

TEMPORARY AWARD ALLOWING COMPENSATION  
(Modifying Award and Decision of Administrative Law Judge  
and Denying Motion for Additional Costs)

Injury No.: 05-094126

Employee: James R. Doerr

Employer: Teton Transportation, Inc.

Insurer: Cherokee Insurance

Date of Accident: August 6, 2005

Place and County of Accident: Dalton, Whitfield County, Georgia

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 entire record, and having heard the oral argument of the parties, the Commission issues this modification of the award and decision of administrative law judge David L. Zerrer dated January 8, 2007 (Decision), pursuant to section 286.090 RSMo. The Decision is attached to and incorporated into this decision. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

#### INTRODUCTION

The Decision awarded employee certain past medical expenses, as well as future medical benefits. It awarded employee temporary total disability benefits. Lastly, it awarded employee certain costs under section 287.560 RSMo.

Employer and insurer filed an Application for Review with the Commission. On January 26, 2007, counsel for employee filed with the Commission a motion to award employee the additional costs connected with defending employer's Application for Review. On April 20, 2007, employee's counsel offered the Commission additional evidence to support its claim for additional costs in the amount of \$8,709.50.

#### COSTS UNDER SECTION 287.560

Section 287.560 RSMo states in relevant part: "[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

The record shows that employee traveled approximately 200 miles out of the way by taking Interstate Highway 75 going southeast out of Chattanooga, Tennessee, instead of following employer's suggested "practical" route using Interstate Highways 24 and 59 going southwest. Employee had used less than four hours of the eleven he could have driven on August 6, 2005, the date of the accident. Less than two months before his injury, employee had signed documentation with employer acknowledging the rising costs of fuel and indicating that he would not take a route other than employer's suggested "practical" route if it added additional miles to the trip unless he had a dispatcher's prior authorization. These factors gave employer a reasonable basis for arguing that employee's deviation from the practical route to Ennis, Texas, relieved it from liability. In addition, employer did not believe that employee had given it proper notice under section 287.420 RSMo. This defense, too, would have absolved employer of any liability. Consequently, we are not persuaded that it had no reasonable grounds for asserting these theories. Therefore, we hereby reverse that part of the Decision that awarded costs under section 287.560.

#### MOTION FOR ADDITIONAL COSTS CONNECTED WITH APPLICATION

For the same reasons as described in the last two paragraphs, we also hereby deny employee's motion to assess the additional costs associated with the Application for Review filed by employer and insurer. Even if we had not determined that employer and insurer had reasonable grounds for defending this case, we would still deny employee's motion for the

additional costs associated with the Application because the cost provision in section 287.560 is discretionary, not mandatory. It was within the administrative law judge's discretion to impose costs. Thus, it stands to reason that the Commission might exercise this question of discretion differently than the judge. Consequently, it was not unreasonable for employer and insurer to appeal this aspect of the Decision.

## CONCLUSION

We affirm the findings and legal conclusions of the administrative law judge with respect to employee's right to certain past medical expenses, future medical care, and temporary total disability benefits. We reverse that part of the administrative law judge's Decision awarding employee costs under section 287.560. We deny employee's right to such costs and deny employee's motion for the additional costs connected with the Application for Review to the Commission.

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.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of July 2007.

## LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

### SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding past and future medical expenses and temporary total disability benefits. On the other hand, my consideration of the record leads me to believe the administrative law judge's award of costs was not only proper, but should be modified so that employee also receives the additional expenses entailed by employee's need to further defend to the Commission the unsupported and unreasonable issues raised in the Application for Review of employer and insurer.

The Commission majority indicates that employer and insurer had reasonable grounds for denying liability under the Workers' Compensation Law. In support of this position, their decision relies on the reasonableness of the deviation and notice defenses of employer and insurer.

"In order for a deviation to remove a claimant from his course of employment, it must be shown that the deviation was aimed at reaching some specific personal objective." *Swillum v. Empire Gas Transport, Inc.*, 698 S.W.2d 921, 928 (Mo. App. S.D. 1985). Yet, employer presented absolutely no evidence that employee's choice of routes through Dalton, Georgia, had any personal objective whatsoever.

Similarly, in order to reasonably defend its liability based on employee's alleged failure to timely notify employer of his injury, employer simply had to produce the testimony of the two individuals that employee said he spoke with on the days immediately following his injury -- the dispatcher and fleet manager. Both were employed by employer and could have testified if they had evidence to contradict employee's first-hand testimony. Again, employer produced neither of such witnesses nor any evidence to dispute employee's testimony that he complied with the notice requirements of section 287.420, RSMo. We can only infer that employer had no evidence with which to dispute employee's testimony.

Furthermore, even if it had proof that employee did not call the dispatcher and fleet manager, employer could not and did not show that it would have been prejudiced by receiving employee's notice on September 13, 2005, instead of by September 5 (the end of the 30-day statutory notice period).

Consequently, neither of the defenses of employer and insurer had any reasonable basis. The bad intent and unreasonableness of employer and insurer was further clearly demonstrated through their continued assertion that employee's August 6, 2005, accident was not a substantial cause in bringing about employee's right ankle and low back problems, even after its own evaluating physician attributed the injuries to the work-related accident.

Accordingly, the administrative law judge correctly awarded costs to employee under section 287.560. Because of the continuing unreasonable behavior of employer and insurer evidenced by their Application for Review to this Commission, however, I would also accept employee's evidence of additional legal expenses incurred to defend this matter to the Commission and award those costs as well.

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John J. Hickey, Member