

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

Injury No.: 03-011409

Employee: Douglas Hayden
Employer: Dave Kolb Grading, Inc.
Insurers: 1) Amerisure Companies
2) Twin City Fire Insurance Co./
Hartford Specialty Risk Services

Date of Accident: February 12, 2003

Place and County of Accident: St. Louis 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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 24, 2005. The award and decision of Administrative Law Judge Linda J. Wenman, issued May 24, 2005, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 7th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Douglas Hayden

Injury No.: 03-011409

Dependents: N/A

Employer: Dave Kolb Grading Inc.

Additional Party:N/A

Insurer: Amerisure Companies
Twin City Fire Ins. Co. / Hartford Specialty Risk Services

Hearing Date: February 1, 2005

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

Checked by: LJW:tr

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: February 12, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis 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: While transporting workers to and from their worksite, Claimant's vehicle was struck by a truck.
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: Cervical spine and left bicep.
14. Nature and extent of any permanent disability: Stipulated as: 10% BAW referable to cervical spine, and 20% at 222 week level referable to the left bicep.
15. Compensation paid to-date for temporary disability: By Amerisure Companies: \$6,307.68 representing 9 5/7ths weeks.
16. Value necessary medical aid paid to date by employer/insurer? By Amerisure Companies: \$12,270.19

Employee: Douglas Hayden

Injury No.: 03-011409

17. Value necessary medical aid not furnished by employer/insurer? To be determined.
18. Employee's average weekly wages: Sufficient for maximum rates
19. Weekly compensation rate: \$649.32 / \$340.12
20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: Outstanding medical bill from Ernst Clinic, Inc. – amount to be determined.

84.4 weeks of permanent partial disability from Employer \$28,706.13

TOTAL: TO BE DETERMINED

Said payments to begin immediately 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: John J. Larsen, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Douglas Hayden	Injury No.:	03-011409
Dependents:	N/A	Before the	
Employer:	Dave Kolb Grading Inc.	Division of Workers'	
		Compensation	
Additional Party:	N/A	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Amerisure Companies	Checked by:	LJW:tr
	Twin City Fire Ins. Co. / Hartford Specialty Risk Services		

PRELIMINARIES

A hearing was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on February 1, 2005. The case was formally submitted with receipt of post-hearing briefs on March 9, 2005. Attorney John J. Larsen, Jr., represented Douglas Hayden (Claimant). Dave Kolb Grading, Inc., (Employer) was insured by Amerisure Companies (Amerisure), and represented by Attorney Dennis Lassa. Employer was also covered by an Owner Controlled Insurance Policy (OCIP) while performing work on the St. Louis Mills Project. The OCIP was insured by Twin City Fire Ins. Co., / Hartford Specialty Risk Services (Hartford), and represented by Attorney Richard Fitzgerald.

Prior to the start of the hearing the parties identified the single issue for disposition in this case as a determination of

which insurer, Amerisure or Hartford, is liable for Claimant's work related injury. Both insurers accept Claimant's accident as arising out of and in the course and scope of his employment. No issue is raised concerning medical causation. Further, the parties offered the following stipulations:

1. Claimant was injured while driving Employer's vehicle on a public roadway.
2. To date, Claimant's medical bills and temporary total disability benefit have been paid in full by Amerisure.
3. A medical bill from Ernst Clinic, Inc., is to be paid by the insurer found liable.
4. The liable insurer will pay permanent partial disability as follows: 10% BAW referable to the cervical spine, and 20% at the 222 week level referable to Claimant's left biceps.

Amerisure offered Exhibits 1-7, and Hartford offered Exhibit I. All exhibits were admitted into the record without objection. Any objections not expressly ruled on in this award are overruled.

JURISDICTION

At the start of the hearing, the parties confirmed that no issues regarding benefits remained to be decided. The only remaining issue involves a controversy between two insurers, and requires interpretation of Hartford's OCIP contract. Due to the nature of the remaining issue, a discussion was held regarding the Court's authority to proceed, namely, did this Court have subject matter jurisdiction over the remaining disputed issue.

