

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

Injury No.: 05-074912

Employee: Randy A. Davidson
Employer: Butler County Fire Protection District (Settled)
Insurer: Missouri Employer's Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated July 6, 2009.

Preliminaries

Employee settled his claim against the Butler County Fire Protection District for 5 1/7 weeks of temporary total disability benefits at \$40 per week. Employee proceeded to final hearing against the Second Injury Fund for second job wage loss benefits. The parties stipulated to the amount of Second Injury Fund liability should employee prevail in his claim. The maximum potential amount of Second Injury Fund liability for second job wage loss was agreed by the parties to be \$3,378.70 ($\$696.97 - \$40.00 = \$656.97/\text{week} = \$93.85/\text{day} \times 36 \text{ days}$).

The administrative law judge found that employee is eligible to receive second job wage loss benefits from the Second Injury Fund. The administrative law judge further stated that employee's status as an owner-operator for Randy Davidson Trucking does not preclude him from receiving second job wage loss benefits from the Second Injury Fund. The Second Injury Fund was ordered by the administrative law judge to pay \$3,378.70 to employee for second job wage loss benefits.

On July 14, 2009, Second Injury Fund appealed to the Commission alleging that the administrative law judge erred as a matter of law in ruling that the definitions of "employee" and "employer" found in §§ 287.020 and 287.030 RSMo do not apply in second job wage loss claims against the Second Injury Fund. The Second Injury Fund argues that the award of second job wage loss benefits was contrary to the Missouri Workers' Compensation Act as employee was an owner-operator and thereby excluded from coverage and entitlement to benefits under the Act.

Therefore, the primary issue currently before the Commission is the nature and extent of Second Injury Fund liability.

Employee: Randy A. Davidson

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Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are hereby adopted and incorporated in this award by the Commission.

Conclusions of Law

First of all, it is important to note that employee's injury occurred on July 24, 2005. Therefore, this case falls under the purview of the pre-2005 amendments to the Missouri Workers' Compensation Law, as the 2005 amendments did not go into effect until August 28, 2005.

As the administrative law judge correctly stated, the primary issue submitted for consideration under the facts of this case is whether or not an injured employee can receive second job wage loss benefits under § 287.220.9 RSMo (2000) when his secondary wage loss is derived from employment as an owner-operator of a motor vehicle.

Section 287.220.9 RSMo provides the following:

Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury....

Section 287.020.1 RSMo defines the term "employee," for workers' compensation purposes, as follows:

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....The word 'employee' shall not include an individual who is the owner and operator of a motor vehicle which is leased or contracted with a driver to a for-hire common or contract motor vehicle carrier operating within a commercial zone....

Lastly, § 287.030.1(1) RSMo defines the term "employer" for workers' compensation purposes. That section defines "employer" in pertinent part, as:

Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a

Employee: Randy A. Davidson

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deceased employer, and every other person, ... using the service of another for pay....

The administrative law judge found that because employee's position with the Butler County Fire Protection District met the definition of "employee," as defined by § 287.020.1 RSMo, employee is entitled to second job wage loss benefits from the Second Injury Fund. The administrative law judge reasoned that, under § 287.220.9 RSMo, an employee need only meet the definition of "employee" with one employer to qualify for second job wage loss benefits and, therefore, his "employee" excluded status of owner-operator with Randy Davidson Trucking does not exempt him from receiving second job wage loss benefits. We disagree with the administrative law judge's conclusion.

Section 287.220.9 RSMo specifically states that in order to be eligible for second job wage loss benefits, an employee who suffers a compensable work-related injury must be "**employed by more than one employer.**" Further, in discussing the Second Injury Fund's liability, § 287.220.9 RSMo states that Second Injury Fund liability shall be derived from "any additional wage loss benefits attributed to loss of earnings from the **employment or employments** where the injury did not occur...."

While there is no argument that employee was an "employee," as defined by § 287.020.1 RSMo, of Butler County Fire Protection District when injured, the aforementioned statutory language clearly requires that an individual be an employee of a second employer in order to qualify for second job wage loss benefits. Employee did not prove that he was employed by a second employer. Further, § 287.020.1 RSMo unequivocally excludes owner-operators of motor vehicles from the definition of "employee."

In *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 449 (Mo. banc 1998), the Missouri Supreme Court stated that "when statutory language is clear, effect to the language must be given as written." In finding that once an individual qualifies as an employee of some employer, they automatically qualify as an employee for second job wage loss purposes, the administrative law judge did not give effect to the statutory language as written. The administrative law judge's interpretation of § 287.220.9 RSMo implies an illogical intent on the part of the legislature. Giving plain meaning to the language in § 287.220.9 RSMo, makes clear that the legislature intended for second job wage loss benefits to only apply to individuals that meet the definitional requirements of "employee," as defined by § 287.020.1 RSMo, for two different "employers," as defined by § 287.030.1 RSMo. In this case, employee only proved an employment relationship with one employer and, therefore, is not entitled to second job wage loss benefits from the Second Injury Fund.

