without objection, medical treatment records of the Claimant from the date of his accident. The treatment records generally support and affirm the testimony of the Claimant and of Dr. Poetz.

Donald Bennett, President and corporate representative of the Employer, testified on behalf of Employer. Mr. Bennett testified that he started D.C. Cycle Ltd, (Employer) 1994 as A Missouri corporation. Mr. Bennett was the president and manager of operations of Employer and was so on July 3, 1997. Mr. Bennett further testified that Employer is in the business of purchasing and selling new and used parts for motorcycles and providing repairs to motorcycles. Mr. Bennett testified that there were three shareholders of D.C. Cycle Ltd. Himself, Michelle Bennett, and John Nax (Mr. Bennett's father-in-law). Mr. Bennett further testified that he was a corporate officer in another corporation known as Be-Back Motors which was a used car dealership which operated out of the same address as D. C. Cycle Ltd.

Mr. Bennett testified that D. C. Cycle Ltd. had three paid employees, namely: Donald Bennett, Chris Passantino, and Larry Busby, Claimant herein. Claimant testified that his brother-in-law, Ian Nax, came to work at the Employer after July 3, 1997, but that Ian Nax did not work for the Employer prior to July 3, 1997. Mr. Bennett further testified that Ian Nax was a teacher in the Lebanon, Missouri, school district. Mr. Bennett identified Exhibit 7, payroll records for Ian Nax which shows his first payroll for the period July 11, 1997, through July 18, 1997. Mr. Bennett testified that Ian Nax left Employer to return to teaching school in August 1997.

Mr. Bennett testified that his spouse, Michelle (Chelly) Bennett, was employed in 1997 by BKD Accounting Firm as a corporate tax accountant. Mr. Bennett testified that Michelle Bennett never received any payroll compensation for working at the Employer. He further testified that Michelle Bennett did not perform regular duties for the Employer and that the Employer did not have an accountant in 1997. Mr. Bennett stated that tax returns were prepared by Paul Fiend, Accountant. Mr. Bennett testified that Michelle Bennett never worked as a parts person, at counter sales, or motorcycle repairs.

Mr. Bennett testified that he knew Shirley Hutchison and that she would come to the Employer about one time per month to look at the Employer's bookkeeping records. Mr. Bennett testified that Shirley Hutchison asked Mr. Bennett if she could learn how to do bookkeeping by helping at his office. Mr. Bennett agreed that Michelle Bennett would help teach Shirley Hutchison how to do bookkeeping. Mr. Bennett further testified that Shirley Hutchison had no set schedule, was paid no compensation, held no position with the corporation, and would come about one time each month to look at the books.

Mr. Bennett testified that Michelle Bennett did the bookkeeping for the Employer until about 2000, when Shirley Hutchison also stopped working on the bookkeeping for Employer. Mr. Bennett testified that he did not replace Shirley Hutchison as a bookkeeper.

Mr. Bennett testified that his deposition testimony, Claimant Exhibit A, was wrong in that Shirley Hutchison never paid the bills, never balanced the checkbook, never recorded all payroll, never prepared quarterly tax reports, and never prepared W-2 forms for D. C. Cycle Ltd.

Mr. Bennett testified that he prepared all tax returns and reports for 1997.

Mr. Bennett identified Employer's Exhibit 14, which were check stubs of the Employer for certain checks written between May 30, 1997, and June 30, 1997. Mr. Bennett testified that some payroll checks for the Claimant show advances withheld from payroll, and that in each such instance, Claimant had asked Mr. Bennett for a loan or an advance on his paycheck. Mr. Bennett further testified that Claimant was considered a seasonal worker because he worked on motorcycles. Claimant usually worked from March through October; however, Claimant would work some from time to time during the winter months, but only as needed.

Mr. Bennett testified that on July 3, 1997, he transported Claimant to Cox North Emergency room for treatment after the accident. Mr. Bennett further testified that he never authorized any treatment for the Claimant but that he did offer to transport the Claimant to the Veteran's Administration Hospital in Columbia, Missouri, but the hospital staff said that Claimant could not ride in a private vehicle and had to go to Columbia in an ambulance.

Mr. Bennett testified that when Claimant returned to work, he returned as a counter man because he was on crutches and could not perform his regular duties. Mr. Bennett laid off the Claimant about September 26, 1997, for the reason that work was slowing down for the season.

On cross-examination Mr. Bennett admitted that his testimony in his deposition of November 5, 2001, was not true in certain respects. He admitted that when he testified in November 2001, that Ms. Hutchison did the bookkeeping, he was wrong. That when he testified Ms. Hutchison worked 10-12 hours per month, he was wrong. That when he testified Ms. Hutchison did the checkbook balancing, he was wrong. That when he testified Ms. Hutchison prepared tax reports, he was wrong. That when he testified that Michelle Bennett came to the Employer's place of business once every three to four weeks, he was wrong. That when he testified Michelle Bennett did not answer the phone at the sales counter, he was wrong. That when he testified that he gave Ms. Hutchison the books to keep, he was wrong. That when he testified he had no knowledge of how to keep the books, he was wrong. That when he testified Ms. Hutchison prepared reports, sales tax reports, and payroll reports that was not the truth.

Mr. Bennett admitted that Ian Nax and Larry Busby never worked at the same time and that Ian Nax never performed any job tasks for the Employer prior to July 3, 1997, nor after August 15, 1997.

On redirect examination Mr. Bennett testified that Ian Nax worked as a family member. On recross-examination Mr. Bennett admitted that the orange colored figures appearing on the check stubs set out on Exhibit 14 were bookkeeping codes for the bookkeeper.

Michelle Bennett testified on behalf of Employer. Ms. Bennett testified that she is the former spouse of Donald Bennett and that they were divorced in about 2001. She testified that she was a director/officer of the corporation, and that she never received any compensation as a director or as an officer.

Ms. Bennett testified that in 1997 she was employed by BKD Accounting firm in Springfield, Missouri as a tax accountant, and that she was preparing to take the exam to be a certified public accountant. Ms. Bennett testified that she worked an average of 72 hours per week from January until April 1997. Thereafter, she worked about 50 hours per week minimum for the remainder of the year.

Ms. Bennett testified that she did not do any work for Employer other than attend officer meetings every several months. She also testified that she would stop in the store from time to time and would answer the telephone if everyone was busy. She also stated that she would put callers on hold until they could talk to someone more knowledgeable about the business. Ms. Bennett further testified that she was not capable of performing technical repairs on motorcycles.

Ms. Bennett testified that between April and July 1997 she would stop by the store for 2-3 hours per week, and that usually she would come by when she was off work from BKD. Ms. Bennett testified that she did not prepare tax reports because it was not her job and that an outside accountant prepared the tax returns.

Ms. Bennett testified that she helped Shirley Hutchison at the Employer's place of business when Shirley Hutchison worked on the books. Ms. Bennett showed Shirley Hutchison how to use accounting software, ten-key add

machine, and the theory of debits and credits. Ms. Bennett also testified that she used records in Mr. Bennett's office to work with Shirley Hutchison and that they used the Employer's computer to do all the bookkeeping work/training.

On cross-examination Ms. Bennett admitted that her W-2 income for 1997 from BKD was \$33,000.00. She further admitted that she worked with Shirley Hutchison 1-2 hours each week working on bookkeeping. Ms. Bennett admitted that she did not know whether Ian Nax performed any tasks for the Employer during May and June of 1997, prior to the date of Claimant's accident.

Shirley Hutchison testified on behalf of Employer by deposition. Ms. Hutchison testified that she began helping to look over tax reports prepared for D.C. Cycle in January 1997 (the same year as Claimant's injury). She ceases coming to the Employer's place of business in 2000 when she obtained a job at Norma's Dress Shop. Ms. Hutchison testified that she worked with the tax reports of Employer during the period from 1997 through 2000, but that she received no cash remuneration for any service she performed for or on behalf of Employer. Ms. Hutchison further testified that she had no set working hours, and that she came in about one time each month.

