

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

Injury No.: 99-042278

Employee: Dennis A. Dunn
Employer: Jordan Concrete
Insurer: Employers Mutual Casualty Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

Date of Accident: March 19, 1999

Place and County of Accident: St. Charles County, 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. We have reviewed the evidence, read the briefs of the parties and considered the entire record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated August 8, 2005. The award and decision of Administrative Law Judge Kevin Dinwiddie is attached hereto solely for reference.

The dispositive issue is whether or not the employee sustained an injury due to an accident arising out of and in the course of employment. Section 287.120.1 RSMo. The administrative law judge concluded that the employee did sustain an injury due to accident arising out of and in the course of his employment. The Commission disagrees with this conclusion and reverses the award.

I. General Principles of Law

The Commission reviews the record, and, where appropriate, it will also determine the credibility of witnesses and the weight of their testimony, resolve any conflicts in the evidence, and reach its own conclusions on factual issues independent of an administrative law judge. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228 (Mo. App. S.D. 2003).

The ultimate determination of credibility of witnesses rests with the Commission. The Commission should take into consideration the credibility determinations made by an administrative law judge. However, the Commission is not bound to yield to an administrative law judge's findings, including those relating to credibility, and the Commission is authorized to reach its own conclusions. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not give those determinations deference. *Kent v. Goodyear Tire and Rubber Company*, 147 S.W.3d 865 (Mo. App. W.D. 2004).

A decision made by an administrative law judge in a workers' compensation proceeding does not in any way bind the Commission and in fact, the Commission is free to disregard an administrative law judge's findings of fact. *Bell v. General Motors Assembly Div.*, 742 S.W.2d 225 (Mo. App. E.D. 1987).

II. Summary of Facts

Witness Dennis Dunn, employee

In summary fashion, the testimony of Mr. Dunn was as follows: as of the date of the accident, March 19, 1999, employee was employed as a foundation foreman; as foundation foreman, employee ran a foundation crew; he operated a company truck; part of his duties included keeping not only his work time, but the work time and hours for his crew, which he turned in to the employer; and he exercised some "initiative" on the job.

Employee's duties also included acquiring materials, hauling materials and tools to job sites, supervising employees, and building and pouring foundations at work sites; however, cutting spacers and affixing spacers to foundation forms was not part of employee's normal job. On one prior occasion, employee had performed the task of cutting spacers but it was performed under the supervision of his employer, Mr. Andy Jordan, and was performed on the premises of Mr. Jordan's workshop, i.e., Mr. Jordan's garage.

Sometimes employee was required to work more than 40 hours per week. As foreman, employee made sure that materials and tools were provided all employees at the job site in order for the work to begin promptly, which occasionally necessitated starting early and ending late. Employee was given the use of a company truck to facilitate this aspect of the employment. To the extent that employee's hours included overtime employee was required to explain the overtime hours worked to Mr. Jordan and such explanations had to be consistent with work done on specific job sites. Employee reported to Mr. Jordan for receiving all job and or work instructions.

Mr. Andy Jordan, owner of the business, and employee, Dennis Dunn, were personal friends for many years. Mr. Dunn and Mr. Jordan also were neighbors, as they lived across the street from one another.

On Friday, March 19, 1999, employee and Mr. Jordan had each worked full workdays from 7:00 a.m. to approximately 3:30 p.m., each supervising two separate crews. They both returned to their respective homes at approximately 4:00 p.m. When employee was returning home at approximately 4:00 p.m., Mr. Andy Jordan "caught him" in Mr. Jordan's driveway. Mr. Jordan had a pile of wood in his driveway, which needed to be cut into spacers.

Employee backed into Mr. Jordan's driveway and discussed with Mr. Jordan employee's intention of cutting the boards into spacers. Employee discussed performing this additional work that evening. Employer indicated to employee that he, Mr. Jordan, would assist him after he returned from attending his son's basketball game. Mr. Jordan was present while employee loaded the boards in his truck and drove across the street into employee's driveway ostensibly to cut the boards into spacers.

Employee testified that the following people witnessed their conversation: Mr. Jordan's son and the daughter of employee.

Subsequently, that Friday evening, employee, while using a table saw to cut the wood into spacers, cut his left hand. This injury to the left hand is the subject matter of the instant claim.

After cutting his left hand, employee and his daughter, Alicia, contacted the wife of Mr. Jordan, Mrs. Beth Jordan, to inform her that he had cut his hand on a table saw, and needed assistance. Mrs. Jordan conveyed employee and his daughter and son to the emergency room at Barnes Jewish Hospital in St. Peters so that employee could receive emergent medical care and treatment. Employee never indicated or reported a work related injury to Mrs. Beth Jordan. Upon his arrival to the emergency room at Barnes Jewish Hospital in St. Peters, employee indicated to the in-take admissions personnel that he had recently cut his hand on a table saw and it was not a workers' compensation injury.