An administrative adjudicative body is a member of the executive branch of government. Executive adjudicative agencies exercise quasi-judicial powers which are limited to the powers defined in its statutory provisions. *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866 (1940). These quasi-judicial powers occasionally extend to determinations of questions which are purely of a legal nature. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69 (Mo.banc 1982). An adjudicator has the duty "to rule upon every issue presented which pertains to a determination of liability in a workers' compensation claim; liability is not fixed until it is determined who is entitled to what from whom". *Highly v. Martin*, 784 S.W.2d 612 (Mo.App. 1989) quoting *Harris v. Pine Cleaners, Inc.*, 296 S.W.2d 27 (Mo.banc 1956); see also *Mikel v. Pott Industries*, 896 S.W.2d 624 (Mo.banc 1995).

The "who" (Claimant), and "what" (benefits) have been stipulated by the parties. What remains to be determined is the "from whom". As liability cannot be determined until the "whom" is decided, based on the authority cited, I find that I have subject matter jurisdiction to proceed to make that determination.

SUMMARY OF TESTIMONY

Only testimony necessary to support this award will be reviewed and summarized.

Claimant: Claimant has worked for Employer for approximately ten years. He worked as a grader/foreman during the construction of the St. Louis Mills project. The St. Louis Mills project encompassed a very large jobsite. One of Claimant's job duties was to oversee grader equipment operators, and transport them when necessary.

Approximately six months into the construction, the grading equipment was at the back of the jobsite, and employee cars were to be staged at the front of the jobsite. The distance between the front to the back of the jobsite was approximately one mile. Due to the distance involved, Claimant was instructed to transport the operators to their graders. Claimant drove a construction vehicle, and utilized a public road necessary to access the project site. At the time of injury, no other access point existed to enter the jobsite.

On February 12, 2003, during a transporting trip, Claimant's construction vehicle was traveling on the public road when it was struck by a turning tractor trailer. Claimant suffered injuries to his cervical spine and left biceps.

Upon cross-examination, Claimant confirmed the roadway had been installed before jobsite construction had begun. Claimant also confirmed that the general public had access to road on the date he was injured.

Jeffrey Kolb: Mr. Kolb has served as Employer's vice-president for fifteen years. He is in charge of daily operations for Employer, and was in charge of grading operations for the St. Louis Mills project. Employer was a subcontractor charged with the project grading. Mr. Kolb corroborated Claimant's testimony.

Mr. Kolb testified the OCIP should cover accident and workers' compensation liabilities, and when the project was bid, it did not include Employer's workers' compensation costs. Mr. Kolb testified that use of an OCIP financially benefits project developers, and an OCIP is the primary insurance coverage when an injury occurs. Claimant's date of injury was

under the coverage period of the OCIP. When Claimant was injured, Employer requested Hartford provide Claimant's workers' compensation benefits. Mr. Kolb testified that Hartford denied coverage, and Employer had no choice but to turn to Amerisure to provide Claimant coverage. If Amerisure bears this loss, Employer fears its workers' compensation rates will increase.

Mr. Kolb indicated that the primary use of the road used by Claimant was for construction access. When the road was built, permanent construction benchmarks were placed, and the roadway benchmarks were frequently used by construction personnel, including graders. Mr. Kolb testified that the roadway would have to be covered by the OCIP, as construction workers would have to access the benchmarks located on the road. When shown a copy of alleged OCIP boundaries for the St. Louis Mills project (Exhibit I), Mr. Kolb questioned the survey boundaries, and testified it was not reflective of the boundary description contained in the OCIP contract. Mr. Kolb also testified that the boundaries contained in Exhibit I had not been shown to him until one hour before his testimony.

Upon cross-examination, Mr. Kolb conceded the injury road was accessible to the general public, and contained other tenants. However, Mr. Kolb indicated that the road was constructed by another developer at the request of the St. Louis Mills developer.

FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

The policy in question indicates that it will cover "all workplaces in connection with or necessary or incidental to the project". (Exhibit 2) In order to determine the liable insurer in this case, two questions must be answered:

- 1) What were the project boundaries envisioned by the OCIP contract?
- 2) Did the OCIP contract exclude coverage for Claimant's injury?
What were the project boundaries of the OCIP contract?

Two exhibits were introduced which contained boundaries of the St. Louis Mills project. The exhibit offered by Hartford is a single page scaled drawing of the project site, bounded by some streets, the names of which cannot be read (Exhibit I). The document is neither referenced, nor incorporated by reference, in the OCIP. Mr. Kolb had never seen the document prior to the hearing date.

The Exhibit offered by Employer/Amerisure is a copy of the OCIP contract issued by Hartford to Employer (Exhibit 1). "Exhibit D" is the insurance manual of the OCIP. As a starting point, contained within the contract under "Exhibit D" is a general information provision. Subsection 3.18 states that "enrolled contractors must have a workers' compensation and employer's liability insurance covering all employees for injuries that occurs away from the jobsite" (pg.13 of "Ex.D"). Subsection 3.8 of "Exhibit D" provides information regarding the designated area for insurance coverage and states in part:

... Workers' Compensation and General Liability policies issued under the OCIP apply only to the operations of each Contractor and Subcontractor of every tier at and within the designated confines of the Project Site, as set forth and described in Exhibit "D", unless otherwise specified by Owner in writing to the Contractor. The OCIP insurance coverage does not apply to the operations of any insured on its own property or other work sites not included in the defined Project Site area described in the exhibits to the Contract Documents. ... (pg.6 of "Ex.D")

Under the definitions section of "Exhibit D", a "job or project site" means:

The premises as described in the exhibits to the Contract Documents between the Owner and the Contractors and such other designated area as may be designated in writing by the Owner. For Workers' Compensation, General Liability and Umbrella Liability, other premises under the control of the Owner, shall also be considered as Jobsite premises, provided that such other premises are used exclusively for the performance of the work. (pg.3 of "Ex.D")

The only jobsite description found in Hartford's OCIP occurs on the third page of the Contractors Special Wrap-up Endorsement, and is titled "Project Description". Subsection B.2 states:

The St. Louis Mills project is a 173.1 acre shopping development located at the intersections of Missouri Intrastate 370, Missouri Bottom Road and Taussig Road in Hazelwood, Missouri.

No other evidence was presented to assist in determining the project boundaries of Hartford's OCIP.

When doubt or uncertainty exists as to the meaning of language used in an insurance policy, and it is capable of two different interpretations, one favorable to the insured, and the other favorable to the insurer, the former prevails over the latter. *Cain v. Robinson Lumber Co.*, 295 S.W.2d 388 (Mo.banc 1956). Applying this guidance, along with the broad project description located in the Hartford OCIP, and the testimony of Mr. Kolb, I find the project boundaries of the OCIP included the road upon which Claimant was injured. At a minimum, it can be argued that the road was “incidental” or “necessary” to the St. Louis Mills project.

Did the OCIP exclude coverage of Claimant’s injury?

In its brief Hartford argues a coverage exclusion defense. Contained in the OCIP contract under “Exhibit D” subsection 3.13.3 is a coverage exclusion that includes, but is not limited to the ownership, maintenance and operation of automobiles. There is an exception to the exclusion regarding “mobile construction equipment”, and is to be defined in the policy. However, a review of the policy uncovers no definition of what constitutes “mobile construction equipment”.

Hartford’s brief equates an automobile as being the same as a “related vehicle (such as a truck)”, and as such the coverage exclusion would apply in this injury. I disagree. If Hartford had wanted to use a broad definition to encompass all vehicles, it would have used the term “motor vehicle” in its policy, it did not. Further, Claimant’s testimony was that he was driving a “construction vehicle” when the accident occurred. Neither on direct, nor cross-examination did either attorney obtain a more definitive description of the type of “construction vehicle” Claimant was driving. As the party asserting the exclusion defense, Hartford carries the burden of proof to prevail. I find Hartford has not met its burden to assert the coverage exclusion.

Finally, Employer/Amerisure seeks reimbursement from Hartford for monies paid for Claimant’s temporary total disability, and medical expenses related to the February 12, 2003 injury. This Court lacks the authority to order one insurer to reimburse another. *Harris v. Pine Cleaners, Inc.*, 296 S.W.2d 27 (Mo.banc 1956). Employer/Amerisure must seek its remedy in a court of proper jurisdiction.

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CONCLUSION

In summary, on February 12, 2003, Claimant sustained an injury out of and in the course of his employment with Employer. On the date of injury, Employer was fully insured for Workers’ Compensation benefits by Amerisure and Hartford’s OCIP. Hartford’s OCIP is the insurer liable for Claimant’s benefits. By stipulation, Claimant is entitled to receive from Hartford permanent partial disability of 10% BAW referable to his cervical spine, and 20% at the 222 week level referable to his left bicep. Hartford is to pay an outstanding medical bill from Ernst Medical Clinic Inc. Claimant’s attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation