

FINAL AWARD ALLOWING COMPENSATION

Injury No. 12-056972

Employee: Dennis L. Hadley, deceased
Claimant: Nannette Hadley, widow
Employer: Beco Concrete Products, Inc.
Insurer: Self-insured

Introduction

On January 26, 2015, an administrative law judge of the Division of Workers' Compensation (Division) issued a corrected award allowing compensation in this matter. Pursuant to § 287.480 RSMo, employer filed an application requesting we review the award.¹ We have read the briefs, reviewed the evidence and considered the whole record. We affirm the award and decision of the administrative law judge as modified herein.

Preliminaries

On July 25, 2012, employee died as a result of injuries he sustained in a motor vehicle accident while driving a tractor-trailer for employer. The parties agree employee's death arose out of and in the course of his employment. The administrative law judge issued an award of death benefits to employee's dependent widow. The administrative law judge determined widow is entitled to a weekly death benefit of \$664.88. The administrative law judge considered and rejected employer's argument that employer is entitled to a percentage reduction of widow's death benefit pursuant to the provisions of § 287.120.5 RSMo.

Employer filed an application for review alleging the administrative law judge improperly calculated the weekly death benefit and erred by refusing to reduce the weekly benefit pursuant to § 287.120.5.

Discussion

Wage Rate

As relevant to the calculation of a weekly death benefit, § 287.240(2) provides, in relevant part:

The employer shall also pay to the total dependents of the employee a death benefit based on the employee's average weekly earnings during the year immediately preceding the injury that results in the death of the employee, **as provided in section 287.250**. The amount of compensation for death, which shall be paid in installments in the same manner that compensation is required to be paid under this chapter, shall be computed as follows:

(d) If the injury which caused the death occurred on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of

¹ Statutory references are to the Revised Statutes of Missouri 2011 (eff. 8/28/2011), unless otherwise indicated.

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the injury; provided that the weekly compensation paid under this paragraph shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

(Emphasis added).

Section 287.250 RSMo sets forth the method for determining an employee's "average weekly earnings" which shall serve as the "basis for compensation provided in this chapter." Section 287.250 provides, in relevant part:²

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

...

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

...

(7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.

...

3. If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the

² Section 287.250 is reprinted in full in the administrative law judge's award attached hereto.

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employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

Employer argues the administrative law judge "erred as a matter of law in failing to apply Section 287.240 in determining employee's average weekly wage and compensate [sic] rate." For reasons set forth herein, we believe the administrative law judge applied § 287.240 exactly as written. Employer's urged application, on the other hand, would have us replace some words appearing in § 287.240(2)(d) and completely ignore other words appearing there.

The relevant sentence of § 287.240(2)(d) provides:

The employer shall also pay to the total dependents of the employee a death benefit based on the employee's average weekly earnings during the year immediately preceding the injury that results in the death of the employee, as provided in section 287.250.

As we understand employer's position, employer wants us to apply the provision as if it reads:

The employer shall also pay to the total dependents of the employee a death benefit ~~based on~~ equal to the employee's average weekly earnings during the year immediately preceding the injury that results in the death of the employee, ~~as provided in section 287.250.~~

The Missouri Supreme Court recently reiterated the basic principles of statutory construction:

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." When engaging in statutory construction, this Court recognizes that "every word, clause, sentence, and provision of a statute must have effect." Presumably, the legislature did not insert superfluous language in a statute.³

Thus, we are bound to give meaning, if we are able, to all words appearing in § 287.240(2)(d), including the phrase "as provided in section 287.250."⁴ At the outset we note that, contrary to employer's position, § 287.420(2)(d) does not say the death benefit is *equal to* "employee's

³ *St. Charles County v. Dir. of Revenue*, 407 S.W.3d 576, 578 (Mo. 2013).

⁴ *Id.*

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average weekly earnings during the year immediately preceding the injury that results in the death of the employee, as provided in section 287.250.” Rather, it says that the death benefit is “based on employee's average weekly earnings during the year immediately preceding the injury that results in the death of the employee, as provided in section 287.250.”

Giving meaning to all of the words of the statute as we must, we conclude that the determination of the amount of the death benefit requires a two-step process. First, the factfinder shall apply the provisions of § 287.250 to employee's employment and wage history. The application will produce an amount that is employee's “average weekly earnings which will serve as the basis for compensation.” Next, the factfinder must plug the average weekly earnings determined under § 287.250 into the formula provided in § 287.240(2)(d) to calculate the death benefit.⁵

Although the administrative law judge did not specifically mention § 287.240 in her discussion, the administrative law judge applied §§ 287.240 and 287.250 in just the manner we have described. After applying § 287.250 RSMo to employee's employment and wage history, the administrative law judge concluded employee's average weekly wage was \$997.31. The administrative law judge then concluded the weekly death benefit due employee's widow is \$664.88, which is “equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings” as directed by § 287.240(2)(d). Employer's first point fails.

Employer next argues that the administrative law judge erred when she applied § 287.250.4 RSMo to determine employee's average weekly wage. Employer argues that since employee was paid by the hour, § 287.250.1(4) must be used to determine employee's average weekly wage. Employer asserts the administrative law judge “was not free to engraft an exemption to Section 287.250.1(4) which did not appear in the express words of that provision.” Contrary to employer's argument, the administrative law judge did not “engraft an exemption” upon the statute. The administrative law judge relied upon an exemption plainly appearing in § 287.250.4:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

Finally, employer cites *Oberly v. Oberly Engineering*⁶ and *Nielsen v. Max One*⁷ for the proposition that § 287.250.4 cannot be used absent a showing of “exceptional facts.” We agree. Claimant has shown such facts here. We find support for our conclusion in *Ash v.*

⁵ The calculation of death benefits is consistent with the calculation of benefits for temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability. See §§ 287.170, 287.180, 287.190, and 287.200 RSMo.

⁶ 940 S.W.2d 953, 956 (Mo. App. 1997).

⁷ 98 S.W.3d 591 (Mo. App. 2003).

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*Ahal Contracting Co.*⁸ Ash involved a worker who was assigned on an as-needed basis from his local union hall. Mr. Ash received assignments sporadically such that his work was intermittent and part-time. The *Ash* court affirmed that the intermittent and part-time nature of Mr. Ash's work was an exceptional fact that warranted application of § 287.250.4.⁹ Like Mr. Ash, employee's work for employer was intermittent and employee worked less than full-time hours. The facts surrounding the nature of employee's work constitute exceptional facts as contemplated by § 287.250.4.

We affirm the administrative law judge's calculation of the weekly death benefit due to employee's dependent.

Safety Penalty

Section 287.120.5 RSMo provides, in relevant part:

Where the injury is caused...from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees...to obey or follow the rule so adopted for the safety of the employees.

It was employer's burden to prove that 1) employer adopted a reasonable rule for the safety of employees; 2) the injury was caused by employee's failure to obey the safety rule; 3) employee had actual knowledge of the safety rule; and, 4) before the injury employer made a reasonable effort to cause employee to obey the safety rule.¹⁰

Employer argues it is entitled to a reduction of the benefits it owes on account of employee's death because "employee failed to follow the rules of the road, as embodied in the federal and state laws and regulations, in driving in a careless and imprudent manner and driving too fast for road conditions, in that Decedent failed to follow the speed warning advisory of 35 mph in relation to the curve he was negotiating immediately prior to losing control of the vehicle."¹¹

Employer failed to establish employer adopted the alleged safety rules in issue

By the September 2011 Truck Driver Safety Information sheet signed by employee, employer hoped to prove employer adopted safety rules declaring that its drivers must follow the rules of the road and obey all traffic control devices. These rules apply to all drivers who exercise the privilege of driving and employee and his co-workers were bound to follow them notwithstanding employer's position on the matter. The

⁸ 916 S.W.2d 439 (Mo. App. 1996).

⁹ *Nielsen*, 98 S.W.3d at 590.

¹⁰ *Carver v. Delta Innovative Servs.*, 379 S.W.3d 865, 869 (Mo. App. 2012).

¹¹ Under employer's rationale, so long as an employer generically admonishes its workers to obey all laws, every motor vehicle accident caused in part by a worker's error or negligence would be subject to the so-called safety penalty. We think if the legislature intended to systematically halve the compensation available to imperfect drivers, it would have said so.

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administrative law judge found that the Safety Information sheet did not prove employer adopted the rules employer says it adopted. We agree.

In the end, it makes no difference whether we consider these rules employer's rules or not, because employer failed to prove that employer made a reasonable effort to cause employee and other drivers to obey the rules, employer failed to prove that employee failed to obey the rules, and employer failed to prove that employee's death was caused by employee's failure to obey the rules.

Employer failed to make a reasonable effort to cause employee to obey the safety rule

"An employer's efforts to train and monitor employee compliance with a safety regulation is relevant to whether the employer took reasonable steps to cause employee compliance."¹² We think any reasonable effort to cause workers to obey a rule will involve the employer monitoring compliance with its rule, establishing sanctions for violation of the rule, and making an effort to uniformly and consistently impose such sanctions on violators.

The Truck Driver Safety Information sheet shows an effort by employer to *remind* its drivers to follow the rules of the road and obey all traffic control devices. But employer's inaction in the face of Mr. Payne's known act of driving over the advisory speed on the very stretch of road employee traveled before his accident suggests employer does not make an effort to *cause* its drivers to follow the rules.

Mr. O'Connor described how violating a traffic law would affect a driver as regards his or her employment. The driver would have to pay any fine or fee associated with the violation. If the violation were a moving violation, the driver would have to report the violation to employer. If the driver's violation resulted in the driver accruing sufficient points to result in a suspension of the driver's driving privileges, employer would not allow the driver to drive for employer because employer's insurance carrier would provide no motor vehicle insurance coverage for the driver. So, based upon Mr. O'Connor's description, employer allows punishment for traffic violations to be meted out by law enforcement, the Department of Revenue, and the courts. As Mr. O'Connor describes it, employer takes no action until the Department of Revenue notifies the would-be driver his license is suspended and employer acts then only because employer's insurance carrier will provide no coverage for the would-be driver.

Mr. Barlow testified that if a driver were in an accident and/or received a ticket because the driver was violating a traffic law, employer would discipline the driver. Mr. Barlow could think of no instance when employer disciplined a driver who failed to follow a traffic law when the violation did not result in a ticket or accident.¹³

Based upon the foregoing, we find employer primarily left it to the public entities responsible for the enforcement of motor vehicle laws to punish employer's drivers accused of violating those laws. Employer did not establish a single instance where employer disciplined one of its drivers for such a violation. Employer has not established

¹² *Thompson v. ICI Am. Holding*, 347 S.W.3d 624, 633 (Mo. Ct. App. 2011).

¹³ Transcript p. 1184.

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that employer made any effort, reasonable or otherwise, to *cause* employee or its other drivers to follow those rules.

Employer is requesting a fifty percent reduction in widow's compensation, the largest reduction available under the law. We would expect an employer who believes a safety rule is so critical that its violation deserves the harshest available punishment would aggressively sanction every driver for every violation of the rule, whether or not the violation resulted in adverse consequences to the driver or to employer. Not so in the case of this employer who took no action to discipline Mr. Payne for driving in excess of the advisory speed just moments after employee did.

For the forgoing reasons, we find employer did not make reasonable efforts to cause employee and its other drivers to obey the safety rules.