On cross-examination employee admitted that cutting spacers was not normally a job assigned to him; but on one prior occasion he had performed this particular task in the presence of the owner, Mr. Jordan; and on further cross-examination employee admitted that he did tell Mrs. Jordan that the injury was not a workers' compensation injury.

As of the date of the accident, March 19, 1999, employee admitted that he was on probation for criminally assaulting his wife; and subsequently, in 2001, employee assaulted his daughter, Alicia, striking her in the face resulting in her being injured, i.e., a bloody nose resulting in a guilty plea eventually for assault in the third degree.

Witness Alicia Dunn, daughter of employee

As of the date of the injury, March 19, 1999, Ms. Alicia Dunn was eleven; Ms. Dunn testified that she was present during the conversation between her father and the owner, Mr. Jordan; the gist of her testimony on direct was that Mr. Jordan agreed that her father could begin cutting the spacers and Mr. Jordan intended to assist her father

when he returned from his son's basketball game; and, consequently, her father began loading the wood in his truck in the presence of her and Mr. Jordan.

In the intervening five years between the injury and the trial, Alicia admitted that she had heard her father and mother discuss the injury and the case on several occasions; she admitted that her father did inappropriate acts upon the consumption of alcohol; she admitted that in 2001, her father assaulted her by striking her in the face which resulted in a bloodied nose; although, Alicia thought that it was partly her fault that her father had committed the assault. Alicia further stated that "I'm the reason why" her father assaulted her mother in 1999. On cross-examination when Alicia was asked if she could recall anything else concerning the conversation between her father and Mr. Jordan on that Friday afternoon, March 19, 1999, five years prior to trial, her answer was "No. That was a long time ago."

Witness Andy Jordan, employer

Mr. Jordan testified that employee was a carpenter foreman who ran a foundation crew for his business; Mr. Jordan and employee worked separate crews; and that he and employee had been personal friends since approximately 1978.

Mr. Jordan began his company in 1998; Mr. Jordan was sensitive to costs and ran the company from his house; his wife, Beth Jordan, was employed on a part-time basis to manage the billing and payroll; and Mr. Jordan solely was responsible for obtaining business for his company.

Ninety-nine percent of the company's work occurred at job sites; and employees did not perform work at home. There was no reason for an employee to perform any work at home. Affixing spacers to concrete forms normally occurred during regular business hours. According to Mr. Jordan another reason for not allowing employees to work at home was the loss of control by him as it would be impossible to know what type of work an employee was doing at home and the hours involved. Mr. Jordan had specifically explained to employee why he, as an employer, could not and would not pay for an employee working at home.

Any work not completed at the job site, such as making spacers would be performed at Jordan Concrete Construction Inc.'s workshop, i.e., Mr. Jordan's garage at his house. Mr. Jordan limited work away from the job site to this location as he would supervise the work being performed. Mr. Jordan never delegated the job of cutting spacers for concrete forms to anyone else, unless he, Mr. Jordan, was present.

At approximately 4:00 p.m., March 19, 1999, employee approached Mr. Jordan about cutting the wood into spacers that was in Mr. Jordan's driveway. Mr. Jordan instructed employee not to cut the forms or spacers; Mr. Jordan told employee that he, Mr. Jordan, would in fact cut the spacers that weekend; he specifically told employee he didn't need to do anything; Mr. Jordan would take care of it; don't worry about it; Mr. Jordan said he had all weekend to cut them; he testified he specifically told him not to do them; he testified he specifically told him not to do anything, he would take care of it; and the employee's subsequent action in cutting the spacers that Friday evening was contrary to his specific instructions to not cut the forms.

Mr. Jordan further testified that employee did not load the wood in the employee's truck in his presence; when Mr. Jordan left with his son to attend his son's basketball game, the wood was still laying beside Mr. Jordan's truck; and the time submitted by employee for March 19, 1999, was eight hours; 7:00 a.m. thru 3:30 p.m. Mr. Jordan also testified there were no witnesses to his conversation with the employee on Friday afternoon, March 19, 1999. Mr. Jordan denied indicating to the employee that he would help him cut the spacers when he returned from his son's basketball game; Mr. Jordan denied that the spacers were necessary for Saturday or Sunday; and Mr. Jordan denied what Alicia, employee's daughter, testified about his conversation with her father.

Witness Elizabeth Jordan, employer's wife

Mrs. Jordan was the wife of the employer, Mr. Andy Jordan; on a part-time basis, she did the billing and payroll for her husband's business and she also handled the reporting of workers' compensation injuries.

Mrs. Jordan was acquainted with Mr. Dunn and testified to receiving the emergent call from employee's daughter after 7:00 p.m. on March 19, 1999; Mrs. Jordan drove to the rear entry garage of the employee's house, and

transported the employee, his daughter and his son to the emergency room of Barnes Jewish Hospital in St. Peters, Missouri.

Employee did not report the injury as a workers' compensation claim or injury; employee had reported two prior workers' compensation injuries to her; and upon admission to the emergency room at Barnes Jewish Hospital in St. Peters, Missouri, employee indicated to the personnel that the injury was not work related.

At the emergency room of the hospital, Mrs. Jordan telephoned her husband informing him that employee had injured himself and that she had taken the employee and his children with her to the hospital emergency room. Subsequently, in three or four weeks, Mrs. Jordan was informed by the company's workers' compensation insurer, that the employee was now indicating that his injury was work related and that was her first notice of a work related injury.

III. Findings of Fact and Conclusions of Law

The Commission concludes that the employee did not sustain an injury arising out of and in the course of his employment as required by section 287.120.1 RSMo. The Commission finds, from the credible evidence, that the activities in which the employee was engaged, at the time of the injury, were contrary to the instructions of the employer, and, therefore, the accident did not arise out of and in the course of employment.

Due to the inconsistencies in the employee's testimony and conflicts between his account and employer's version, the Commission will not defer to the credibility findings of the administrative law judge. Likewise, due to the circumstances and facts surrounding the testimony of the daughter of the employee, the Commission will not defer to the credibility findings of the administrative law judge concerning her testimony. The Commission does make its own findings of credibility and in so doing, reverses the award issued by the administrative law judge. The employee failed to meet his burden of proof that there was an injury due to an accident arising out of and in the course of his employment. In so doing, the Commission finds the testimony of Mr. Andy Jordan and Mrs. Beth Jordan to be the most credible, believable and trustworthy.

The Commission finds that employee's duties did not include cutting spacers, the activity in which he was engaged when he injured himself at his home on Friday evening. Employee was specifically instructed by the owner, Mr. Jordan, not to cut the spacers, that were located in Mr. Jordan's driveway, Friday evening, March 19, 1999. The Commission further finds that the employee was not to work away from a job site; not to work at his home; and not to work overtime; unless Mr. Jordan specifically authorized any of these activities beforehand.

The Commission finds Mr. Jordan's instruction to the employee to not cut the lumber into spacers, that was in his driveway Friday evening, was direct, clear and unequivocal.

Mr. Jordan was unaware until receiving a telephone call from his wife, Friday evening, while attending his son's basketball game, that Mr. Jordan's direct order had been violated by employee, and it had resulted in an injury to the employee.

The Commission finds that employees of this particular employer were not to work overtime; were not to work at home; were not to cut spacers, unless the spacers were being cut at the employer's garage in the presence of the employer, Mr. Jordan; and during regular working hours. Accordingly, at the time employee sustained his injury, he was performing a prohibited thing/job, i.e., cutting spacers; he was working at a prohibited place, i.e., his home; and he was working at a prohibited time.

Consequently, at the time of the injury, employee was not at a place where his duties required him to be; he was working at a forbidden place; he was not performing an assigned task, rather a forbidden task; and was performing a thing/job in direct violation of the orders of his employer.

Employee was not performing a job/thing he was employed to do. This was not mere disobedience of an order as to the detail of the work or as to the manner of performing the work. The employer had determined what the employee was to do and not do, i.e., do not cut spacers; when the employee was to work, i.e., no overtime; and where the work was to be performed, i.e., never at employee's house.

The injury occurred in direct disobedience of employer's orders. Consequently, Dunn's employment had been terminated for the day. At the time of injury, Dunn was engaged in a purely voluntary act, not only prohibited by employer, but unknown to and unaccepted by employer.

The Supreme Court case of *Fowler v. Baalman, Inc.* 234 S.W.2d 11 (Mo. 1950), is the authoritative case holding compensation cannot be allowed when an employee goes outside the sphere and scope of his employment and is injured in connection with an activity, which has been expressly forbidden.

The Missouri Supreme Court adopted the reasoning that there are prohibitions which limit the sphere of employment and prohibitions which deal only with conduct within that sphere, *id.* "A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that a man has gone outside the sphere". *Id.*

The *Fowler* court added that "An employer has the unqualified right to limit the scope of a servant's employment and activity and to determine what an employee shall or shall not do. The employer likewise has the unqualified right to determine when an employee shall do a certain thing."

In the instant case, as found above, at the time of injury employee was performing a prohibited job; working at a prohibited time; and working at a prohibited place. Under these circumstances employee was engaged in a purely voluntary act, not only forbidden by his employer, but unknown to and unaccepted by his employer, and it cannot be held that the injury arises out of and in the course of any employment. Prior to the injury, employee's employment had been terminated for the day. The credible facts do not lead to a conclusion that as of the time of the injury, employee was doing a thing he was employed to do, but was doing it in manner prohibited by his employer. Compensation cannot be allowed when the employee goes outside of the sphere and scope of his employment and is injured in connection with an activity he has been expressly forbidden to undertake.

IV. Conclusion

The Commission determines and concludes that based on the credible, believable and trustworthy evidence, employee did not sustain an injury due to an accident arising out of and in the course of his employment. The injury incurred was directly due to employee's disregard of several express orders. Employee's employment relationship had been terminated for the day prior to the occurrence of the injury.