For the foregoing reasons, we reverse the administrative law judge's award and find that employee is not entitled to second job wage loss benefits.

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The award and decision of Administrative Law Judge Gary L. Robbins, issued July 6, 2009, is attached hereto for reference.

Given at Jefferson City, State of Missouri, this 20th day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Randy A. Davidson

DISSENTING 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 believe the decision of the administrative law judge should be affirmed. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Randy A. Davidson

Injury No. 05-074912

Dependents: N/A

Employer: Butler County Fire Protection District

Additional Party: Second Injury Fund

Insurer: Missouri Employer's Mutual Insurance Company

Hearing Date: May 13, 2009

Checked by: GLR/kh

SUMMARY OF FINDINGS

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 24, 2005
5. State location where accident occurred or occupational disease contracted: Butler 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? Yes

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was injured while working as a volunteer fireman for Butler County Fire Protection District.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Bilateral shoulders and body as a whole.
14. Nature and extent of any permanent disability: The employee settled with the employer-insurer for 15% permanent partial disability of the left shoulder, 7% permanent partial disability of the right shoulder and 12 ½% permanent partial disability of the body as a whole.
15. Compensation paid to date for temporary total disability: \$205.71
16. Value necessary medical aid paid to date by employer-insurer: \$23,294.47.
17. Value necessary medical aid not furnished by employer-insurer: \$0
18. Employee's average weekly wage: The parties stipulated to Second Injury Fund liability and hence wage rate should the Second Injury Fund be responsible for second job wage loss.
19. Weekly compensation rate: Butler County Fire Protection District-\$352.56 for permanent partial disability and \$40.00 per week for temporary total disability.
20. Method wages computation: The parties stipulated to Second Injury Fund liability and hence wage rate should the Second Injury Fund be responsible for second job wage loss.
21. Amount of compensation payable: \$3,378.70
22. Second Injury Fund liability: See Award
23. Future requirements awarded: None

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: Jeffrey P. Gault

FINDINGS OF FACT AND RULINGS OF LAW

On, May 13, 2009, the employee, Randy A. Davidson, appeared in person and by his attorney, Jeffrey P. Gault, for a hearing for a final award. The employee had previously settled his primary case with the employer-insurer/Butler County Fire Protection District. Assistant Attorney Frank A. Rodman represented the Second Injury Fund. The trial in this matter involved second job wage loss. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about July 24, 2005 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
2. The employer had notice of the employee's accident.
3. The employee's claim was filed within the time allowed by law.
4. The parties agree that the employee is the owner-operator of Randy Davidson Trucking.
5. The parties agree that if the employee is successful in his second job wage loss claim the Second Injury Fund would have liability in the amount of \$3,378.70.

ISSUES

1. Whether Randy Davidson Trucking is an employer operating under and subject to the provisions of the Missouri Workers' Compensation Act?
2. Whether on or about the date of the accident or occupational disease the employee was an employee of Randy Davidson Trucking and was working under the Workers' Compensation Act?
3. What is the employee's average weekly wage and appropriate wage rates? (See Number 5 supra).

EXHIBITS

The following exhibits were offered and admitted into evidence over any objections made by the Second Injury Fund:

Employee's Exhibits

A-Stipulation for Compromise Settlement

B-Medical records of R. August Ritter, M.D.

C-Hester Trucking Pay Invoices

D-Missouri Employers' Mutual Check Stubs

E-Missouri Employers' Mutual Recap of Payments

Second Injury Fund Exhibits
1-Deposition of Randy A. Davidson

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT

On July 24, 2005, Randy A. Davidson, the employee served as a volunteer fireman with the Butler County Fire Protection District. On that day, he sustained injuries to his neck and shoulders while fighting a fire. He was treated by Dr. August Ritter who took him off work for 5 1/7 weeks, and returned him to work as of August 29, 2005. (Employee Exhibit B). The employee settled his claim with Butler County Fire Protection District and they paid claimant 5 1/7 weeks of temporary total disability benefits at \$40 per week. (Employee Exhibits A, D, E).

At the time Mr. Davidson was injured as a volunteer fireman, his principal employment was as the owner-operator of a dump truck. Obviously his major source of income was from this employment. His company was called Randy Davidson Trucking. He had been an owner-operator of dump trucks since the early 1990s. Mr. Davidson had a lease agreement with Hester Trucking to haul asphalt and building materials. This agreement had existed for several years prior to July 24, 2005. He paid all taxes and registration fees for the truck. Mr. Davidson received payment from Hester Trucking based upon the amount of asphalt hauled and mileage driven after deduction of a 5% fee by Hester Trucking. (Employee Exhibit C). No taxes were taken out and Mr. Davidson, doing business as Randy Davidson Trucking, handled all income tax matters with the assistance of an accountant. For the time period from April 25, 2005, through July 22, 2005, the employee was paid \$19,208.62 under the lease arrangement. This averaged out to \$215.82 per day and \$1,510.74 per week. The maximum temporary total disability rate at the time of the accident was \$696.97. The parties stipulated to the amount of Second Injury Fund liability should the employee prevail in his claim. The maximum potential amount of Second Injury Fund liability for second job wage loss is \$3,378.70 ($\$696.97 - \$40 = \$656.97/\text{wk} = \$93.85/\text{day} \times 36 \text{ days}$).

RULINGS OF LAW

The parties agree on the basic facts of this case. The employee was employed as an employee by Butler County Fire Protection District at the time of his injury. He settled this case with the Butler County Fire Protection District on March 2, 2007. (Employee Exhibit A).

Mr. Davidson employee owned and operated a dump truck as his principal employment and principal source of income at the time he was injured while working for the Butler County Fire Protection District. The primary issue submitted for consideration under the facts of this case is whether or not an injured employee can receive second job wage loss benefits per RSMO § 287.220.9 (2000) when his secondary wage loss is derived from employment as an owner-operator of a motor vehicle. This primary issue as stated is the subject matter of this case despite the parties phrasing the issues in terms that deal with the relationship of the employee with Randy Davidson Trucking. The parties have stipulated that if the Second Injury Fund is held

liable to pay the second job wage loss claim herein, that its liability is \$3,378.70; calculated at the maximum temporary total disability rate of \$696.97 per week less the \$40.00 per week paid, multiplied by the five and one/seventh weeks which the employee was off work. The Court adopts the stipulation and agreement of the parties as the wage calculations in this case.

There are several statutory sections that are relevant in this case.

Section 287.020.1 RSMo. defines the term “employee” for workers’ compensation purposes:

“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 for hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations. ... The word “employee” shall not include an individual who is the owner and operator of a motor vehicle which is leased or contracted ...”

Section 287.030 RSMo. defines the term “employer” for workers’ compensation purposes.

Section 287.220.9 RSMo. states:

“Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer’s employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributable to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury...” .

The Second Injury Fund’s position is that Mr. Davidson’s status as the owner-operator of a dump truck for his company Randy Davidson Trucking, preempts him from second job wage loss coverage under Chapter 287. The employee’s position is that Chapter 287 does not preclude Mr. Davidson from receiving benefits under a theory of second job wage loss.

Is Mr. Davidson an employee under Chapter 287? The answer has to be yes as he had to be in a covered employee status to receive benefits from the Butler County Fire Protection District. His eligibility for benefits under Chapter 287 was met due to that employment. Given the proceeding answer, does the employee’s owner-operator status prohibit him from receiving second wage job loss benefits from the Second Injury Fund? The answer has to be no. The Second Injury Fund cited **Booth v. Trailiner Corporation**, 21 S.W. 3d 869 (Mo. App. 2000) as authority for their position. That case is distinguished from the facts of this case as Mr. Davidson’s employee status was not established as an owner-operator, it was established by the fact that he was injured while working for Butler County Fire Protection District. Mr. Davidson is not trying to receive benefits under the primary injury portion of his case as that liability was established against the Butler County Fire Protection District.

The law changed from a liberal to a strict application in August 2005. Prior to August 2005, Chapter 287 was to be liberally construed with the intent of providing benefits to the widest number of injured employees. Strict construction is not the appropriate standard to be applied in this case as the injury occurred on July 24, 2005.

Section 287.220.9 uses the language “Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer’s employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributable to loss of earnings from the employment or employments where the injury did not occur ...”.

This language allows Mr. Davidson to seek wage loss benefits from the Second Injury Fund due to his employee status with Butler County Fire Protection District as he sustained a compensable work-related injury while working for them as an employee. The language of the statute is “any employee”. Mr. Davidson’s status as an employee is derived from his employment with the Butler County Fire Protection District, not from his status while driving a dump truck as an owner-operator from Randy Davidsson Trucking. The statute goes on to say that the injured employee shall be entitled to file a claim for wage loss from the employment or employments where the injury did not occur. The term employment or employments where the injury did not occur is not defined. The employee also worked for Randy Davidson Trucking driving a dump truck at the time he was injured at Butler County Fire Protection District. Driving a dump truck and receiving compensation is employment in the Court’s opinion.

Based on the evidence in this case, the stipulations of the parties and above cited statutory language; the Court finds Mr. Davidson is an employee that is eligible to receive second job wage loss benefits from the Second Injury Fund. In the converse, given the facts of this case, the Court finds that Mr. Davidson’s status as an owner-operator for Randy Davidson Trucking does not preclude him from receiving second job wage loss benefits from the Second Injury Fund under the statutory language in the above cited sections. The Second Injury Fund is order to pay \$3,378.70 to the employee for second job wage loss benefits.

ATTORNEY’S FEE

Jeffrey P. Gault, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Randy A. Davidson

Injury No.: 05-074912

Date: _____

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Employee: Randy A. Davidson

Injury No.: 05-074912