Employee did not fail to obey a safety rule/failure to follow a safety rule did not cause accident

Employer identifies the employer safety rules at issue as “drivers are to follow the rules of the road and obey all traffic control devices” and “drivers are to follow state and federal laws, regulations and rules of the road.”¹⁴ A closer consideration of employer's expressions of its safety rules reveals that employer's alleged safety rules really consist of five rules, each of which falls under the umbrella of “rules of the road:”

1. Drivers must obey all traffic control devices.
2. Drivers must follow state motor vehicle laws.
3. Drivers must follow state motor vehicle regulations.
4. Drivers must follow federal motor vehicle laws.
5. Drivers must follow federal motor vehicle regulations.

Employer's argument implicates only two of the five rules; drivers must obey all traffic control devices and drivers must follow state motor vehicle laws.

Employer alleges employee violated two speed-related rules. First, employer alleges employee failed to obey the 35 mph speed advisory sign posted before employee entered the curve on which he crashed. Inasmuch as the 35 mph speed warning was advisory and required no action from employee, employee did not “fail to obey” the speed advisory.

Employer also alleges that employee's failure to honor the 35 mph advisory speed proves employee was driving too fast for conditions. We disagree. The conditions on the date of the accident were clear and calm. We feel confident that if the state of Missouri and/or the Missouri Department of Transportation (MDOT) believed that on a calm and clear day the curve in question could only be navigated at speeds of 35 mph or lower, then MDOT would have made the actual legal speed limit for the curve 35 mph instead of 55 mph. We find employee was not driving too fast for conditions at the time of the accident. Mr. Payne's proven ability to successfully navigate the curve at

¹⁴ Employer's brief, p. 24.

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approximately the speed employee was traveling lends additional evidentiary support to our finding.

Finally, employer alleges employee failed to obey state motor vehicle law § 304.012 RSMo in that employee did not drive carefully and prudently. Employer also argues employee's failure to obey § 304.012 was the cause of the motor vehicle accident. As support for this allegation, employer points to the opinion of Sgt. Pulley that the accident was the result of employee operating his vehicle "in a careless and imprudent manner by failing to exercise the highest degree of care for the roadway being traveled, traffic, and the safe operation of his truck." Employer argues that Sgt. Pulley's opinion regarding the cause of the accident is admissible as an expert opinion. We disagree.

In Missouri, expert opinion testimony is appropriate "if scientific, technical or other specialized knowledge will assist the trier of fact **to understand the evidence or to determine a fact in issue...**"¹⁵ Sgt. Pulley's opinion that employee drove in a careless and imprudent manner was not offered to help us understand technical evidence or to assist us in determining a fact. Rather, Sgt. Pulley's opinion expresses a legal conclusion that the care and prudence actually exercised by employee fell short of the care and prudence he was legally required to exercise.¹⁶ Sgt. Pulley is not shown to be an expert in legal questions. In any event, we do not need an expert's assistance to help us reach our legal conclusions in this case.

Aside from being offered as an expert opinion, Sgt. Pulley's causation opinion is the opinion of a law enforcement officer. The administrative law judge cited *Kearbey v. Wichita Southeast Kans. Transit*¹⁷ for the proposition that a law enforcement officer "may not state his opinion as to whether a party to an auto accident was at fault or which actions of the parties contributed to the accident." The administrative law judge's reliance on *Kearbey* appears well-founded. The *Kearbey* court held that "[t]he types of opinions by police officers that must be excluded by the trial court are those that go to the officer's own assessment of who was responsible for an accident."¹⁸ Although we agree with the administrative law judge's analysis, in this administrative proceeding we are directed to consider evidence without regard to the technical rules of evidence.¹⁹ For that reason, we reverse the administrative law judge's ruling that Sgt. Pulley's causation opinions are not admissible and we admit them.

Having admitted Sgt. Pulley's causation opinions, we accord them no weight. Sgt. Pulley admitted he does not know what caused employee to lose control of the truck (i.e. to crash),²⁰ yet Sgt. Pulley inconsistently purports to know that the crash was caused by

¹⁵ Section 490.065.1 RSMo (emphasis added).

¹⁶ The determination of the appropriate standard of care for purposes of § 304.012 is a question of law. *Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151 (Mo. 2000).

¹⁷ 240 S.W.3d 175 (Mo. App. 2007).

¹⁸ *Id.*, at 184.

¹⁹ Section 287.550 RSMo provides, in relevant part: "All proceedings before the commission or any commissioner shall be simple, informal, and summary, and without regard to the technical rules of evidence, and in accordance with section 287.800..."

²⁰ Transcript p. 699.

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employee driving carelessly and imprudently.²¹ In particular, employer has not convinced us that Sgt. Pulley's opinion that employee was driving carelessly and imprudently is based upon anything other than speculation, conjecture and surmise.²² Sgt. Pulley's testimony and opinion regarding the cause of employee's accident are wholly unpersuasive.

Employer has not proven that employee was driving carelessly and/or imprudently at the time of the accident. Thus, employer has failed to prove employee violated § 304.012 RSMo, or any other state or federal statute or regulation.

Award

For the foregoing reasons, we affirm the administrative law judge's corrected award and decision, as modified herein.

We approve and affirm 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.

We attach the January 26, 2015, corrected award and decision of Administrative Law Judge Maureen Tilley hereto and we incorporate the administrative law judge's findings, conclusions, corrected award and decision herein to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 29th day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

²¹ Transcript p. 748.

²² See, for example, *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 703-704 (Mo. App. 1973) ("Whatever may be the quantum of proof the law imposes on a given issue in a compensation case, however, such proof is made only by competent substantial evidence and may not rest on surmise or speculation.

Employee: Dennis Hadley

Injury No. 12-056972

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AMENDED

FINAL AWARD

Employee: Dennis L. Hadley (deceased)

Injury No. 12-056972

Dependents: Nannette Hadley

Employer: Beco Concrete Products Inc.

Additional Party: N/A

Insurer: Self-insured; TPA, CMI

Hearing Date: September 23, 2014

Checked by: MT/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? 7-25-12.
5. State location where accident occurred or occupational disease contracted: Wayne County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.