Accordingly, the award of the administrative law judge issued August 8, 2005, is reversed; the employee is not entitled to any amount of compensation payable; and all additional issues are rendered moot.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued August 8, 2005, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 11th day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of Commissioner Bartlett reversing the award and decision of the administrative law judge and agree employee did not sustain an injury due to an accident arising out of and in the course of employment.

William F. Ringer, Chairman

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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 awarding compensation should be affirmed.

There is no dispute that employee was injured doing the work of employer. The compensability of this claim is dependent upon the conversation and events that occurred in employer's driveway on March 19, 1999. The administrative law judge heard the live testimony of the alleged witnesses to the conversation and events, assessed their credibility, and made findings regarding what occurred. The administrative law judge's reasoning based upon those findings is sound.

I respectfully disagree with the majority of the Commission's assessment of witness testimony. In particular, the Commission errs by disregarding the administrative law judge's determination that the testimony of Alicia Dunn was credible. The administrative law judge described Alicia Dunn's testimonial demeanor. "Ms. Dunn was a very composed young lady at hearing, and her testimony was given with conviction and without equivocation." This notwithstanding that, "Mr. Jordan did his best to discredit her testimony."

The Commission is the ultimate judge of the credibility of witnesses. However, "to say that the Commission is not obligated or bound to defer to the administrative law judge's credibility determinations is not to say they may be slighted or ignored, either by the Commission or the appellate court. Credibility is clearly a consideration for both the ALJ and the Commission, and the Commission should not make its credibility calls in a vacuum." *Davis v. Research Medical Ctr.*, 903 S.W.2d 557, 569 (Mo. App. 1995) (overruled on other grounds).

The courts have distinguished between live testimony and deposition testimony and the deference to be afforded the administrative law judge with regard to each type of testimony.

The ultimate determination of credibility of witnesses rests with the Commission. However, the Commission should take into consideration the credibility determinations made by the administrative law judge (ALJ), particularly, where the ALJ "had the witnesses before him and

was thus in a position which gave him a great vantage ground over members of the Commission who afterwards had only the opportunity of reading a transcript of the testimony." *Davis v. Research Med. Ctr*, 903 S.W.2d 557, 569 (Mo. App. 1995) (overruled on other grounds).

...

An ALJ is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 239 n. 4 (Mo. App. 2003).

Kent v. Goodyear Tire & Rubber Co., 147 S.W.3d 865, 871 (Mo. App. 2004).

"[I]t is...a great aid to the reviewing court if the Commission articulates the reasons why it differed in its credibility determinations. Otherwise, the court is left to search the record and speculate as to the Commission's rationale." *Davis*, 903 S.W.2d at 571 (Mo. App. 1995).

In the instant case, Alicia Dunn testified live before the administrative law judge. The administrative law judge clearly articulated why he found the testimony of Ms. Dunn credible. The majority's reason for rejecting the administrative law judge's credibility finding is less clear. The majority states that, "due to the circumstances and facts surrounding the testimony of the daughter of the employee," it is not deferring to the administrative law judge's credibility findings concerning her testimony. The majority has not identified what circumstances and what facts prompt it to deny deference to the administrative law judge's credibility finding. I am persuaded by the administrative law judge's detailed explanation that his credibility findings are due deference. I accept the administrative law judge's credibility findings.

I would affirm the award of the administrative law judge without modification. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny compensation.

John J. Hickey, Member

FINAL AWARD

Employee: Dennis A. Dunn Injury No. 99-042278

Employer: Jordan Concrete

Add. Party: State Treasurer, as Custodian of the Second Injury Fund (Open)

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and
Industrial Relations of
Missouri
Jefferson City, Missouri

Insurer: Employers Mutual Casualty Insurance Company

Hearing Date: 10/18/04; 4/11/05; finally submitted

5/2/05 Checked by: KD:df

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: 3/19/99

5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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 suffered injury to hand while cutting wood on a table saw.
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: Left hand and fingers
14. Nature and extent of any permanent disability: 30% permanent partial disability of the left upper extremity at the wrist.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? \$63,443.28
18. Employee's average weekly wages: Maximum compensation rates
19. Weekly compensation rate: \$562.67/\$294.73
20. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|---|-------------|
| Unpaid medical expenses: | \$63,443.28 |
| 13-4/7 weeks of temporary total disability (or temporary partial disability) at \$562.67 per week..... | \$ 7,636.24 |
| 52.5 weeks of permanent partial disability from Employer at \$294.73 per week... | \$15,473.33 |
| 12 weeks of disfigurement from Employer..... | \$ 3,536.76 |
| Claim for direct payment of medical is denied. See award. | |

22. Second Injury Fund liability: Open

TOTAL: \$90,089.61

This total is subject to a reduction of 15% per Section 287.120.6(1) RSMo. See award.