Ms. Hutchison testified that she did not remember what materials were left for her but that she did remember using a ten key add machine. Ms. Hutchison testified that she had no timetable for completing her review task but she estimated that it usually took two-three hours. Ms. Hutchison also testified that when she completed her work she would leave on whatever schedule she chose.

Ms. Hutchison admitted on cross-examination Donald Bennett was a friend of hers and that the issue in this claim was that Donald Bennett should have carried workers' compensation insurance if he had more than a certain number of employees; and that her intention in testifying on behalf of Employer was to testify that she was not an employee. She further testified that she has been a guest in Donald Bennett's home and attended the same church, and that their friendship has extended over a period of years to prior to 1997.

Ms. Hutchison admitted that she was never at the Employer's place of business more often than one time each month for two to three hours. She also admitted that the forms were already prepared when she received them, and when she finished "auditing" the numbers the forms were ready for filing with the appropriate tax officials. Ms. Hutchison further admitted that, other than double checking payroll reports, she did nothing with the Employer's checkbook, didn't balance the checkbook and that she never looked at the Employer's checkbook.

Ms. Hutchison admitted that she did not do the books for Employer. She also admitted that if Donald Bennett testified in 2001 that Ms. Hutchison came in ten to twelve hours a month, that would be incorrect; that if Donald Bennett testified that Ms. Hutchison recorded payroll receipts and balanced the checkbook for D. C. Cycle, that would be incorrect; that if Donald Bennett testified that he had no knowledge of bookkeeping, that he gave her the books and that she agreed on a time that she was going to be there to do his books, that would be incorrect; that if Donald Bennett testified that he gave Ms. Hutchison the books and said here you go do what you want, that would be incorrect; if Donald Bennett testified that Ms. Hutchison did more than balance the checkbook of the Employer; that would be incorrect; if Donald Bennett testified that Ms. Hutchison compiled all the sales tax figures, she admitted that she sometimes looked at the sales tax figures. Ms. Hutchison denied that she prepared W-4 forms, W-2 forms, and she admitted that if Donald Bennett testified that Ms. Hutchison prepared those forms, that would be wrong.

Ms. Hutchison admitted that Chelly Bennett answered the phone occasionally if the phone rang. She further admitted that she was not aware that Chelly Bennett helped stock any parts.

Ms. Hutchison admitted that Chelly Bennett showed her how to perform bookkeeping functions. She also admitted that Chelly knew how to show her how to check payroll.

Employer introduced, and there was admitted into evidence, certain records of the Secretary of State's office submitted to establish that D.C. Cycle was a corporation in good standing during the period from its inception up to and including 1997. Employer also introduced, and there was admitted into evidence, copies of employment reports submitted to the State of Missouri which showed the persons who received wages from Employer during 1997 from a period of time prior to the injury date until after the injury date.

FINDINGS OF FACT AND RULINGS OF LAW

Whether on or about July 3, 1997, the Employer, D.C. Cycle and/or Donald Bennett was operating subject to the Missouri Workers' Compensation Law.

The issue to be determined is whether or not the Employer had five or more employees on or about July 3, 1997. The evidence is sufficient to establish, and Employer's representative, Donald Bennett, testified that he, Chris Passantino, and Larry Busby, claimant herein, were employed by D.C. Cycle. There is a question of fact as to whether Ian Nax, Shirley Hutchison, and/or Michelle Bennett were employees under the law on or about July 3, 1997. There is substantial and competent evidence that Ian Nax was an employee of Employer after the Claimant's injury. Claimant testified that Ian Nax was around the Employer's place of business before July 3, 1997, but Claimant admitted that he did not know any specific days or dates that Ian Nax was present prior to July 3, 1997, and Employer's payroll records do not reflect any compensation paid to Ian Nax prior to July 3, 1997. Claimant has failed on any burden of proof to prove that Ian Nax was an employee of the Employer prior to July 3, 1997.

