

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

Injury No.: 01-126441

Employee: William R. Davis  
Employer: J. T. Pitts  
Insurer: Mid-Century Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 31, 2001  
Place and County of Accident: St. Louis, 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 31, 2005. The award and decision of Administrative Law Judge Cornelius T. Lane, issued March 31, 2005, 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 13<sup>th</sup> day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

DISSENTING OPINION FILED

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

DISSENTING OPINION

I respectfully dissent from the award and decision of the majority of this Commission affirming the award of the administrative law judge. I would modify the award.

The only issue this case presents is whether the employer is entitled to a 15% reduction in compensation under Section 287.120.6(1) RSMo. Section 287.120.6(1) reads:

Where the employee fails to obey any rule or policy adopted by the employer relating to the use of alcohol or nonprescribed controlled drugs in the workplace, which rule or policy has been kept posted in a conspicuous place on the employer's premises, the compensation and death benefit provided for herein shall be reduced fifteen percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs; provided, that it is shown that the employee had actual knowledge of the rules or policy so adopted by the employer and, provided further that the employer had, prior to the injury, made a diligent effort to inform the employee of the requirement to obey any reasonable rule or policy adopted by the employer.

A technical violation of the statutory posting requirement does not bar application of § 287.120.6 where employer proves the employee had actual knowledge of employer's policy.

If a statute requires constructive notice to an employee, but the employee has actual notice of the information and is not prejudiced by the employer's failure to post notice, the employee cannot complain of a failure to receive constructive notice.

*Brockmeyer v. Stiefeman Bros. Van & Storage*, 34 S.W.3d 236, 240 (Mo. App. 2000).

In the instant case, the evidence is undisputed that employee had actual notice of employer's alcohol policy. The evidence is also undisputed that employer's president made a diligent effort to inform employee of the need to obey the alcohol policy. President had previously counseled employee regarding his alcohol use. President had even laid employee off due to his alcohol abuse. President only allowed employee to return to his job after employee completed an alcohol rehabilitation program. I find that employer's failure to post the alcohol prohibition policy in president's home is not a bar to the application of § 287.120.6 in this case.

I believe the administrative law judge erred in concluding that Employer's Exhibit 3 regarding the results of the urine sample is not competent and substantial evidence. The urine sample was collected and tested at a hospital for purposes of diagnosis and treatment. I believe the report showing the results of testing on the sample is inherently reliable because the testing was performed with the knowledge that it would be relied upon by employee's treating physicians in determining his care. I find that the testing results on the urine sample, combined with the testimony of Dr. O'Donnell, establish that employee was under the influence of alcohol at the time of his work accident. I conclude employee's "injury was sustained in conjunction with the use of alcohol." § 287.120.6.

I would modify the award of the administrative law judge to reduce compensation benefits by fifteen percent (15%) in accordance with § 287.120.6 RSMo. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Alice A. Bartlett, Member

## AWARD

Employee: William R. Davis

Injury No.: 01-126441

Dependents: N/A

Before the  
Division of Workers'  
Compensation

Employer: J. T. Pitts

Department of Labor and Industrial

Additional Party:

Second Injury Fund Relations of Missouri

Insurer: Mid Century Insurance Co.

Hearing Date: March 7, 2005

Checked by: CTL:tr

FINDINGS OF FACT AND RULINGS OF LAW

- 1. Are any benefits awarded herein? N/A (15% statutory penalty not to apply)
- 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 31, 2001
- 5. State location where accident occurred or occupational disease was contracted: St. Louis
- 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 occurred or occupational disease contracted: Painting.
- 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: Multiple, including closed head injury
- 14. Nature and extent of any permanent disability: -0-
- 15. Compensation paid to-date for temporary disability: -0-
- 16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: William R. Davis

Injury No.:

01-126441

- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable: None

15% statutory penalty not to apply

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: William R. Davis

Injury No.: 01-126441

Dependents: N/A

Employer: J. T. Pitts

Additional Party: Second Injury Fund

Insurer: Mid Century Insurance Co.

Before the  
Division of Workers'  
Compensation  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: CTL:tr

### PRELIMINARIES

The Claimant, William R. Davis, was represented by Michael Shelton and the Employer/Insurer was represented by Paul Huck. The date of the hearing was March 7, 2005.