Said payments to begin as of date of award 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Nile Griffiths

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dennis A. Dunn

Injury No: 99-042278

Before the
DIVISION OF WORKERS'
COMPENSATION

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

Employer: Jordan Concrete

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund (Open)

Insurer: Employers Mutual Casualty Insurance Company

Checked by: KD:df

The claimant, Mr. Dennis A. Dunn, and the employer and insurer, Jordan Concrete and Employer's Mutual Casualty Insurance Company, appeared at hearing by and through their counsel and entered in to certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. Attorney Nicholas G. Higgins appeared on behalf of Barnes St. Peters with respect to its application for direct payment of certain medical expenses, and sought and received leave from the hearing once the medical bills from Barnes St. Peters were put in evidence. The parties agree that the issues to resolve at hearing are as follows:

Injury by accident arising out of and in the course of employment;
Liability for past medical expense;
Temporary total disability;
Permanent partial disability and disfigurement;
Reduction of benefit for use of alcohol; and
Application by Barnes St. Peters Hospital for direct payment.

The claimant appeared at hearing and testified on his own behalf. Mr. Dunn further elicited rebuttal testimony from his daughter, Ms. Alicia Dunn. The employer and insurer elicited the testimony of Mr. Andrew Jordan and of Ms. Elizabeth Jordan.

EXHIBITS

The hearsay objection of the employer and insurer at hearing on 10/18/04 to the offer of Claimant's Exhibit B was sustained. The record was left open for further hearing, if necessary, to allow the employee the opportunity to submit medical records that would survive a hearsay objection. At hearing on 4/11/05, the claimant submitted Claimant's Exhibits H, I, J, and K, without objection, except that the employer and insurer renewed its objection as it relates to Exhibit B. The following exhibits are in evidence:

Claimant's Exhibits

- A. Medical bills of Barnes St. Peters Hospital
- B. Not admitted
- C. Medical records of Dr. James Scheu
- D. Medical records of Barnes-Jewish St. Peters Hospital
- E. Medical records of St. Joseph Health Center
- F. Report of Dr. Robert P. Margolis dated 6/26/00
- G. Healthsouth physical therapy records
- H. Certified billing records of Plastic Surgery Consultants, Ltd
- I. Certified billing records of Healthsouth
- J. Certified billing records of Woods Mill Anesthesia, Inc.
- K. Certified records of Health & Welfare, Pension, and Vacation Trust Funds

Employer and Insurer's Exhibits

- 1. Independent medical evaluation of Dr. Henry Ollinger dated 10/29/03
- 2. Certified records of the Circuit Court of St. Charles County, Missouri

FINDINGS OF FACT AND RULINGS OF LAW

The claimant, Mr. Dennis Dunn, and Mr. Andrew Jordan, President of Jordan Concrete, are long time friends who have known one another since they first began working together over twenty years ago. The two started out working together as carpenters, and Mr. Jordan had occasion to hire Mr. Dunn on jobs in the past at a time when Mr. Jordan was working "in the office" for certain other construction contractors. On the date of the injury at issue, the two lived across the street from one another, and Mr. Jordan was in some way instrumental in helping claimant to get the lot next to the Jordan home, where Mr. Dunn had a home built.

Jordan Concrete, a company started up by Mr. Jordan in January of 1998, employed a couple of crews that set forms and poured foundations. Mr. Dunn was hired on in March of 1998 as a foundation foreman, running a crew and reporting to Andrew Jordan, who more often than not was supervising another crew. As foreman, Mr. Dunn had the use of a company truck, and in addition to being a working foreman and using the tools of the trade, Mr. Dunn would be responsible for getting materials to the construction site; keeping a log of work activity; reporting hours worked; and performing crew supervision in general.

On Friday, March 19, 1999, Messrs. Dunn and Jordan met in their subdivision at the close of the workday for each of their crews. Mr. Jordan testified that the crews usually started at around 7:00 a.m. and worked until 3:30 p.m. In the driveway of the Jordan home that evening sat a stack of lumbar that was to be cut up into spacers that are eventually screwed on to the backs of the construction forms used by Jordan Concrete (Mr. Jordan acknowledged that he ran his business from home, save that he did have another location where he could park a trailer). Both Messrs. Dunn and Jordan explained that turning the wood into spacers was a three step process that involved cutting the wood to length with a power saw; cutting to the required width on a table saw; then drilling holes for affixing the wood to the forms. Both testified that the spacers were going to be needed for work to be performed on the following Monday.

At some point that evening Mr. Dunn loaded up the wood in his truck and took it over to his home, to cut into spacers. Mr. Dunn claims that he advised Mr. Jordan of his plans to cut the wood, and claims that Mr. Jordan agreed to the plan and suggested that he would help finish the job upon his return from the basketball practice. Claimant further relates that he was loading the work into his truck at the same time the Jordans, father and son, were leaving to attend the practice.