10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee died in a car accident after he made a delivery for his employer.
12. Did accident or occupational disease cause death? Yes.
13. Parts of body injured by accident or occupational disease: Death.
14. Nature and extent of any permanent disability: Death.
15. Compensation paid to-date for temporary total disability: None.
16. Value necessary medical aid paid to-date by employer-insurer: None.
17. Value necessary medical aid not furnished by employer-insurer: None.
18. Employee's average weekly wage: See findings.
19. Weekly compensation rate: See findings.
20. Method wages computation: Disputed/Finding by ALJ.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: See Findings.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: James F. Malone.

FINDINGS OF FACT AND RULINGS OF LAW

On September 23, 2014, the employee's widow, Nannette Hadley, appeared in person and with her attorney, James F. Malone, for a hearing for a final award. The employer was represented at the hearing by its attorney, Robert W. Haeckel. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Covered Employer: Employer was operating under the Missouri Workers' Compensation Act as a self-insured employer;
2. Covered Employee: On or about the date of the alleged accident or occupational disease, the employee was an employee of Beco Concrete Products, Inc. and was working under the Missouri Workers' Compensation Act.
3. Accident: On or about July 25, 2012, the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. Notice: Employer had notice of Employee's accident;
5. Statute of Limitations: Employee's claim was filed within the time allowed by law.
6. Medical causation: Employee's injury was medically causally related to his accident or occupational disease.
7. Employer paid \$5,000.00 in burial expenses under Section 287.240 and \$500.00 in extraction expenses.
8. There was not any temporary disability paid by Employer-Insurer.

ISSUES:

1. Average weekly wage and rate.
2. Dependency.
3. EI is claiming a safety violation under RSMo 287.120 (5).
4. Past and future death benefits.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

1. Marriage Certificate of Dennis Lee Hadley and Nannette Marie Gonzales with a date of marriage of January 13, 1973.
2. Death Certificate of Dennis Lee Hadley with a date of death of July 25, 2012.
3. Deposition of Kimberly Klos taken on February 14, 2014, with deposition Exhibits 1, 2, 3 and 4.
4. Not admitted.

5. Not admitted.
6. Contract for legal services between Employee's dependent and her attorney.
7. Photograph of Missouri Route D taken at the scene of accident.
8. Missouri Department of Revenue's Driver's Guide, page 35.

Employer-Insurer's Exhibits:

- A. Dennis Hadley Missouri Driver's license and ID's.
- B. Beco Employee "Code of Conduct".
- C. Beco Tool Box Talk Training – Driver Training Rules of the Road (by Barlow depo).
- D. Beco Wage Verification for Dennis Hadley 8/02/11 to 7/24/12, 52 week period per 287.240 (Employer affidavit). Gross wages of \$22,753.84; AWW \$437.57; Comp rate \$291.71.
- E. Beco Wage Verification for Dennis Hadley 4/24/12 to 7/17/12. 13 week-period (Employer affidavit). Gross wages \$5,799.04; AWW \$446.08; Comp rate \$297.38.
- F. Beco Unemployment Benefits Records on Dennis Hadley.
- G. Beco Workers' Compensation Death Benefits payment register for Dennis Hadley (Employer affidavit). Burial benefit paid, \$5,000.00, and 113 6/7 weeks of Death Benefits, \$33,213.09 at \$291.71.
- H. Deposition of Sergeant T. G. Pulley Missouri State Highway Patrol-Accident-Reconstructionist (Video deposition). (Subject to Employee's objections to testimony in said deposition).
- I. Withdrawn
- J. Missouri Commercial Driver's License Manual with Missouri Rules of the Road.
- K. U.S. Department of Transportation Federal Motor Carrier Safety Regulations, with Rules of the Road.
- L. Accident Reconstruction Engineering Report of Expert Witness Torrey Roberts of S.E.A. (objected to by employee).
- M. Road Surface Accident scene photos 7/25/12 by Missouri State Highway Patrol.
- N. Deposition of Kim Klos, Beco payroll administrator.
- O. Deposition of Mike Barlow, Beco dispatcher.
- P. Video assimilation of accident.

During the hearing, Exhibits B and O were taken under advisement. Those exhibits were later admitted into evidence.

FINDINGS OF FACT:

Nannette Hadley is the surviving widow and sole dependent of Dennis Hadley who died in a one-vehicle accident on July 25, 2012, while employed by Beco Concrete Products, Inc. She and Mr. Hadley were married on January 13, 1973, and had been married for almost 30 years at the time of his death. They had two sons who are grown and were not dependent on Mr. Hadley at the time of his death. He had no other children. Mrs. Hadley has not remarried. She testified

that her husband had been employed as a commercial truck driver by Beco Concrete Products, Inc. since October, 1998. He was a member of Teamsters Local Union No. 682 and worked under the terms of a labor contract between the Union and Beco. She also testified that Mr. Hadley was on call every day, Monday through Friday, unless it was a holiday or he was on vacation.

John O'Conner, a Risk Manager for Employer, also testified that Mr. Hadley was on call every day, Monday through Friday, unless it was a holiday or he was on vacation. Employee would normally receive a call the night before to inform him whether Beco needed him to drive the following day. If the employee did not hear from Beco the night before, he would call Beco around 6:30 a.m. to be told whether or not he would be sent out as a driver on that date. Mr. O'Connor testified that even if Mr. Hadley was not needed first thing in the morning, he had to remain on call until 10:30 a.m. every morning pending an assigned route or duty. Mr. O'Connor also stated that Employee was not paid for the time he was on call.

