

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

Injury No. 15-086586

Employee: Allen Cleghorn
Employer: Sunshine Home Improvements
Insurer: Travelers Property Casualty Company of America
Employer: Done-Rite Home Improvement
Insurer: None
Alleged Employer: Welcome Home Exteriors, LLC
Alleged Insurer: Missouri Employers Mutual Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

We note there is no evidence in the record that either Sunshine Home Improvements or Done-Rite Home Improvement hired or paid Welcome Home Interiors, LLC, to perform any work. Employee Allen Cleghorn performed work for both entities solely in his individual capacity. Under these circumstances, the administrative law judge correctly concluded that, because employee's immediate employer Done-Rite is uninsured, employer Sunshine Home Improvements is secondarily liable for employee's October 20, 2015, work injury as a statutory employer pursuant to § 287.040.1 RSMo.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Lawrence G. Rebman, issued March 2, 2018, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm 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.

Employee: Allen Cleghorn

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Given at Jefferson City, State of Missouri this 16th day of August 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

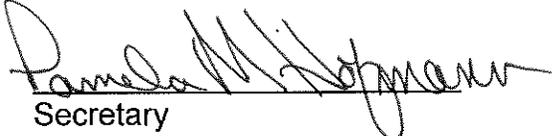



John J. Larsen, Jr., Chairman

SEPARATE CONCURRING OPINION FILED
Reid K. Forrester, Member


Curtis E. Chick, Jr., Member

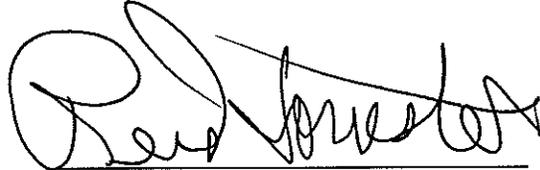
Attest:


Secretary

Employee: Allen Cleghorn

SEPARATE CONCURRING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I would, affirm the administrative law judge's award as written.

A handwritten signature in black ink, appearing to read "Reid K. Forrester". The signature is written in a cursive style with a large initial "R".

Reid K. Forrester, Member

FINAL AWARD

Employee: Allen Cleghorn Injury No. 15-086586
Employer: Welcome Home Exteriors, LLC
Insurer: Missouri Employers Mutual Insurance Co.
Employer: Done-Rite Home Improvement
Insurer: None
Employer: Sunshine Home Improvements
Insurer: Travelers Property Casualty Co. of America
Additional Party: N/A
Hearing Date: January 12, 2018 Checked by: LGR/drl

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: October 20, 2015
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, Mr. Cleghorn was in the employ of Welcome Home Exteriors, Done-Rite Home Improvement, and Sunshine Home Improvement, LLC.
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? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Fell from an elevated position while on a ladder
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: Right lower extremity (160 week level), right shoulder (232 week level), and low back (400 week level)
14. Nature and extent of any permanent disability: 15% to the right lower extremity (160 week level), 25% to the right shoulder (232 week level), and 10% to the body as a whole (400 week level)
15. Period of temporary total disability: October 21, 2015 through February 14, 2016
16. Compensation paid to-date for temporary disability: None
17. Value necessary medical aid paid to date by employer/insurer? \$0
18. Value necessary medical aid not furnished by employer/insurer? \$5,713.20
19. Employee's average weekly wages: \$750.00
20. Weekly compensation rate: \$500.03 for temporary total disability. \$464.58 per permanent partial disability
21. Method wages computation: By testimony of Employee

COMPENSATION PAYABLE

Medical Already Incurred and owed: \$5,713.20

Temporary Total Disability owed: \$8,355.50

Permanent Partial Disability: \$56,678.76

Total Award: \$70,747.46

Second Injury Fund liability: N/A None

22. Future requirements awarded: None

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Michael J. Haight, Attorney, for necessary legal services plus expenses.

FINAL AWARD

Employee: Allen Cleghorn Injury No. 15-086586
Employer: Welcome Home Exteriors, LLC
Insurer: Missouri Employers Mutual Insurance Co.
Employer: Done-Rite Home Improvement
Insurer: None
Employer: Sunshine Home Improvements
Insurer: Travelers Property Casualty Co. of America
Additional Party: N/A
Hearing Date: January 12, 2018 Checked by: LGR/drl

FINDINGS OF FACT AND RULINGS OF LAW

On January 12, 2018, employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to § 287.110. The employee, Allen Cleghorn, appeared in person and with counsel, Michael Haight. The employer, Sunshine Home Improvement, and its insurer, Travelers Property Casualty, appeared through its counsel, Randall Schroer. The employer, Welcome Home, and its insurer Missouri Employers Mutual, appeared through its counsel, Danielle Augustine. The employer Done-Rite Home Improvement was not insured and was not represented by counsel. The Second Injury Fund was not a party to the case.

STIPULATIONS

The parties stipulated that:

1. On or about October 20, 2015 (“the injury date”), Sunshine Home Improvements (“Sunshine”) was an employer working subject to Missouri’s Workers’ Compensation law with its liability fully insured by Travelers Insurance;
2. Allen Cleghorn suffered accidental injuries on the injury date while in Blue Springs, Jackson County, Missouri;
3. At the time of said accident, Allen Cleghorn was performing work on a job that Sunshine had contracted to perform for the property owner;
4. Allen Cleghorn filed his claim against Sunshine within the time allowed by law;

5. Allen Cleghorn was hired by Jesse Klee, owner of Done-Rite Home Improvement ("Done-Rite"), to provide services on the date of loss at the work site in issue;
6. Jesse Klee and Done-Rite Home Improvement did not have Missouri workers' compensation coverage on the injury date;
7. Allen Cleghorn is the managing member of Welcome Home Exteriors, LLC ("Welcome Home");
8. On the injury date, Welcome Home Exteriors, LLC was insured by Missouri Employers Mutual Insurance;
9. Allen Cleghorn is shown to have excluded himself from coverage under said insurance policy and was not covered by it on the injury date;
10. Allen Cleghorn incurred medical expenses in the amount of \$5,713.20 for reasonable and necessary medical treatment for injuries suffered in this accident;
11. Allen Cleghorn was temporarily and totally disabled from October 21, 2015 through February 14, 2016.

ISSUES

The parties requested the Division to determine:

1. Whether Sunshine qualifies as a statutory employer of Allen Cleghorn;
2. Whether timely notice of the accident was provided to Sunshine;
3. The applicable average weekly wage; and
4. The nature and extent of permanent partial disability.

EXHIBITS

Allen Cleghorn testified on his own behalf and submitted the following exhibit which was admitted into evidence without objection:

Exhibit A – Independent Medical Evaluation Report of Dr. William O. Hopkins and Curriculum Vitae

Sunshine did not present any witnesses to testify and presented the following exhibit which was admitted into evidence without objection:

Exhibit 1- Missouri Employers Mutual Insurance Workers' Compensation Policy

Based on the above exhibits and the testimony of Mr. Cleghorn, I make the following findings:

FINDINGS OF FACTS

Mr. Allen Cleghorn testified that he has performed carpentry work and window installation for more than 30 years in the Kansas City area. He has performed this work both through his own company, Welcome Home Exteriors, LLC, and as side jobs when hired by other individuals.

Done-Rite Home Improvement, owned by Jesse Klee, is another company that performs work through similar arrangements as those made by Welcome Home. Mr. Cleghorn testified that he would sometimes work for Done-Rite when work was not available through Welcome Home. He would be paid in cash by Jesse Klee on behalf of Done-Rite. Mr. Cleghorn testified that he would not declare his wages paid by Done-Rite as revenue earned by or through Welcome Home. He further testified that he would routinely be paid \$250 per day by Done-Rite and has been paid as much as \$300 per day in the past.

On the date of injury, Mr. Cleghorn was performing work on a job that was contracted by Sunshine Home Improvements. The evidence indicates that Sunshine had contracted with Done-Rite to perform some or all of the work it had agreed to complete. Jesse Klee of Done-Rite had arranged for Mr. Cleghorn to perform the work with him as he had done in the past. Neither Mr. Klee or Mr. Cleghorn were direct employees of Sunshine on the date of injury.

On the date of the accident, Welcome Home Exteriors, LLC had a workers' compensation policy issued by Missouri Employers Mutual (MEM) on June 16, 2015 with a policy period of June 17, 2015 to June 17, 2016 and policy number of MEM 2012831-01. (See Employer/Insurer's Ex. 1.) This policy covered the date of accident. The workers' compensation policy has a Partners, Officers and Others Exclusion Endorsement (WC 00 03 08). The insured is identified on the declarations page of the policy and within the endorsement as "Allen Cleghorn DBA Welcome Home Exteriors, LLC." As stipulated at the hearing and as indicated in the subject endorsement, Allen Cleghorn excluded himself from coverage under said insurance policy and was not covered by it on the alleged date of accident.

On October 20, 2015, Mr. Cleghorn was working on a ladder between 15 and 20 feet up the side of a building. The ladder shifted causing his right leg and right arm to slip through the ladder and he fell to the ground. Mr. Cleghorn felt immediate pain in his right shoulder and low back, and subsequently felt pain in his right leg. Mr. Cleghorn reported the accident and his injuries to the owner of Sunshine the following day by telephone.

A subsequent medical evaluation and treatment confirmed that he had fractured his right fibula with damage to the peroneal nerve in that area. He had also torn his right rotator cuff with tendonitis as well and had suffered a sprain/strain to his low back. Due to the denial of his workers' compensation claim, Mr. Cleghorn's medical treatment was truncated. While receiving this treatment, however, he was unable to return to work in any capacity through February 14, 2016.

Mr. Cleghorn testified that he continues to suffer from pain and limitations in each of the body parts injured in the accident. He has weakness as well as limited range of motion in both his right shoulder and his knee. His low back pain is exacerbated by lengthy standing and walking. These symptoms have impacted both his ability to work and some activities of daily living.

Mr. Cleghorn was examined by Dr. William Hopkins whose opinion on disability is the only one in the evidentiary record. Dr. Hopkins concluded that he suffers from disabilities of 35% to the right shoulder at the 232 week level, 25% permanent partial disability at the 400 week level for the low back injury, and 20% to the right lower extremity at the 160 week level.

RULINGS OF LAW

The workers' compensation system was enacted to provide quick recovery to those who were injured without their incurring the cost and delay associated with litigation. *McCormack v. Stewart Enterprises, Inc.*, 916 S.W.2d 219, 226 (Mo.App.1995). The act served to place upon industry losses experienced by employees arising out of injuries sustained in the course of employment. *Rooks v. Trans World Airlines*, 887 S.W.2d 671, 673 (Mo.App.1994); *McFarland v. Bollinger*, 792 S.W.2d 903, 907 (Mo.App.1990).

According to §287.800 RSMo (2013) Strict construction presumes nothing that is not expressed. *Robinson v. Hooker*, 323 S.W. 3d 418(Mo. App. 2010) Courts may not add to or subtract from the express language of the statute. *Id.* at 423.

1. Whether Sunshine qualifies as a statutory employer of Allen Cleghorn.

The threshold issue is whether Sunshine Home Improvement is liable under §287.040 RSMo.

Section 287.020. 1. RSMo states:

The word "employee" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations.

Section 287.037 RSMO states:

Notwithstanding any other provision of law to the contrary, beginning January 1, 1997, those insurance companies providing coverage pursuant to chapter 287, to a limited liability company, as defined in

section 347.015, shall provide coverage for the employees of the limited liability company who are not members of the limited liability company. Members of the limited liability company, as defined in section 347.015, shall also be provided coverage pursuant to chapter 287, but such members may individually elect to reject such coverage by providing a written notice of such rejection on a form developed by the department of insurance, financial institutions and professional registration to the limited liability company and its insurer. Failure to provide notice to the limited liability company shall not be grounds for any member to claim that the rejection of such coverage is not legally effective. A member who elects to reject such coverage shall not thereafter be entitled to workers' compensation benefits under the policy, even if serving or working in the capacity of an employee of the limited liability company, at least until such time as said member provides the limited liability company and its insurer with a written notice which rescinds the prior rejection of such coverage. The written notice which rescinds the prior rejection of such coverage shall be on a form developed by the department of insurance, financial institutions and professional registration. Any rescission shall be prospective in nature and shall entitle the member only to such benefits which accrue on or after the date the notice of rescission form is received by the insurance company.

Section 287.040.1 states:

1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

2. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.

3. In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. The liability of

the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may be recovered from those primarily liable, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. **No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.** (Emphasis added)

Based upon the evidence, Mr. Cleghorn is a person in the service of Done-Rite Home Improvement and Sunshine Home Improvement under any contract of hire on the day of the accident. Sunshine Home Improvement is an employer under the act and engaged in construction with at least one employee.

Next, we must determine if Mr. Cleghorn was insured by any other employer. The purpose of the §287.040 is "to prevent employers from circumventing the requirements of the Act by hiring independent contractors to perform work the employer would otherwise perform." *Busselle v. Wal-Mart*, 37 S.W.3d 839, 841 (Mo.App. S.D.2001)(quoting *Bass v. Nat'l Super Mkts., Inc.*, 911 S.W.2d 617, 621 (Mo. banc 1995), *cert. denied*, 517 U.S. 1208, 116 S.Ct. 1825, 134 L.Ed.2d 930 (1996)).

The MEM workers' compensation policy in evidence is for "Allen Cleghorn DBA Welcome Home Exteriors, LLC." Under the MEM policy issued to Allen Cleghorn DBA Welcome Home Exteriors, LLC, there is a declared withdrawal of Allen Cleghorn from coverage under the policy. Mr. Cleghorn has clearly waived coverage under the MEM policy.

The parties stipulate that Done Right Home Improvement did not have insurance. "Uninsured" is not ambiguous. Any person of average intelligence should know that the plain meaning of 'uninsured' is to be lacking any insurance." *Brake v. MFA Mutual Insurance Company*, 525 S.W.2d 109, 112 (Mo. App. 1975), *cert. denied*, 423 U.S. 894, 46 L. Ed. 2d 126, 96 S. Ct. 192 (1975). The employer/insurer's argument that Mr. Cleghorn was insured under the MEM policy but "excluded from coverage" is not persuasive. The plain meaning of the word "insured" means "One covered by insurance" American Heritage Dictionary, Second College Edition. (1985). Mr. Cleghorn is not covered under the policy from which he has excluded himself and he is not insured by Done Right Home Improvement.

The Employer/Insurer argument that sole proprietors or independent contractors can waive coverage under the Missouri Workers Compensation Act by buying insurance policies that exclude themselves is not supported by the law.

Section 287.035 RSMo. specifically addresses sole proprietors and their authority to withdraw from coverage under the provisions of a valid workers' compensation insurance policy by listing such employees to be withdrawn. Mr. Cleghorn was operating under a limited liability corporation and therefore section 287.035 RSMo provisions applicable to sole proprietors is not applicable.

Section 287.090. 5. RSMo. provides "A corporation may withdraw from the provisions of this chapter, when there are no more than two owners of the corporation who are also the only employees of the corporation, by filing with the division notice of election to be withdrawn. ..." There is no evidence in this matter that Mr. Cleghorn nor Welcome Home Exteriors, LLC has filed a notice of election to withdraw.

Therefore, the Missouri Workers Compensation law provides that in order to waive coverage under the Act one must file with the division notice of election to be withdrawn. There is no evidence before the division that Mr. Cleghorn has withdrawn coverage as required by law.

The parties have stipulated that Sunshine Home Improvements was an employer working subject to Missouri's Workers' Compensation law with its liability fully insured by Travelers Insurance. According to section 287.040 Sunshine Home shall be liable as an employer of the employees of his subcontractors.

2. Whether timely notice of the accident was provided to Sunshine;

Section 287.420 states:

"No proceedings for compensation for any occupational disease or repetitive trauma under this Chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice."

Mr. Cleghorn testified that he reported the accident and his injuries to the owner of Sunshine the following day by telephone. There is no contradictory evidence and, therefore, proper notice has been established.

3. The applicable average weekly wage

Mr. Cleghorn testified that he would sometimes work for Done-Rite when work was not available through Welcome Home. He would be paid in cash by Jesse Klee on behalf of Done-Rite. Mr. Cleghorn testified that he would not declare his wages paid by Done-Rite as revenue earned by or through Welcome Home. He further testified that he would routinely be paid \$250 per day by Done-Rite and has been paid as much as \$300 per day in the past.

Mr. Cleghorn was employed by Done-Rite for less than two calendar weeks immediately preceding the injury. He testified that he has been engaged in this field of work for decades and is sufficiently familiar with the average weekly wage prevailing in the same or similar employment. His testimony supports his contention that his average weekly wage is \$750.00 per week with a resulting rate of \$500.03 for temporary total disability and the maximum rate of \$464.58 for permanent partial disability.

4. The nature and extent of permanent partial disability.

Mr. Cleghorn has met his burden of proof establishing that he was a statutory employee of Sunshine on the date of loss. He suffered industrial accident resulting in injuries and provided timely notice of same to Sunshine. The medical treatment provided was reasonable and necessary to cure or relieve the effects of those industrial injuries, and the medical expenses are appropriate for the treatment received. Mr. Cleghorn was incapable of substantial, gainful employment from October 21, 2015 through February 14, 2016. The injuries suffered have resulted in permanent partial disability to the right shoulder, the right lower extremity, and to the low back.

Mr. Cleghorn is hereby awarded \$5,713.20 for medical expenses, \$8,355.50 for temporary total disability totaling 16.71 weeks and benefits reflecting a 25% permanent partial disability to the right shoulder (232 week level) for 58 weeks, a 15% permanent partial disability to the right lower extremity (160 week level) for 24 weeks, and 10% to the body as a whole (400 week level) for 40 weeks. The total weeks for permanent partial disability amount to 122 at the maximum benefit rate of \$464.58. The award for permanent partial disability is then \$56,678.76.

CONCLUSION

Mr. Cleghorn is hereby awarded \$5,713.20 for medical expenses, \$8,355.50 for temporary total disability totaling 16.71 weeks and benefits reflecting a 25% permanent partial disability to the right shoulder (232 week level) for 58 weeks, a 15% permanent partial disability to the right lower extremity (160 week level) for 24 weeks, and 10% to the body as a whole (400 week level) for 40 weeks. The permanent partial disability amounts to 122 week at the maximum benefit rate of \$464.58 and equal to \$56,678.76. The total amount of the award is \$70,747.46.

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Michael J. Haight, Attorney, for necessary legal services plus expenses.

I certify that on 3-2-18,
I delivered a copy of the foregoing award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

By: MP

Made by: JG Rebman
Lawrence G. Rebman
Administrative Law Judge
Division of Workers' Compensation