Andrew Jordan, to the contrary, testified that he advised the claimant that evening that he was going to cut the wood into spacers himself that weekend. Mr. Jordan denies that he accepted an offer made by Mr. Dunn to cut the wood, and denies saying he would help finish the job upon his return. Mr. Jordan further testified that Mr. Dunn acknowledged to him that claimant had taken some painkillers and had indulged in some beer, and had acknowledged that he should not cut the spacers. Mr. Jordan further testified that the wood was still stacked on his driveway when he left for basketball practice.

Ms. Alicia Dunn, the claimant's 16-year-old daughter, testified that she was standing nearby and overheard the conversation between Messrs. Dunn and Jordan that evening. Ms. Dunn testified that she heard Mr. Jordan tell her father to start cutting the wood, and further testified that Mr. Jordan offered to help finish when he returned home. Ms. Dunn recalls seeing her father load the wood, and claims that Mr. Jordan was there while the truck was being loaded.

Ms. Elizabeth Jordan testified on behalf of the employer. Ms. Jordan acknowledged that she and Andrew Jordan have been married for 26 years, and that for that same period of time she has worked for Boeing Company, most recently as a financial manager. Ms. Jordan acknowledged she also works part-time as Vice President of Jordan Concrete, helping with billing and payroll issues. Ms. Jordan was home after about 5:30 p.m. on the evening of 3/19/99, and recalls hearing the table saw running for an extended period of time at the Dunn home. Ms. Jordan received a call that evening from Alicia Dunn and then from Dennis Dunn, advising that claimant had cut his hand. Ms. Jordan recalls that Mr. Dunn called at around 7:00 p.m. that evening, asking to be taken to the hospital. Ms. Jordan relates that she drove both the claimant and his two children to Barnes St. Peters Hospital. She further relates that claimant advised her that he had cut his hand on the table saw; that he did not advise her that he had cut his hand while cutting wood for Jordan Concrete forms; and that he specified that he did not consider the injury to be related to his work. Ms. Jordan notes that she was also present at the hospital when claimant was being processed at the emergency room, and notes that at that time the claimant again denied that the injury was work related.

Ms. Jordan further testified that claimant smelled of beer, and appeared impaired to the extent that his speech was slurred. She further relates that claimant advised her that he had taken more of the pain medication that he had taken previously for a back condition.

Mr. Dunn acknowledged that he drank maybe a can of beer and half of a second can on the evening of his injury. He further acknowledged that at the time of the injury he was on probation for committing an assault on his wife, Jean, and acknowledges that drinking the beer was a violation of the terms of his probation. Alicia Dunn, the claimant's daughter, acknowledged that on one occasion her father had assaulted her (See Employer and Insurer's Exhibit No. 2).

INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

It is clear from the evidence that Mr. Dunn injured his hand on the evening of 3/19/99 while cutting the lumber that he had picked up from the Jordan driveway. Mr. Jordan acknowledged that the following day the cut pieces were to be found lying around the table saw owned by Mr. Dunn. The testimony further suggests that Mr. Dunn had cut as many as 160 of the 200 pieces at the time of his injury.

It is further apparent that Dunn and Jordan had a conversation about the cutting of the wood prior to the point when Mr. Jordan left to take his son to basketball practice. The testimony of Alicia Dunn supports that testimony of her father, to the effect that the two men agreed that claimant was to begin cutting the wood, and that Jordan would help finish the job upon his return. Ms. Dunn was a very composed young lady at hearing, and her testimony was given with conviction and without equivocation. Mr. Jordan did his best to discredit her testimony by suggesting that it was beyond the realm of reason to suppose that an eleven-year-old girl would have been hanging around on that Friday evening, listening to and committing to memory such a conversation.

The truth of the matter can only be weighed based upon the totality of the involved circumstances. The wood was there to be cut, and needed to be cut by that next Monday morning. Mr. Jordan was not available to cut the wood upon his arrival at home that evening. The two had cut wood together in the past, although on prior occasions the woodcutting was done at the Jordan home and with Mr. Jordan there to supervise. Nonetheless, Mr. Dunn was the foreman of a crew, and was used to exercising supervisory authority on behalf of the employer, and also as a foreman exercised his independent judgment on the job.

"The fact that an employee, at the time of receiving his injury, was performing an act that was specifically prohibited by his employer does not necessarily deprive him of the right to compensation for his injury". Smith v. Hussmann Refrigerator Company, 658 S.W.2d 948, 949 (Mo.App. E.D. 1983), citing Fowler v. Baalman, 234 S.W.2d 11 (Mo banc 1950). The cases on point distinguish injuries occurring where the claimant violates a directive as to the manner of performing the work (the "how" as to the method of completing the work), versus violating a directive as to work that either prohibits activity in terms of "what" an employee is to do or not do, or as to "when" an employee is to do a certain thing. In other words, violating the method by which the activity is to be done does not necessarily take the claimant outside of the sphere of employment, but violating a prohibition as to what is to be done and when it is to be done will sever the relationship of employer and employee. See Fowler, at. pp. 212-213, also citing Kasper v. Liberty

Foundry Co., 54 S.W.2d (Mo.App. 1932).