### STIPULATIONS

The Claimant, William R. Davis, was injured at work on October 31, 2001 while employed by the Employer, J.T. Pitts, as a painter.

### ISSUE(S)

Whether the Employer/Insurer is entitled to a statutory penalty of 15% pursuant to Section 287.120.6(1) RSMo, to wit, Claimant's past temporary total disability benefits, past medical, future temporary total disability benefits, future permanent total disability benefits and future medical are all to be reduced by 15% according to statute.

### EXHIBITS

The Claimant offered the following exhibits and were admitted without objection:

- Exhibit A1. Copy of Missouri Revised Statute 287.120.6(1).
  - Exhibit A2. Copy of 19 Missouri Code of State Regulations §25-30.070.
  - Exhibit B. Answer filed by Employer/Insurer.
  - Exhibit C. St. Louis County Recorder of Deeds Records.
  - Exhibit D. St. Louis County Recorder of Deeds Records.
  - Exhibit E. City of Ladue EMS Report dated October 31, 2001.
  - Exhibit F. Deposition Transcript of James O'Donnell taken August 5, 2004.
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- Exhibit 1. Report of Injury dated October 31, 2001.
  - Exhibit 2. Ladue Fire Department EMS Report dated October 31, 2001.
  - Exhibit 3. Medical Records from St. John's Mercy Medical Center.
  - Exhibit 4. Curriculum Vitae of James O'Donnell.
  - Exhibit 5. Narrative Report of Dr. O'Donnell dated May 30, 2003.
  - Exhibit 6. Report of Dr. O'Donnell dated February 8, 2005.

Ruling as to Claimant's objection to Employer/Insurer's Exhibit 3 was overruled.

### FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

1. Claimant, on October 31, 2001, while in the employ of the Employer, was painting when he fell from a ladder causing Claimant's injuries. The Employer/Insurer claims to be entitled to a 15% penalty pursuant to §287.120.6(1) RSMo for all past and future benefits.
2. Employer did not have a written policy concerning alcohol usage in the workplace on October 31, 2001.
3. Employer did not have any written rule or policy concerning drinking on the job posted in a conspicuous space although the Employer said that the employees of his company certainly knew that it was against Employer's policy to be drinking because of safety as well as for performance reasons.
4. John Pitts, the president of the Employer's company, was working with the Claimant on the date of October 31, 2001, when Claimant fell and seriously injured himself. Mr. Pitts testified he did not see anything about the Claimant that he was drinking on the job or that he was under the influence of alcohol while on the job.
5. Claimant, after his fall, was taken by the City of Ladue emergency services to St. John's Medical Center. Employer's expert, Dr. O'Donnell, a pharmacist in the State of Illinois, after reviewing the medical records of St. John's Mercy Medical Center, felt that the Claimant had a blood alcohol

content of .071 at the time of his fall. The rating of .071 is less than the legally presumed intoxication level of the State of Missouri.

6. The pharmacist, Dr. O'Donnell, based his conclusion that Claimant's had alcohol in his urine on the basis of the toxicology report in St. John's Mercy Medical Center's records which indicates that the urine sample was not handled as a legal specimen and was received without a chain of custody. Dr. O'Donnell's, the Employer's expert, testimony as to the level of alcohol in Claimant's blood was not based upon competent and substantial evidence, to wit: a valid urine sample.

#### RULINGS OF LAW

Based upon the above Findings of Fact, I find:

1. The Employer/Insurer is not entitled to a 15% penalty for all of Claimant's past and future benefits.
2. Employer/Insurer have not showed quite clearly that the statute requirement that a rule or policy against drinking on the job was kept in a conspicuous place on Employer's premises in accordance with §287.120.6(1), however Claimant had actual knowledge according to his Employer.
3. Claimant's objection to Employer/Insurer's Exhibit 3 is overruled; however, this exhibit (upon which the Employer/Insurer based their argument that the 15% penalty should apply) is not competent and substantial evidence. Exhibit 3 clearly states that there was "no chain of custody" regarding the urine sample in question. This makes the evidence incompetent and those conclusions derived thereupon as conjecture to this Claimant.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Cornelius T. Lane  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*