

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

Injury No.: 03-143533

Employee: Mike Crigger
Employer: Charles Kerns D/B/A Kerns Construction
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: December 8, 2003
Place and County of Accident: Bowling Green, 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 June 25, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Ronald F. Harris, issued June 25, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of December 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mike Crigger

Injury No. 03-143533

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Charles Kerns D/B/A Kerns Construction

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: April 15, 2008

Checked by: RFH/tmh

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? Yes.
 4. Date of accident or onset of occupational disease: December 8, 2003.
 5. State location where accident occurred or occupational disease was contracted: Bowling Green, Missouri.
 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
 7. Did employer receive proper notice? Yes.
 8. Did accident or occupational disease arise out of and in the course of the employment? No.
 9. Was claim for compensation filed within time required by Law? Yes.
 10. Was employer insured by above insurer? Uninsured.
 11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was using a cutting torch to do work on his personal vehicle when a fire started.
 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: Arms, legs, and body as a whole.
- Nature and extent of any permanent disability: N/A.

15. Compensation paid to-date for temporary disability: -0-.
16. Value necessary medical aid paid to date by employer/insurer? -0-.
17. Value necessary medical aid not furnished by employer/insurer? \$75,425.80.
18. Employee's average weekly wages: \$300.37.
19. Weekly compensation rate: \$200.25/\$200.25.

- Method wages computation: Stipulation.

COMPENSATION PAYABLE

- Amount of compensation payable: None.

FINDINGS OF FACT and RULINGS OF LAW:

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

Dependents: N/A

Employer: Charles Kerns D/B/A Kerns Construction

Additional Party: Second Injury Fund

Insurer: Uninsured

Checked by: RFH/tmh

FINAL AWARD

PRELIMINARIES

The parties appeared before the undersigned Administrative Law Judge for a final award on April 15,

2008. Attorney Nicholas Carter represented Mike Crigger ("Employee"). Attorney Bruce McGuire represented Charles Kerns D/BA Kerns Construction ("Employer"). The Employer did not carry workers' compensation insurance at the time in question. Assistant Attorney General Amber Jordan appeared for the Second Injury Fund ("SIF" or "Fund"). Hearing venue is correct and jurisdiction properly lies with the Division of Workers' Compensation. All parties submitted post-hearing memoranda.

STIPULATIONS

The parties have agreed that on or about December 8, 2003:

1. Employee and Employer were operating under the provisions of the Missouri Workers' Compensation Law.
2. Employer did not have workers' compensation insurance at that time.
3. Employee's average weekly wage was \$300.37.
4. Employee's rate of compensation for both TTD and PPD would be \$200.25.
5. Employer had notice of the alleged accident and a claim for compensation was filed within the time prescribed by law.
6. To date, Employer has paid no temporary total disability (TTD) or medical benefits.

ISSUES

1. Did Employee suffer a compensable injury by way of an accident arising out of and in the course of employment;
2. Whether Employer is liable for past medical expenses; [1]
3. Whether Employer is liable for paying temporary total disability benefits and if so for what period;
4. Nature and extent of permanent partial disability; and
5. Liability of the Second Injury Fund.

EXHIBITS

Employee's Exhibits 1 through 9 and Employer's Exhibit A were admitted into evidence. The SIF offered no exhibits. Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

SUMMARY OF EVIDENCE

All of the evidence was reviewed, but only evidence supporting this award is summarized below.

Employee testified that he began working for Kerns Construction, a concrete construction company, in August of 2003 and, during his employment, his job duties included setting up forms, pulling concrete and loading, unloading materials and other errands as needed.

On December 8, 2003, Employee testified that he arrived at Kerns Construction along with other employees at or around 7:00 a.m. and loaded up tools for a job off of Route NN. Employee testified that he arrived on the jobsite and prepared for, or possibly assisted with, pouring the footing for a garage. Employee testified that they did not need a lot of help at that site, so Mr. Charles "Ed" Kerns, the owner and operator of Kerns Construction, instructed him to go to McGruder's Limestone to pick up some forms and tools that had been left there from a previous job. Employee testified that he took the company truck to McGruder's, loaded up the tools and forms, returned to the shop, and unloaded the truck. Once he finished unloading the materials from the truck, Employee testified that he drove to his girlfriend's home for lunch.

Employee testified that when he returned from lunch at or around 12:30 p.m., he brought with him a box of parts for his Pontiac Firebird. Ed Kerns had returned to the shop and Employee testified that Mr. Kerns instructed him to fix the crawler (bulldozer) and to stay busy cleaning the shop and wait for the other employees to return from the job on Route NN. Employee testified that he primed the crawler and got it running in approximately 30 minutes. He then spent about 5 to 10 minutes picking up tools around the shop, then pulled the company truck into the shop and spent approximately 10 to 15 minutes cleaning out the trash from the floorboard.

Employee testified that once he had finished cleaning the trash from the company truck, he was “going to cut rebar” and also was going to cut a bolt off of a part to be used on his personal 1969 Firebird with a blowtorch. Even though he indicated he was going to cut rebar he did not do so, but instead began working on his personal vehicle. Employee testified that he was using the blowtorch to cut a bolt so that it would fit within the headlight assembly of his personal vehicle. As he was cutting the bolt, he noticed that some rags lying on the floor had caught on fire due to sparks from the torch he was using. Employee attempted to put the fire out with his foot but was unable to get the fire out.

Employee’s clothing caught on fire and he dropped and rolled, but this did not put out the fire. He next tried to get water out of the bathroom sink but it did not work. Finally, he was able to get water out of a water faucet in the shop and extinguish the flames. The fire was still burning in the shop so he called 911 twice, once for a fire truck and once for an ambulance. He then went and moved the Employer’s truck from the shop so it would not be damaged.

Employee was taken by ambulance to the airport where he was lifted by helicopter to St. John’s Mercy Medical Center where he was admitted. After he was placed into the ambulance his coworkers arrived at the shop. The crawler/bulldozer was still running when they arrived. He was treated by St. John’s Mercy Medical Center and Mercy Burn and Plastic Surgery from the period of December 8, 2003, through December 16, 2003, and was subsequently released. While he was hospitalized he underwent several skin grafts.

Employee did not work again until approximately June 1, 2004. Employee testified that during that entire period he was completely incapable of working, that he could not compete on the open labor market and that he was not capable of working eight hours a day, 40 hours a week.

As a result of the incident, employee sustained burns to approximately 15 percent (15%) of his body, including the right hand, right forearm and arm, as well as his torso.

At the time of the hearing, employee complained of daily pain in his right hand and arm, as well as his trunk. He further noted increased sensitivity with the scars.

Charles “Ed” Kerns testified that he was the owner and operator of Kerns Construction on December 8, 2003. He testified that employee was hired as a laborer and that he never asked employee to use a blowtorch to cut rebar, or for any other reason, and that, on December 8, 2003, there was no reason for rebar to be cut. Ed Kerns testified that he had never seen employee use the blowtorch and he had never given employee permission to use the blowtorch. He further testified that he had no knowledge of employee working on his personal car during working hours, nor had he ever given employee permission to work on his personal car during working hours. Ed Kerns testified that on one occasion after working hours, employee had asked if he could pull his car up in front of the doors to work on something and Ed Kerns agreed since he was waiting at the shop for someone. Ed Kerns offered to assist the employee in removing a piece from his car. Ed Kerns used the blowtorch/cutting torch on that occasion to remove the piece from the employee’s car. He further testified that Raymond Preston, another employee, was the primary person to cut rebar and that as a certified welder Preston was allowed to use the blowtorch to cut rebar if he felt it was necessary to do so.

Mr. Leo Kerns testified that he worked with employee on 99 percent of the jobsites and had been the employee’s supervisor on those sites. He testified that he did not recall ever giving employee instructions on how to use the blowtorch and did not know why employee would need to use the blowtorch. Leo Kerns testified that the normal way to cut rebar is to use a chop saw and that the employees usually cut rebar

outside with the chop saw. Leo Kerns also stated that only Raymond Preston, another employee of Kerns Construction, used the blow torch and no one else.

In addition to their live testimony, both the Employee and Ed Kerns were deposed on July 14, 2005, or just short of three years prior to the hearing. (Employer's Exhibit A and Employee's Exhibit 9). The medical evidence contained in Employee's Exhibit 1 speaks for itself and will not be repeated here rather than to note that Dr. Musich saw Employee on December 4, 2006, and opined employee had suffered a permanent partial disability of 20% of the body as a whole as a result of the December 8, 2003, incident.

As just noted, nearly three years had lapsed between the depositions of the employee and Ed Kerns and the hearing. At the hearing, there were instances in which counsel pointed out to Ed Kerns that his testimony at the hearing was not the same as his testimony at the deposition to which he consistently responded that his answers at the deposition would be more accurate because they were much closer in time to the incident and significant time had passed since the deposition. It was also apparent that Ed Kerns had not "prepared" for the hearing.

On the other hand, even considering the significant lapse in time, Employee's memory and recollection seemed to have improved considerably in the nearly three years since his deposition was taken. It was also apparent employee had "prepared" for the hearing.

Finally, Mr. Leo Kerns was called as a late witness at the hearing. Prior to being called, Leo Kerns was at work and had no idea he would be called to testify in this case. So Leo Kerns also had not "prepared" for the hearing, and as he testified, no longer works for Kerns Construction as he found a higher paying job elsewhere.

Based upon my review of the evidence, the depositions and my observations of the live witnesses, I find Ed Kerns and Leo Kerns to be more credible than the Employee.

RULINGS OF LAW

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable laws of the State of Missouri, I find Employee has failed to meet his burden of proving that he sustained a compensable injury by way of an accident arising out of and in the course of his employment for the following reasons:

BURDEN OF PROOF

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of his claim. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). To prevail, employee must prove he sustained an injury by accident arising out of and in the course of his employment, and the accident resulted in the alleged injuries. *Choate v. Lily Tulip, Inc.*, 809 S. W. 2d 102, 105 (Mo. App. 1991) (Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W. 3d 220, 223 (Mo banc 2003)).

Accident/arising out of and in the course of employment

Section 287.120.1 RSMo (2000) provides workers' compensation benefits where an injured worker shows that his injury was caused by an accident arising out of and in the course of the employee's employment. The injury must be incidental to and not independent of the relation of employer and employee. An accident arises out of the employment relationship when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Abel By and Through Abel v. Mike Russell's Standard Service*, 924 S.W.2d 502,503 (Mo. 1996) (citations omitted). An injury occurs in the course of employment if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment. *Shinn v. General Binding Corp.* 789 S.W.2d 230, 232 (Mo. App.1990). Arising out of and in the course of employment are two separate

tests. Both must be met before an employee is entitled to compensation. *Automobile Club Inter-Insurance Exchange v. Bevel*, 663 S.W.2d 242, 245 (Mo. Banc 1984).

There is no dispute that the “accident” employee described actually occurred. The medical records are consistent with the fact that this accident did actually happen. The issue is whether the accident arose out of and in the course of Employee’s employment.

The testimony of Ed and Leo Kerns was consistent that neither had ever instructed or authorized Employee to use the blow torch/cutting torch and in the event it was necessary to use a torch to cut rebar, it was done by a co-worker who was a certified welder. Neither Ed nor Leo Kerns ever observed Employee using a torch. Ed Kerns testified he had never given Employee permission to work on his personal vehicle during working hours. Ed Kerns testified in his deposition that on December 8, 2003, he instructed Employee, after getting the crawler started and letting it run awhile, to go back to the job site on NN and see if the other employees needed anything (Employee’s Exhibit 9, p.20). [2] While the crawler was running, the employee was to pick up around the shop.

Employee admitted in his deposition that no one had ever instructed him on how to use the torch, that he learned how to do it simply by “watching the other guys”. (Employer’s Exhibit A, p.36). Employee’s deposition testimony was that Ed Kerns gave him a few things to do around the shop, including getting the crawler running and then to “F-off around the shop” until the other employee’s returned. (Employer’s Exhibit A, pgs. 25-26). Employee also stated that he had used the torch before with both Raymond and Leo present. (Employer’s Exhibit A, pgs. 36-37). Employee further testified that Ed Kerns had given him permission to work on his personal vehicle (Employer Exhibit A, p.13) and claimed that he had cut rebar both with the cutoff saw and the torch, whichever was quicker. However, when questioned how he determined which method would be quicker he responded “I’m not sure” (Employer Exhibit A, p.8).

There were numerous other discrepancies between the testimonies of Employee, Ed Kerns and Leo Kerns not detailed here. Suffice it to say, the consistent testimonies of Ed Kerns and Leo Kerns are more credible than Employee’s self-serving testimony to the contrary.

Employee argues that application of the mutual benefit doctrine leads to a conclusion his injuries are compensable. Under the mutual benefit doctrine, “an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is compensable when some advantage to the employer results from the employee’s conduct.” *Brenneisen v. Leach’s Standard Service Station*, 806 S.W.2d 443,448 (Mo. App. 1991).

While it can be argued that letting the crawler run after getting it started, as he was instructed to do, was a benefit to the employer, the same cannot be said of using a torch, which he was not authorized or instructed to use, to work on his personal vehicle, which he was not authorized or instructed to do. Employer testified that he had instructed Employee to pick up around the shop, which both the employee and the employer acknowledged was always a mess. Employee testified in his deposition that he thought he picked up some tools and that tools were laying everywhere (Employer’s Exhibit A, p.28). Choosing to use the torch to work on his personal vehicle rather than picking up around the shop, as instructed, provided no benefit to the employer.

Therefore, following a thorough review of the testimony and the evidence, I conclude the Employee’s injuries are not compensable, as they did not arise out of and in the course of his employment. There is no doubt Employee sustained serious injuries as a result of the fire; however, I find the accident did not arise out of or in the course of his employment.

Consequently, all other issues are moot and will not be addressed in this award.

CONCLUSION

Employee did not sustain an accident which arose out of and in the course of his employment. Neither the Employer nor the Second Injury Fund have any liability for employee’s injuries.

Date: _____

Made by: _____

RONALD F. HARRIS
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey Buker
Director
Division of Workers' Compensation

[1] Official notice is taken of the St. John's medical fee dispute in the Division file, which is also contained in Employee's Exhibit 1.

[2] In his live testimony, Ed Kerns stated that after getting the crawler running the employee was to clean up around the shop and wait for the other employees to return. He testified there was more than enough to keep Employee busy until the others returned.