On July 25, 2012, at approximately 8:40 a.m., Mr. Hadley was traveling northbound on Missouri Route D in Wayne County, driving a 2000 Mack truck tractor which was pulling a drop deck flatbed trailer owned by his employer. Mr. Hadley was returning from delivering a load of pipe he had transported from St. Louis to Wappapello earlier that morning. He was returning to his employer's business in St. Louis where he was going to pick up another load of pipe which he was also going to deliver to Wappapello. The accident occurred approximately 2/10 of a mile before the intersection of Missouri Route D and County Road 529. At the scene of the accident, Missouri Route D is a two lane asphalt road divided into one northbound and one southbound lane of travel. The asphalt apron that bordered the northbound lane was less than six inches wide and the road was a sweeping curve to the left as a motorist drove northbound. According to the evidence at the scene, the accident occurred when Mr. Hadley's vehicle failed to negotiate a curve and traveled off the right side of the roadway. The vehicle then overcorrected, re-entered the roadway, skidded off the left side of the roadway and then struck three trees before coming to its final rest. Sergeant T.G. Pulley of the Missouri Highway Patrol described the area as very heavily wooded and the road as being windy and narrow.

The Wayne County Coroner responded to the scene and the death certificate stated that Mr. Hadley died of immediate massive neck and head trauma as a result of the accident.

Sergeant Pulley testified that he did not know what caused Mr. Hadley to go off the right side of the roadway. He testified that the Highway Patrol's investigation concluded that Mr. Hadley's vehicle was traveling approximately 42 miles an hour when he ran off the right side of the road. The speed limit on Missouri Route D at this point was 55 miles per hour. The scene of the accident is approximately 1/10 of a mile past the end of a one-mile speed advisory area where the speed advisory is 35 miles per hour. Sergeant Pulley read from the Missouri Driver Manual that in a speed advisory area, "Curve and turn signs have an advisory speed plate that shows the recommended speed for the curve or turn. Although you may feel comfortable at a higher speed in fair weather, you should never do so in rain, snow or icy conditions". The weather at the time of the accident was clear and dry. Sergeant Pulley testified that it is not at all against the law for a motorist to exceed the speed advisory sign.

There were no witnesses to the accident. However, a fellow driver who worked for Beco, Russell Payne, was also returning from Wappapello, and had been following Mr. Hadley. He came upon the scene minutes after the accident. Sergeant Pulley stated that Mr. Payne told the officer at the scene that he had been coming along the same curve as Mr. Hadley, traveling at the same speed as Mr. Hadley, approximately 40-45 miles per hour and did not have an accident.

Sergeant Pulley testified that although he knew certain facts about the accident, he did not why it happened.

Kimberly Klos testified by deposition that she is the payroll administrator of Beco. She identified two labor contracts which had been in effect between July 2011 and July 2012 between Beco and Local 682. She stated that under the terms of those contracts, Mr. Hadley was prohibited from working on either a regular or part-time basis with any other employer while employed by Beco. She also acknowledged that under the terms of the Union contract, the commercial truck drivers worked on a seniority basis with the first hired being the first sent out each day as a driver by the employer.

Ms. Klos testified that at the time of Dennis Hadley's death, pursuant to the Union contract, he was paid an hourly wage of \$24.67 plus overtime at time-and-a-half, a mileage allowance and premium or down time.

Ms. Klos identified the Beco timecards for each week for each of the Beco drivers during the 52-week period prior to the death of Mr. Hadley. Dennis Hadley's time records for the 52-week period prior to his death show that he was not called in to work for 153 days, or over seven months, not including holidays and vacation time.

Ms. Klos also identified, as her deposition Exhibit 4, the payroll records for the drivers employed during this 52-week period. When Ms. Klos produced the payroll records at deposition, she had blacked out all of the employee's names on the records and replaced them with a number, except for Mr. Hadley's records. At her deposition, she identified each numbered payroll record with the actual name of the employee. She identified payroll record 1 as Vernon Brown, record 2 as David Absheer, record 3 as Tony Trapp, record 5 as Steve Thole, record 6 as Russell Payne, and record 7 as Reed Hawkins. There was no record 4 as this was Dennis Hadley's record and it had not been blacked out. Reed Hawkins, driver record 7, last worked for Beco on October 18, 2011. Steve Thole, driver record 5, last worked for Beco on June 19, 2012. She had not numbered the record belonging to Carroll Hartline because he had retired from the company on September 27, 2011.

The gross wages paid to the five commercial truck drivers who were actually employed throughout the year (7/26/2011-7/17/2012), prior to Dennis Hadley's death, as set forth in the Klos deposition, Exhibit 4, are as follows:

- 1) Vernon Brown \$54,642.72
- 2) David Absheer \$49,077.24

- 3) Anthony Trapp \$33,177.70
- 4) Dennis Hadley \$22,753.84
- 5) Russell Payne \$29,105.18

Michael Barlow testified by deposition on February 14, 2014. Prior to his deposition, pursuant to a subpoena issued by the Division, Beco had been ordered to designate a representative and to produce all writings, documents or records in support of Beco's allegation in its amended answer to the Claim for Compensation that Dennis Hadley had been in violation of Section 287.120.5 at the time of his death. Mr. Barlow acknowledged that he was the person who had been designated by Beco to testify as to any safety rule violation and that he had brought all of the documents in support of the employer's allegation of a safety rule violation to his deposition.

Mr. Barlow testified that Dennis Hadley's safety rule violation was that he had "violated a posted speed limit".

When he was asked at the deposition to produce the actual safety rule of the company which Mr. Hadley had allegedly violated, Mr. Barlow produced, Barlow deposition Exhibit 1, a single sheet of paper entitled "Truck Drivers Safety Information September 2011." That paper provided information purportedly from a study by the American Transportation Research Institute regarding the correlation between various traffic ticket violations and crashes. The convictions and violations analyzed were for "failure to use/improper signal," convictions for "improper lane usage, improper turns, and failure to obey traffic control device" and, finally, convictions for "[e]xcessive speeding (15 or more mph over the limit)." The document then set out various "action items" for each of these offenses-e.g. for failure to use/improper signal-the "action item" was "Always use a turn signal", for improper lane usage, improper turns and failure to obey traffic control devices-the "action item" was "follow the rules of the road and obey all traffic control devices," and finally for excessive speeding (15 or more mph over the limit)-the action item was "[p]ay close attention to the speed you are traveling....".