Shirley Hutchison testified that she worked at the Employer's place of business prior to July 3, 1997, for no compensation. She testified that she at least checked over payroll records and "may" have done some things with compiling and/or preparing sales tax reports. Chelly Bennett testified that she helped train Shirley Hutchison at least 1-2 hours per week. Shirley Hutchison testified that Chelly Bennett helped her at the Employer's place of business. Donald Bennett, corporate representative and president of Employer, testified in 2001, under oath, that he knew nothing about bookkeeping; and that Shirley Hutchison was in charge of compiling, preparing and filing tax reports, keeping the corporate checkbook balanced, and that bookkeeping was her responsibility. At the hearing in 2008, Mr. Bennett completely changed his testimony and testified that he kept the books of the Employer in 1997, and that everything with regard to bookkeeping that he testified to in 2001, was not true, or wrong, or incorrect. From the abundance of conflicting testimony it appears there are several common facts: Shirley Hutchison performed a service task for the Employer in 1997 prior to July 3, 1997. Her tasks included, at a minimum, auditing the payroll records and payroll tax reports for the Employer. At maximum, her tasks included keeping the checkbook balanced, compiling and preparing sales tax reports, and compiling financial reports. If Shirley Hutchison performed services for the benefit of the Employer by appointment or election or by employment agreement, she can be considered an employee for purposes of Section 287.020.1

After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has sustained his burden of proof to prove that Shirley Hutchison was an employee of the Employer on or about July 3, 1997.

Chelly Bennett testified that she was present at the Employer's place of business on at least several occasions per month, and Chelly Bennett admitted that she answered the business telephone sometimes and routed calls to appropriate persons at the shop. She also admitted that she was present 1-2 hours per week to work with Shirley Hutchison on the computer training her to perform bookkeeping tasks. Shirley Hutchison testified that this training occurred for a period of three years.

Claimant testified that he saw Chelly Bennett at the Employer's place of business from time to time, and that he observed her answering the Employer's business telephone when she was present. Claimant testified that Chelly Bennett prepared the W-2 forms for the other employees of the Employer. Chelly Bennett testified that she was an accountant in 1997 working for an accounting firm in Springfield, Missouri, during 1997; and that she was preparing to take the CPA exam, and that she did, in fact, become a certified public accountant. Witness Neilsen, a regular customer of the Employer, testified that he would see Chelly Bennett present at the Employer's place of business, and that he observed her answering the Employer's business telephone from time to time. Chelly Bennett testified that she did no bookkeeping for the Employer and was not employed by the Employer, although she did testify that she was an officer of the Employer and attended officers' meetings every several months.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Chelly Bennett performed services for the Employer either by appointment or by election. I further find that Chelly Bennett's attendance at officers' meetings every several months, along with her presence at the business from time to time, as well as her performing an essential task of business such as answering the business telephone and working on the bookkeeping of the Employer or training someone to work on the bookkeeping of the Employer, constitutes sufficient service to meet the definition of employee pursuant to Section 287.020.1. I further find that Chelly Bennett's activities on behalf of the Employer took place over a period which exceeds 5-1/2 consecutive days.

I find that Claimant has sustained his burden of proof to prove that Chelly Bennett was an employee of the Employer on or about July 3, 1997.

Based on the preceding findings, and based on the evidence adduced at the hearing, and based on the record as a whole, I find that D.C. Cycle Ltd. was an employer who had five or more employees on or about July 3, 1997 and was therefore subject to the Missouri Workers' Compensation Law. I find this issue in favor of Claimant.

**Whether the accident caused the injuries and disabilities for which benefits are now being claimed.
Whether the Employer is obligated to pay for past medical expenses.**

The evidence adduced at the hearing established that Claimant had an accident at the Employer's place of business during working hours at a time when Claimant was performing tasks in the service of the Employer's business. Donald Bennett transported Claimant to the hospital immediately after the accident. Treatment that ensued at the Cox Medical Center and later at the Veteran's Administration Hospital was reasonable and necessary to cure and relieve the Claimant of the effects of the injury. The accident of July 3, 1997, was the substantial factor in the Claimant's need for treatment; therefore, the medical expenses to provide that reasonable and necessary care and treatment of Claimant's injuries was the responsibility of the Employer, and such expenses should have been paid by the Employer.