Mr. Jordan did not testify that he specifically prohibited Mr. Dunn from cutting the wood into spacers; rather, he testified that he advised claimant that he planned to cut the wood himself later that night. The fact that Mr. Dunn began to collect the wood into his truck to deliver it to his own table saw for cutting did not violate a specific directive given by Mr. Jordan; rather, it simply ran counter to the expectations of Mr. Jordan as to how the task of cutting the wood was to be accomplished. Further, it is found more likely than not that given the friendly relationship between Jordan and Dunn, Mr. Dunn would not have been inclined to violate a direct order from Mr. Jordan that prohibited Mr. Dunn from cutting the wood.

Either Mr. Jordan assented to the cutting of the wood that evening, consistent with the testimony of Alicia and Dennis Dunn, and the resulting injury was compensable by law, or he advised Mr. Dunn that it was his intention to cut the wood himself at some point following his return from the basketball practice. In the absence of a directive from Mr. Jordan that specifically proscribed the cutting of the wood by Mr. Dunn, the violation by Mr. Dunn as to any directive from his employer amounts to a violation of a directive as to how the work is to be performed, as opposed to what work was to be performed, or as to when the work was to be done. In the absence of a direct order that proscribed the cutting of the wood, Mr. Dunn exercised his independent judgment, as he had in times past as a foreman for the employer, and chose to cut the wood. The claimant was within the sphere of his employment with Jordan Concrete at the time he cut his hand when sawing boards into spacers on 3/19/99. Claimant is found to have suffered an injury by accident arising out of and in the course of his employment within the meaning of Chapter 287 RSMo.

LIABILITY FOR PAST MEDICAL EXPENSE

Section 287.140.1 RSMo, provides, in part, as follows: "In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

The issue as to the requisite proof needed to support a claim for medical expense was addressed in Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo banc 1989). The Court stated:

In this case, Martin testified that her visits to the hospital and various doctors were the product of her fall. She further stated that the bills she received were the result of those visits. We believe that when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation. The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. In this age of soaring medical costs it no longer serves the purposes of the Act to assume that medical bills paid by an injured worker are presumed reasonable (because they were paid), while those which remain unpaid, very probably because of lack of means, must be proved reasonable and fair. Martin, at pp. 111-112.

It is further apparent that there must be medical records in evidence that correspond to the bills put in evidence. See Meyer v. Superior Insulating Tape, 882 S.W.2d 735 (Mo.App. E.D. 1994).

The following medical bills were for treatment necessary to cure and relieve of the effects of the injury, as indicated by the requisite and corresponding medical records in evidence. The employer and insurer are found liable for the following medical bills:

| <u>Provider</u> | <u>Date(s) of Service</u> | <u>Amount</u> |
|------------------------------------|---------------------------|-------------------|
| Plastic Surgery Consultants, Ltd | See Exhibit H | \$27,963.00 |
| Healthsouth | See Exhibit I | \$7,484.00 |
| Barnes-Jewish St. Peters Hospital | See Exhibit A | \$24,338.28 |
| <u>Woods Mill Anesthesia, Inc.</u> | <u>See Exhibit J</u> | <u>\$3,658.00</u> |
| Total | | \$63,443.28 |

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The claimant also submitted certain records from Health & Welfare, Pension, and Vacation Trust Funds, Claimant's Exhibit K. A summary of medical bills, in lieu of the actual medical bills, will not serve as an adequate substitute when past medical is in dispute. Farmer-Cummings v. Personnel Pool of Platte County, 2002 WL 31654578 at *5 (Mo.App. W.D.), rev'd on other grounds, 110 S.W.3d 818 (Mo. banc 2003). Likewise, an explanation of benefits from an insurer is not a medical bill, and will not serve the same purpose as its substitute, unless the parties otherwise agree. Claimant's Exhibit K does not support an award of medical expense.

TEMPORARY TOTAL DISABILITY

Section 287.020.7 defines "total disability" as the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". "Temporary total disability" is a judicial creation that is defined by case law and not by statute. See Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 820 (Mo.App 1995). Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. Vinson v. Curators of Univ. of Missouri, 822 S.W.2d 504, 508 (Mo.App. 1991) In determining whether an employee is totally disabled, the main issue is whether any employer, in the usual course of business, would reasonably be expected to employ the employee in the employee's present physical condition. Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A number of cases have acknowledged that a claimant can be totally disabled even if able to perform sporadic or light duty work. Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906, 909 (Mo.App. 1996); Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849 (Mo.App. 1995). "A nonexclusive list of other factors relevant to a claimant's employability on the open labor market includes the anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment." Cooper v. Medical Center of Independence, 955 S.W.2d 570, 576 (Mo.App. W.D. 1997).