Mr. Barlow testified that he could not give an educated answer as to what the speed limit was nor did he have any personal knowledge as to whether or not Mr. Hadley was paying close attention to the speed he was traveling. He also stated that he "couldn't possibly answer" whether Dennis Hadley violated a safety rule of Beco if he was not in violation of the speed limit.

Torrey Roberts, a project engineer employed by S.E.A., testified at the hearing over the objection of the employee. He stated that on November 21, 2012, S.E.A. was hired by Beco to do an accident reconstruction of the Hadley accident. Mr. Roberts stated that he never visited the scene of the accident but relied upon the accident reconstruction report prepared by the Highway Patrol. In the conclusion to his report, Mr. Roberts states that his estimate of the speed of the tractor trailer, prior to running on the east shoulder of the roadway, was 47-53 miles per hour. He stated that Mr. Hadley exceeded the advisory speed for the left-hand curve and failed to control the tractor trailer while driving through the curve, resulting in the accident. On cross-examination, he admitted that the speed limit on the highway at the point of the accident was 55

miles per hour. He also conceded that the accident occurred 1/10 of a mile past the end of the speed advisory area. He agreed that 1/10 of a mile was about the same distance as the length of two football fields. He agreed with the Highway Patrol, as noted in its report, that the right-side brake on the trailer of Mr. Hadley's vehicle was out of adjustment and that the tire tread depth on one of the outside tires was defective. In his opinion, the brakes being out of adjustment and the inadequate tire tread depth did not contribute to the loss of control of the tractor trailer.

RULINGS OF LAW:

Issue 1. Average weekly wage and rate

The Missouri Workers' Compensation law provides that in the event of the death of an employee, while in the scope and course of his employment, the employer shall pay to the total dependents of the employee a death benefit based on the employee's average weekly earnings during the year immediately preceding the injury that results in the death of the employee as provided in Section 287.250. The weekly death benefit shall be an amount equal to 66 2/3 percent of the deceased's employee's average weekly earnings as of the date of the injury.

In the event of an employee's death, the "compensation rates for the purpose of workers' compensation benefits are calculated according to Section 287.250 RSMo which sets forth specific statutory formulas to calculate benefits based on the average weekly wage an employee received from his or her employer." *Neilsen v. Max One Corp., et al.*, 98 S.W.3d 585,590 (Mo.App. S.D. 2003). In determining the applicable weekly wage rate under Section 287.250, "it is necessary to commence with the first subsection and then to descend in numerical order under the other subsections until the wage rate provision is found that applies to the particular facts of the case." *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204, 210 (Mo.banc 1981).

At the time of his death, Employee was paid an hourly wage of \$24.67, together with overtime at time and a half, a mileage allowance, and premium or downtime.

Section 287.250 states: Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided in this chapter shall be as follows:

- (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
- (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
- (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
- (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the

employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subsection, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

- (5) If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be employee's average weekly wage;
- (6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer.

Since Employee's wages were fixed by the hour and by the output of the employee, subsections (1), (2), and (3) of Section 287.250.1 do not apply since these sections pertain to an employee's wages which are fixed by the week (1), month (2), or by the year (3).

Subsection (4) of Section 287.250.1 does not apply because the employee did not work the "last thirteen calendar weeks immediately preceding the week in which the employee was injured."

Subsection (5) does not apply because the employee was not employed less than two Calendar weeks immediately preceding the injury.

Subsection (6) of Section 287.250.1 does not apply because Employee's hourly wage has been "ascertained" at \$24.67.

Section 287.250.3 pertains to an employee who is "hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee". In this case, there was not any evidence presented that showed that the employee was hired for less than the hours per week needed to be classified as a full-time or regular employee. In fact, in the deposition of Kimberly Klos, she stated that the employee was a "permanent, full-time employee" on the date of the accident. Therefore, Section 287.250.3 does not apply in this case.

If it is determined by the Division that Employee's average weekly wage cannot be "fairly and justly" determined by the formulas provided in subsections (1) to (3) of Section 287.250.1, then: "the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based

upon the exceptional facts presented, fairly determine such employee's average weekly wage." Section 287.250.4 RSMo.

Based on all of the evidence presented, I find that Section 287.250.4 RSMo is applicable in this case. Due to the job assignment order, the employee did not work consistently during the year preceding his death. In fact, only two employees worked consistently during the year preceding Employee's death. These two employees were Vernon Brown and David Absheer. They performed jobs of a same or similar nature as the employee. Therefore, I find that the only fair way to determine the Employee's average weekly wage is to base the average weekly wage from the two employees' wages who were consistently working during the year preceding Mr. Hadley's death. Vernon Brown's wages for that year were \$54,642.72, and David Absheer's wages for that year were \$49,077.24. The average wages of these two employees is \$51,859.98. This computes to an average weekly wage of \$997.31 and a death benefit rate of \$664.88. Therefore, based on all of the evidence presented and Section 287.250.4, I find that the Employee's average weekly wage is \$997.31 and his death benefit rate is \$664.88.

Issue 2. Dependency.

Based on the evidence submitted, I find that Dennis Hadley and Nannette Hadley were married on January 13, 1973, and remained married living as wife and husband at the time of the employee's death on July 25, 2012. As of the date of the hearing, Nannette Hadley had not remarried and therefore, is a conclusively presumed total dependent under the provisions of Section 287.240 (4) RSMo. Other than Nannette Hadley, I further find that Dennis Hadley was not survived by any other dependents, either total or partial.

Issue 3. Employer-Insurer is claiming a safety violation under RSMo 287.120 (5).