Claimant admitted evidence that the amount of medical expense expended for his treatment, set out in Claimant's Exhibit D, was \$1,004.20 from Cox Medical Center and \$13,461.00 from the Veteran's Administration Hospital.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant's accident caused the injuries and disabilities for which benefits, including medical treatment benefits, are now being claimed. I further find that medical treatment expenses incurred by the Claimant in the amount of \$14,465.20 were the responsibility of the Employer, and Employer is hereby ordered to reimburse Claimant in the sum of \$14,465.20, as and for medical expense reimbursement.

I find these issues in favor of Claimant.

Any temporary total benefits owed to Claimant.

The evidence adduced at the hearing established that Claimant was off work from July 3, 1997, through August 14, 1997, a period of 6-2/7 weeks. The parties stipulated that Claimant's average weekly wage was \$178.77.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole and the findings and rulings previously set out herein, I find that Claimant is entitled to a temporary total disability benefit of \$1,123.69 (6-2/7 x \$178.77 = \$1,123.69). Employer is hereby ordered to pay to Claimant the sum of \$1,123.69, as and for temporary total disability benefit.

I find this issue in favor of the Claimant.

The nature and extent of any permanent disability.

Claimant admitted Exhibit B, the report and deposition of Dr. Poetz. Dr. Poetz's report states that, in Dr.

Poetz's opinion, Claimant has suffered a 45% permanent partial disability to the right lower extremity at the knee. Employer did not offer any evidence of disability for this injury. Claimant testified that, as a result of this injury, he cannot jump, run, or bend his knee freely. He also stated that he has constant pain in his right knee and that he does not lift more than 25 pounds. Dr. Poetz restricted Claimant from prolonged standing, walking, kneeling and squatting, as well as avoiding activities which exacerbate pain symptoms in his knee. In addition, Dr. Poetz recommended Cox II non-steroidal anti-inflammatory medications and exercises for the right knee. Claimant was cross-examined concerning a right knee injury in 1998; however, Claimant testified that after the 1998 injury, his right knee condition returned to the level of disability after the 1997 injury and before the 1998 injury.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has suffered a 45% permanent partial disability to the right knee. The parties stipulated that the compensation rate for permanent partial disability was \$178.77. Employer is hereby ordered to pay to Claimant the sum of \$12,871.44. as and for a permanent partial disability benefit ($160 \times 45\% = 72 \text{ weeks} \times \$178.77 = \$12,871.44$).

I find this issue in favor of Claimant.

The liability of the Second Injury Fund for reimbursement of medical expenses incurred by the Claimant.

Based on the findings and rulings set out above I find that the Second Injury Fund is liable for the reimbursement of medical expenses incurred by the Claimant which were reasonable and necessary to cure and relieve the effects of the injury. The medical expense incurred by Claimant is in the total sum of \$14,465.20. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to the Claimant the sum of \$14,465.20, as and for reimbursement of medical expenses incurred by the Claimant as a result of this injury.

Whether health care provider, Cox Medical Center, is entitled to direct payment of medical expenses incurred by Claimant as alleged in Medical Fee Dispute No. 97-00971.

Claimant and Donald Bennett each testified concerning the events which took place at the Cox Medical Center emergency room on July 3, 1997. Claimant testified that he was given medication to relieve his pain from the fracture injury he suffered. He testified that he remembered Donald Bennett telling him that insurance would take forever to collect and that Claimant was "on his own." Donald Bennett denied signing any authorization for treatment or agreeing to any hospital representative that Employer would be responsible for payment of Claimant's medical treatment expense. The health care provider did not present any written or oral evidence that Employer agreed to pay for Claimant's treatment.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that health care provider, Cox Medical Center, failed to sustain its burden of proof that Employer authorized the treatment administered to the Claimant at Cox Medical Center on July 3, 1997. Cox Medical Center's Request for Direct Payment is denied.

Claimant's attorney requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Date: March 24, 2008

Made by: /s/ David L. Zerrer
David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker

Director
Division of Workers' Compensation