Mr. Dunn had multiple surgeries performed to his hand by Dr. Scheu from March through May of 1999. Included in the records of Dr. Scheu (Claimant's Exhibit C) is disability certificate from the doctor indicating that claimant was totally disabled from 3/19/99 through 6/21/99. The records of Dr. Scheu persuade that the work injury caused the claimant to suffer a condition of temporary and total disability from 3/19/99 through 6/21/99. At the stipulated rate of \$562.67, the amount due is for 13 and 4/7 weeks, or \$7,636.24.

PERMANENT PARTIAL DISABILITY AND DISFIGUREMENT

The records of Dr. Scheu reveal that the claimant had multiple surgeries to the ring, middle, and index fingers on his left hand to address the soft tissue injuries suffered by claimant as a result of his table saw accident. Dr. Margolis performed a disability examination of Mr. Dunn on or about 6/26/00 (Claimant's Exhibit F). Dr. Ollinger performed a disability examination on or about 10/29/03 (Employer and Insurer's Exhibit No. 1).

Mr. Dunn is able to make a fist with his left hand, but suffers from some loss of flexion and has constant numbness in the tips of the involved fingers. The expert medical opinion of Dr. Ollinger, as contained in his report, persuades that as a result of a work injury to his several fingers the claimant has suffered a permanent partial disability that causes the claimant a functional loss of use that is referable to the hand. The testimony of Mr. Dunn, in conjunction with the disability evaluation of Dr. Ollinger, persuades that the claimant has suffered a permanent partial disability equivalent to 30% of the left upper extremity at the level of the wrist. At the stipulated rate of \$294.73 per week, the total is for 52.5 weeks, or \$15,473.33.

Section 287.190.4 provides an additional benefit for serious and permanent disfigurement to the head, neck, hands or arms. Mr. Dunn exhibited at hearing disfigurement that was prominent on the ring, long, and index fingers of his left hand, most pronounced on the left ring finger, where claimant suffered a loss of pulp of the distal portion of the finger in front of the nail. Claimant also exhibited scarring on his arm at the site where skin had been taken for grafting. Claimant is awarded 12 weeks of benefits for serious disfigurement to the involved arm and hand. The total due for disfigurement is \$3,536.76.

PENALTY PER SECTION 287.120.6(1)

The employer and insurer put in issue the provisions of paragraph 1 of Subsection 6 of

Section 287.120, which provides for a reduction of compensation benefit by fifteen percent if the injury sustained in conjunction with the use of alcohol or nonprescribed controlled drugs. The section provides that the penalty is applicable where the employee fails to obey a rule or policy relating to the use of alcohol or non-prescribed controlled drugs in the workplace, where the rule or policy has been kept posted in a conspicuous place on the employer's premises.

Mr. Dunn acknowledged at hearing that he had consumed a can of beer, and had consumed a part of a second beer on the evening of 3/19/99 prior to suffering his hand injury. Mr. Dunn did not dispute the contention that drinking on the job was prohibited pursuant to his union's contract rules, or that Jordan Concrete was a union shop; rather, Mr. Dunn testified that Mr. Jordan was aware of, and to an extent supported the practice of having a beer at or near the end of a work day. Mr. Jordan, to the contrary, disputed that he had ever encouraged or in any way tolerated drinking by any employees during working hours.

From all of the evidence, the injury suffered by Mr. Dunn while using a table saw was "sustained in conjunction with the use of alcohol" within the meaning of Section 287.120.6(1) RSMo. Mr. Dunn had actual notice of the rule that prohibited drinking on the job at Jordan Concrete. The testimony of Mr. Jordan persuades that, consistent with the union agreement, the drinking of alcohol while on the job was not tolerated or encouraged by the employer. All of the compensation benefits awarded herein are reduced by fifteen percent for the use of alcohol.

APPLICATION OF BARNES ST. PETERS HOSPITAL FOR DIRECT PAYMENT

Paragraph 6 of Subsection 13 to Section 287.140 RSMo provides as follows:

A hospital, physician or other health care provider whose services have been authorized in advance by the employer or insurer may give notice to the division of any claim for fees or other charges for services provided for a work-related injury that is covered by this chapter, with copies of the notice to the employee, employer and the employer's insurer. Where such notice has been filed, the administrative law judge may order direct payment from the proceeds of any settlement or award to the hospital, physician or other health care provider for such fees as are determined by the division. The notice shall be on a form prescribed by the division.

The liability of the employer and insurer for direct payment was at issue at hearing. The employer and insurer are liable for direct payment only in those instances where the medical services in issue have been authorized in advance by the employer or insurer. The involved health care provider offered no proof in support of the proposition that the services in issue were authorized in advance. The proof in the matter suggests, to the contrary, that the claim for compensation and all of the various benefits that could come into play, including necessary medical services, have been contested by the employer and insurer. The request of the medical provider for direct payment of any of the proceeds of the award for their fees must be denied.

This award is subject to a lien in the amount of 25% thereof in favor of Nile Griffiths, Attorney at Law, for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: _____ Made by: _____
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia Secret
Director