On May 17, 2013, almost ten months after the death of Dennis Hadley, the employer amended its answer to the claim for compensation asserting that Dennis Hadley was "in violation of Section 287.120(5) RSMo 2005... and any benefits... should be reduced 50% for safety violations."

Missouri's Workers' Compensation Act provides that:

"[w]here the injury is caused by the failure of the employee to use safety devices... or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device... and to obey or follow the rule so adopted for the safety of the employees." Section 287.120.5, RSMo.

"With respect to claimed safety-rule violations, the employer must establish the following elements to satisfy its burden under Section 287.120.5:

1. That the employer adopted a reasonable rule for the safety of employees;

2. That the injury was caused by the failure of the employee to obey the safety rule;
3. That the employee had actual knowledge of the rule; and
4. That prior to the injury the employer had made a reasonable effort to cause his or her employees to obey the safety rule. *Carver v. Delta Innovative Services*, 379 SW3d 865, 869 (Mo.App. W.D. 2012) .

The employer produced no evidence that it had adopted a reasonable safety rule applicable in this case.

Michael Barlow, a corporate representative, had his deposition taken on February 14, 2014.

Mr. Barlow testified that the basis for the company's affirmative defense that Dennis Hadley had violated a safety rule of the company was that Mr. Hadley had "violated a posted speed limit".

He testified that he "couldn't possibly answer" whether Dennis Hadley would have violated a safety rule of Beco if he was not in violation of the speed limit.

At the deposition, Mr. Barlow produced a single sheet of paper entitled "Truck Driver Safety Information, September 2011". Mr. Barlow was asked repeatedly if this was the only document in Beco's possession to support its safety rule violation allegation and he repeatedly said it was.

That sheet of paper set forth information purportedly from a study by the American Transportation Research Institute regarding how certain traffic violations "increased the likelihood of a future crash." Those specific violations were "failure to use/improper signal;" "improper lane usage, improper turns and failure to obey traffic control device;" and "excessive speeding (15 or more m.p.h. over the limit)." The document then set out various "action items" to diminish risk. The first action item was "always use the turn signal." The second was "follow the rules of the road and obey all traffic control devices." The third action item was "pay close attention to the speed you are traveling." Mr. Barlow testified that Employee had signed the bottom of the page acknowledging the information and understood the importance of following the law.

There is nothing in the safety information sheet which establishes a company safety rule that states that a driver may not violate a posted speed limit. The closest reference to speed in that sheet is an "action item" stating that a driver should "pay close attention to the speed you are traveling..." Mr. Barlow stated that he could not give an educated answer as to what the speed limit was nor did he have any personal knowledge as to whether or not Mr. Hadley was paying close attention to the speed he was traveling.

Even if Employer had enacted a safety rule which had anything to do with "violating a posted speed limit," the evidence is uncontradicted that Employee was driving within the posted speed limit. Sergeant T.G. Pulley of the Missouri Highway Patrol testified that the posted speed

limit on Missouri Route D at the scene of the accident was 55 miles per hour. He estimated Mr. Hadley's speed at approximately 42 miles per hour immediately before the accident. At the scene of the accident, Mr. Hadley was 1/10 of a mile past the end of a speed advisory area of 35 miles per hour. However, Sergeant Pulley testified that even if Mr. Hadley was still in the speed advisory area, it was not at all against the law to exceed the advisory speed.

Based on all of the evidence presented, I find that the employer did not produce any evidence that it had adopted a reasonable safety rule that was applicable in this case.

There was no evidence of any causal connection between Mr. Hadley's death and any alleged violation of a company safety rule.

In his deposition, Sergeant Pulley testified that he supervised the accident reconstruction team investigating Mr. Hadley's death. Photos were taken, measurements were made and the physical evidence was inspected. Missouri Route D at the scene of the accident had a 5-inch asphalt shoulder and a 55 mile per hour speed limit. Tire mark evidence suggested that Mr. Hadley had attempted to steer back on the road surface after his trailer tires went off the road and that he had oversteered causing him to cross the road and go into the trees. Sergeant Pulley did not know why Mr. Hadley had lost control of the vehicle and gone off the right side of the roadway. He did not know if an oncoming vehicle had pulled into Mr. Hadley's lane or if a deer or some other animal had run in front of his truck. Sergeant Pulley stated that, based on the physical evidence, Mr. Hadley was driving approximately 42 miles per hour when the skid began, at a point which was 1/10 of a mile past the end of a one-mile 35-mile-per-hour speed advisory area. When he was asked if he knew why Mr. Hadley had lost control of the vehicle, he replied that there are just certain facts that he did know but he did not know why the accident happened.

The employer has attempted to introduce Mr. Hadley's alleged negligence as an issue in this case to somehow support its allegation of a violation of a company safety rule; however the first sentence of Section 287.120 provides that: "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for...death of the employee by accident arising out of and in the course of the employee's employment." Section 287.120.1 RSMo.

The law does allow a penalty if the employee fails to obey a reasonable rule adopted by the employer for the safety of employees and this failure causes the employee's injury or death (Section 287.120.5).

Employer's counsel asked Sergeant Pulley and Torrey Roberts to give their legal opinions as to the cause of the crash and elicited opinion testimony, over the objection of Employee, that Mr. Hadley had been careless and imprudent by failing to maintain control of his vehicle and that driving 42 miles per hour was one of the contributing factors.

Missouri courts have long recognized that while a police officer or an expert witness with experience involving automobile accidents and accident reconstruction may give an opinion as to

the speed of a vehicle, if that opinion is based upon the physical evidence observed at the scene of an accident, the officer may not state his opinion as to whether a party to an auto accident was at fault or which actions of the parties contributed to the accident. *Kearbey v. Wichita Southeast Kansas*, 240 S.W.3d 175, 184 (Mo.App. W.D. 2007). Accordingly, in police reports or accident reconstruction reports, information that is based upon the police officer's personal observation is admissible. *State v. Jordan*, 664 S.W.2d 668, 672 (Mo.App. E.D. 1984). However, sections in a police report or accident report not based on observation, but which are conclusions of the police officer are not admissible into evidence. *Penn v. Hartman*, 525 S.W.2d 773, 778 (Mo.App. E.D. 1975). Therefore, based on case law, I find that Sergeant Pulley's opinion that Employee was driving in a "careless and imprudent manor" is not admissible evidence to determine whether the employee contributed to the accident or whether a safety penalty violation should be applied.

With respect to the testimony of Torrey Roberts, Employee has filed a Motion to Strike Mr. Roberts' testimony and his accident reconstruction report because the employer violated the Division's subpoena by not producing this report at the deposition of Michael Barlow. However, during the hearing, Employee's counsel did not request that the record be left open for the purpose of a written motion as to the admissibility of Exhibit L and the testimony of Torrey Roberts. Instead, Employee's attorney cross-examined Mr. Roberts regarding Exhibit L. Therefore, Employee's Motion to Strike is denied.

Mr. Roberts concluded that his estimate of the speed of the tractor trailer was 47-53 miles per hour. He stated that Mr. Hadley exceeded the advisory speed for the left-hand curve and failed to control the tractor trailer while driving through the curve, resulting in the accident. Mr. Roberts admitted that the accident took place 1/10 of a mile past the speed advisory. Furthermore, Mr. Roberts admitted that even according to his estimation, the employee was driving below the speed limit.

Based on all of the evidence presented, I find that Mr. Robert's testimony did not contain any evidence of any causal connection between Mr. Hadley's death and an alleged violation of a company safety rule.

No evidence was offered that Dennis Hadley acknowledged any safety rule which was allegedly violated at the time of his death.

Mr. Barlow produced the one page "Truck Driver's Safety Information September 2011" which appeared to show Mr. Hadley's signature at the bottom of the page. Mr. Barlow testified that he had not seen Mr. Hadley sign this form and, as stated above, the form sets forth no safety rule which was violated by Mr. Hadley.

With no evidence of an actual existing safety rule of the employer which had been violated, the employer has introduced into evidence as business records the Missouri Commercial Driver's License Manual with the Missouri Rules of the Road and the U.S. Department of Transportation Federal Motor Carrier Safety Regulations, with Rules of the Road. There was no testimony from any witness that any specific rule or provision in these volumes had been adopted by the employer for the safety of the employees. There was no testimony from any witness that

Mr. Hadley had violated any such rule. There was no testimony from any witness that Mr. Hadley had actual knowledge of any such rule and there was no testimony from any witness that, prior to Mr. Hadley's injury, the employer had made a reasonable effort to cause its employees to obey any specific safety rule adopted by the employer for the safety of the employees. All of these elements were required to be proven by the employer before any violation of a company safety rule can be considered under Section 287.120.5.

No evidence was offered that Beco had made reasonable efforts to cause its employees to obey any alleged safety rule adopted by the employer.

Mr. Barlow testified that the safety rule violation relied upon by the employer was that Mr. Hadley had violated a posted speed limit. As stated previously, no testimony was adduced to the existence or adoption of any such rule adopted by the employer for the safety of the employees. However even if such a rule had been adopted, it was the duty of the employer to produce evidence to show that it had made reasonable efforts to cause employees to observe such a safety rule. Mr. Barlow testified that he was not aware of any driver who had ever been disciplined for violating a speed limit when that driver did not receive a ticket for that violation.

In conclusion, there was no credible evidence produced by the employer that it had adopted a reasonable rule for the safety of employees applicable to the facts of this case; no evidence was adduced that Dennis Hadley's death was caused by his failure to obey any such safety rule; since no rule was established by the evidence, there was no evidence that Dennis Hadley had actual knowledge of any such rule; and, finally, no evidence was submitted that, prior to the injury, the employer had made a reasonable effort to cause its employees to obey any such rule. In the failure to produce any such evidence, the employer's affirmative defense that Dennis Hadley was in violation of Section 287.120.5 is denied.

Issue 4. Past and future death benefits

Under Section 287.240 (4), RSMo, any death benefits are payable to conclusively presumed total dependent "to the exclusion of other total dependents." As previously found, the employee's average weekly wage qualifies his dependent for a rate of compensation for death benefits equal to \$664.88 per week. Pursuant to Section 287.240 RSMo, the employer-insurer is therefore directed to pay the sum of \$664.88 per week to the conclusively presumed total dependent, Nannette Hadley, of the deceased employee commencing on July 26, 2012, and continuing until the conclusively presumed total dependent loses her status as a dependent as provided below. The employer-insurer shall receive a credit of the amount paid to the employee's conclusively presumed total dependent, Nannette Hadley, for all benefits paid to the dependent.

Nannette Hadley's ongoing status as a conclusively presumed total dependent shall be determined in accordance with the provisions of Section 287.240 (4) (a). This section provides that the death payment to Nannette Hadley, as widow, shall cease upon her death or remarriage. In addition to weekly death benefits, Section 287.240 also provides that "in the event of remarriage a lump sum payment equal in amount to the benefits due for a period of two years

shall be paid to the widow or widower.” Pursuant to this provision, in the event Nannette Hadley shall remarry, the employer-insurer shall also make a remarriage lump sum payment to Nannette Hadley equal to 104 times the weekly death benefit of \$664.88, for a total payment of \$69,147.52.

As provided under Section 287.240, the payment of compensation by the employer-insurer in accordance with this order shall discharge the employer-insurer from all further obligations as to compensation payable under this chapter. All death benefits shall be paid in installments in the same manner as provided for disability compensation. The dependent receiving death benefits under the terms of this award shall annually report to the Division as to the marital status of the widow.

ATTORNEY’S FEE:

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

INTEREST:

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

Employee: Dennis Hadley

Injury No. 12-056972

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation