

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-119522

Employee: Farin L. Deck
Employer: Modern Paving Systems
Insurer: State Farm Fire & Casualty
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 7, 2004
Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated August 23, 2005.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Emily S. Fowler, issued August 23, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 14th day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY AWARD

Employee: Farin L. Deck

Injury No. 04-119522

Dependents: N/A

Employer: Modern Paving Systems

Insurer: State Farm Fire & Casualty

Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund

Hearing Date: July 27, 2005

Checked by: ESF/lh

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: April 7, 2004.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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 occurred or occupational disease contracted: Employee while in the course and scope of his employment he was involved in an automobile accident.
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: Body as a whole
14. Nature and extent of any permanent disability: Not determined at this time.
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? Unknown.
18. Employee's average weekly wages: \$900.00.
19. Weekly compensation rate: \$600.03/\$347.05.

20. Method wages computation: By Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employee did not request any particular monetary compensation at this time, only that this court determine whether this claim was compensable.

22. Second Injury Fund liability: N/A

23. Future requirements awarded: Not determined at this time.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all benefits paid herein to his attorney, William Spray.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Farin Deck

Injury No: 04-119522

Dependents: N/A

Employer: Modern Paving Systems

Insurer: State Farm Fire & Casualty

Additional Party: N/A

Hearing Date: July 27, 2005

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The employee and employer appeared for a temporary hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee Farin Deck appeared in person and by his attorney William Spray. The employer and insurer appeared in person and through his attorney Denise Tomasic.

STIPULATIONS

The parties stipulated to the following:

- 1) that on or about April 7, 2004, Modern Paving Systems was an employer operating subject to the Missouri Workers' Compensation law and its liability was fully insured by State Farm Fire & Casualty Insurance Company;
- 2) that Farin Deck was its employee;
- 3) that Farin Deck was working in Kansas City, Jackson County, Missouri;
- 4) that Employee's claim was filed within the time allowed by law;
- 5) that Employee's average weekly wage was approximately \$900, resulting in a compensation rate of \$600.03 for temporary total disability and \$347.05 for permanent partial disability compensation;
- 6) that employer has paid no temporary total disability compensation benefits or any medical care costs.

ISSUES

The issues the parties requested this Court to determine were

- 1) whether Employee sustained an accident or occupational disease arising out of and in the course of his employment;
- 2) whether the Employee notified the employer of the injuries required by law.

FINDINGS AND RULINGS

The Employee's evidence consisted of the testimony of the Employee Farin Deck.

The employer and insurer's evidence consisted of the testimony of the owner John Cook and the following exhibits, which were all allowed into evidence without objection.

- No. 1 – Discovery Deposition of Farin Deck dated March 2, 2004
- No. 2 – Six paged attendance sheet
- No. 3 – Wage Statement from 7/23/04 to 10/19/04
- No. 4 – Missouri Uniform Accident Report

After reviewing all the evidence and testimony, the Court makes the following findings:

Employee Farin Deck, hereinafter referred to as Employee, worked for Modern Paving Systems as a lead man beginning in approximately March of 2004. As part of his agreement with his employer, he was given a company truck to drive to and from work, as well as to jobsites as needed. Employee testified that he was told by his employers that he should pick up certain employees who needed a ride to work, specifically Bill Hull and Mike Boerst. He states that he was told by his supervisor to pick up crewmembers and that this happened more than once. He stated he would pick up these crewmembers and then drive to the yard to begin the workday. He states there were times when he drove to the yard first and was told to turn around and go pick up crewmembers that needed a ride. He would then travel to the jobsite in company trucks.

On April 7, 2004, Employee stated that he went to the yard after picking up two employees and bringing them with him. When they got to the yard, it was determined that not all of the people could fit in the truck that they were going to use to go to the jobsite; therefore, they used Employee's truck to fit everybody in. The employees he had given a ride to were Bill Hull and Mike Boerst. When the job was finished that day they left the work site in the company truck. Employee states that he was taking these gentlemen home and was approximately two blocks from the

job site. He was traveling to the intersection of 11th and Harrison and as he traveled through the intersection he was struck by another vehicle broadside on the driver side. Employee refused medical treatment at the scene and did not go to the emergency room that day or night. He eventually went to the emergency room approximately one week later. He went after work and the next day he told his employer that he had gone to the emergency room because his hand was hurting him. He believed he might have knocked out a window with his hand when he was hit by the other vehicle. Employee stated that he told his employer that the emergency room visit was related to his accident. He worked for about a week after the accident and started missing work because he was having problems doing his job due to physical problems from the accident. After about two weeks he started missing one or two days a week and then after three weeks he was missing two and then three days at a time. He stated he told both John and Brian his supervisor and boss that his back was hurting him and he could no longer work.

Employee stated that he was not the only person to have a company vehicle; that his supervisor did as well, and that at times his supervisors would pick up employees and take them to work.

On cross-examination, Employee admitted that the job they went to that day was an asphalt job and was finished approximately at 4:00. He left his jobsite at 4:00 and he was headed home with no intention of returning to the company yard. He admitted the accident happened approximately 4:30 in the afternoon. He stated that he was given expenses for fuel money, but that he was also paid the same with regard to salary whether he went back to the yard or went straight home after a job. He admitted that he went to the emergency room a week later on his own and that he further followed up with chiropractor treatment on his own. He believed he worked for approximately two, maybe three months after the injury but was not exactly sure how long; although, he felt he worked only until approximately May or June of 2004. He reiterated that he notified both John and Brian, his supervisor and boss, that he was hurt in the accident and that his back was messed up. He stated that although he continued to work for a few months, that he did a lot less than what he used to do and was not pulling his regular hours. He denied that there had been any safety meetings other than one prior to the accident itself. He admitted that he never asked his employer to send him to a doctor and never asked his employer to assist him with any paperwork for workers' compensation.

On redirect, he stated that he was going to be dropping off the other employees on the way home when the accident occurred. He stated that he was given money to fuel the truck when he had to go pick up people. He explained that although the truck was not necessary for the particular job as the job was an asphalt job and he was driving a concrete truck, that the truck was actually needed to get to the jobsite. He further stated that when he missed two or three days a week his employer stopped paying him a salary and put him on an hourly basis.

The employer John Cook testified that he hired Employee in approximately March of 2004; that when he hired him Employee had a van but it probably would not be reliable to get him back and forth to work and therefore he gave him a vehicle to drive. The vehicle he was driving during the accident was a 1997 Chevrolet three-quarter ton pick-up truck. He stated he does not provide trucks to all of his employees but Employee was a lead man, which was basically an assistant to the foreman. He never had any conversation about asking Employee to pick up other employees to drive them to work. In fact, he stated that he specifically told him to stop taking people to work because it was making him late, but more importantly if a job was done early in the day, he would have to drive these employees back to their homes, therefore making Employee leave early when he was needed on the jobsites after the general workers were done. Mr. Cook believed that the employees Employee brought to the jobsites actually went to Employee's house first and Employee would simply drive them from his house to the jobsites and back to his house again and then they would go on home from there. Mr. Cook explained that Employee was expected to be at work by 6:30 for a start time of 7:00 and work through the day until 5:00 in the evening. He never reimbursed Employee for any traveling expenses or gas. On the day of the accident Employee never went to the yard, but drove straight to the jobsite as it was closer to his home than going to the yard first. Employee worked much longer than had been testified to and in fact that he worked to approximately October 19, 2004, and submitted Employer's Exhibit No. 2 to show the exact days and times that Employee worked. This Exhibit does show that Employee worked until approximately October 19, 2004. Also admitted into evidence was Employer's Exhibit No. 3, which is a wage statement running from approximately July 23rd through October 19th of 2004. Both of these exhibits were hand written by the employer.

Mr. Cook pointed out that Employee had been hired as a salaried employee for \$900 a week and was expected

to work 40 hours a week. However, when he failed to do a full 40 hours a week, which began approximately the second or third week of his employment, he was put back to an hourly rate and was paid only for the hours he worked. Employer noted that the jobsite that date was at approximately 55th and Troost. He stated that nine out of ten times Employee's truck, which was a concrete truck, was not used on jobsites as it was specifically for concrete work and had concrete tools in it.

Mr. Cook testified that he asked Employee constantly for approximately two weeks after the accident if he was all right and was constantly told that Employee had no problems. He stated that Employee never asked for medical treatment, he was not aware the Employee went to the emergency room, and did not have any knowledge of any of the physical problems of which Employee was complaining. He did find out in September that Employee had gone to a chiropractor but the Employee had never asked him to provide forms to fill out work compensation claims. He specifically told Employee if you have any problems to please let him know and we would file the forms. He found out about the chiropractor at some point when Employee told him about it. He noted that Employee told him he had one hip that was two inches higher than the other but never made reference to the accident of April 7, 2004. He noted that he did not see any physical problems of Employee's after the accident. In fact, in July he took Employee to the races and he states they walked up and down the grandstands 30 to 40 times that day and didn't appear to have any problems at all.

On cross-examination, Mr. Cook noted that he believed that Employee was lying with regard to the fact that he stated he came to the yard that day, that he was told to pick up employees, that he told him he went to the emergency room, and that he was reimbursed for gasoline. He admitted that he did not bring the ADT records from which he took the information in Exhibit 2. He reiterated that he could not be absolutely certain that the other employees showed up at Employee's house or that he would have to take them home separately. However, he also restated that he never told Employee to pick up other employees; in fact, told him not to pick them up.

This Court also reviewed all the exhibits, including a police report dated April 7, 2004, which shows that Employee was traveling west on 11th Street near the intersection of 11th and Harrison. As he was crossing Harrison, another vehicle ran a stop sign on Harrison and struck his vehicle. It is also noted that all parties involved refused medical treatment at the scene. Further it is noted that a Michael Boerst and a Bill Calvert were passengers in Employee's vehicle. Finally, Employer's Exhibit No. 1 was reviewed, the discovery deposition of Farin Deck. In this deposition it is noted that Employee stated that he believed he was still working at Modern Paving at some time in late October of 2004, and that he was only working a day or two at a time because he was hurting so bad. On page 14 he was asked, "So you think sometime after your last appointment with Dr. Driskell you left your job?" "Yeah, after he told me that I needed to see a doctor to get an MRI." His last visit with Dr. Driskell was in October of 2004. On page 16 of the deposition Employee admitted that he picked up one worker that day and the other one had come to his house. On page 19 Employee stated that there were approximately three or four safety meetings during the time that he worked for employer.

The first issue to be determined in this matter is whether the Employee sustained an accident or occupational disease arising out of and in the course of his employment. It is clear that Employee was involved in an accident on April 7, 2004, when he was driving a vehicle and was struck broadside by another vehicle at 11th and Harrison. The question is whether or not Employee was in the course and scope of his employment when the accident occurred. Workers' compensation benefits are available for the "personal injury or death of the employee by accident arising out of and in the course of his employment" §287.120.1. An injury arises out of the employment if it is a natural and reasonable incident thereof, McClain v. Walsh Company, 748 S.W.2d 720, 724 (Mo. App. 1988). An injury is within the course and scope if it occurs during the period of employment at a place where the employee may reasonably be fulfilling the duties of his job. *Id.* These are two separate tests, both of which must be met before the employee is entitled to compensation. Rogers v. Pacesetter Corp., 972 S.W.2d 540, 543 (Mo. App. 1988). Generally, an accident or injury that occurs while driving to and from an employee's place of employment is not compensable. An exception to this rule is the mutual benefit doctrine. This doctrine holds that "an injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable." Blades v. Commercial Transportation Tran SP., Inc., 30 S.W.3d 827, 829 (Mo. Banc 2000).

If Employee is to be believed, he was requested by the employer to pick up and return home certain employees who are unable to drive themselves to work. The employer adamantly denies that he requested Employee to do such task and further stated that he in fact had conversations with him asking Employee not to pick up other employees as he would then be required to leave work early when he needed to be there at the jobsite for other duties. In reviewing Employer and Insurer's Exhibit No. 2, it is noted on numerous days Employee did leave the jobsite early quite often between 2:00 and 3:00. This, in fact, might show and give credence to the argument that Employee did in fact pick up other employees and transport them to the job sites on a regular basis. It is clear that Employee had in his truck at the time of the accident two other employees. Whether the employer approved or not it is clear that on that day Employee was transporting fellow employees to some destination. Whether he was returning to the yard or taking these employees home is irrelevant as it is clear that the transportation of these employees was a benefit to the employer. Employee was driving employer's truck and transporting co-employees to some destination, presumably home. Employee testified that he transported these employees because they did not have their own means of legal transportation and that his employer told him to do it. This clearly imports a benefit to employer.

There was no testimony as to what route Employee was taking and whether this took him off his normal route to go home or not. Employer testified that the two employees went to Employee's house and therefore he was simply going straight home. Employee's testimony was that he was dropping at least one off at their home. Regardless of whether he was going out of his way or not the facts show that this case falls under the mutual benefit doctrine making this accident compensable. Therefore, this Court finds that this accident was compensable.

The other issue to be determined is whether or not Employee gave notice to his employer of his injury. Section 287.420 R.S.Mo. requires that an employee give notice to his employer in writing as soon as practicable but no later than within thirty days, unless there was good cause for failure to give notice or the employer was not prejudiced by such failure. It is clear that employer knew about the accident. It occurred in a company truck and a police report was filed naming Modern Paving Systems as the owner. Further employer's witness, the owner himself testified that he knew the accident occurred. Therefore clearly the employer was made aware and thus received actual notice of this accident. There was a great deal of testimony regarding whether Employee told his supervisors he was injured in the accident or if he requested medical care. He testified that he went to the emergency room about a week after the accident because his hand was hurting and that he reported this the next day to his boss and supervisor. John Cook, the owner stated that Employee never told him he was hurt or that he was seeking treatment. He stated that he asked Employee "everyday for two weeks" if he was o.k. and did he need treatment for any injuries he may have suffered from the accident. He said Employee always told him "no". This testimony does not appear credible to this court. The idea that an Employer would ask his employee everyday for two weeks if he was hurt just does not seem right. The employer also testified to the fact that if Employee worked less than 40 hours he would not be paid his salary, but would be paid hourly instead. However it is clear after looking at the payment documents presented that the majority of the weeks Employee did not work forty hours he was still paid his full salary. This Court finds that Employee's testimony is more credible herein than employer's and therefore finds that employer also had notice Employee sustained injuries due to this accident for which he sought treatment. At the time of the hearing Employee was not requesting medical care nor payment of medical bills so there shall be no order herein for such treatment.

This Court therefore determines that Employee's accident occurred during the course and scope of his employment and therefore is compensable under Workers' Compensation. And that employer had notice of this accident and the injuries suffered therefrom.

Date: _____

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest

Director
Division of Workers' Compensation