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

Injury No.: 17-024570

Worker: Eugene Henshaw (deceased)

Dependent: Linda Henshaw (spouse)

Employer: Vansant Mills Funeral Services, LLC

Insurer: United Fire & Casualty Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480, RSMo. We have reviewed the evidence, read the parties' briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090, RSMo, the Commission reverses the award and decision of the administrative law judge.

Preliminaries
The parties asked the administrative law judge to resolve the following issues: (1) whether on or about April 17, 2017, Eugene Henshaw (Worker) was an employee of Vansant Mills Funeral Services, LLC (Employer); (2) whether an accident occurred within the course and scope of employment on April 17, 2017; (3) Worker's wage rate; (4) whether the dependent spouse, Linda Henshaw, is entitled to weekly death benefits pursuant to § 287.240, RSMo; and (5) whether Employer is liable to Worker for funeral expenses pursuant to § 287.240, RSMo.

The administrative law judge determined that (1) Worker was an employee of Employer on April 17, 2017; (2) an accident occurred within the course and scope of employment on April 17, 2017; (3) Worker's wage rate was $500.00 per week; (4) the dependent spouse is entitled to a weekly death benefit of $333.33; and (5) that Employer already paid funeral expenses beyond the requirement of the statute for funeral expenses and is not liable for further funeral expenses.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred because (1) Worker was not an employee of Employer on April 17, 2017; (2) the accident on April 17, 2017 did not arise out of and in the course of employment with Employer; and (3) the wage rate was not $500.00 per week.

After briefing by the parties, the Commission heard oral argument on these issues on December 19, 2018. For the reasons set forth below, we reverse the award and decision of the administrative law judge.

Findings of Fact
Employer operated a funeral home in Clinton, Missouri. As of the date of the accident, Employer employed two full-time employees, the owner and his wife. However, Employer stipulated that it was operating subject to Missouri's Workers' Compensation Law as of April 17, 2017. If Employer's work demand required additional help, Employer paid friends or acquaintances by the day to assist. For example, the record describes the owner's father as a part-time helper.

Worker, who was 79 years old, had worked in funeral homes in the past, including for the previous owners of Employer. Worker was good friends with the current owner of Employer. Years earlier, Worker was hired by the current owner to work in a different funeral home. About two weeks prior to April 17, 2017, Worker called the current owner of Employer, indicating that he was bored and offered to assist in any way. Worker had previously transported bodies for

Employer, but not for overnight trips. There is no record how much Employer paid on those prior occasions.

Employer normally transported dead bodies in its course of business for local trips, from the place of death to the funeral home and then to the place of burial or to the crematorium. If a body needed to be transported to another state, Employer normally took the body to a nearby airport, where it was flown to the other state for another funeral home to pick up. Employer normally had the option of using another business to transport dead bodies. The record is not clear if that was an option for out-of-state ground transports.

In this matter, Employer had made a pre-burial arrangement with a client to have her body transported by van to a funeral home in Temple, Texas. Such an arrangement was unusual for Employer; this instance was the second out-of-state ground transport in the four to five years the current owner owned Employer. Employer was unable to spare personnel to make the trip to Temple, Texas due to the press of business. When the client passed, the current owner's wife suggested that the owner call Worker to transport the body.

Employer contacted Worker about transporting the client's dead body from Employer's funeral home in Clinton, Missouri to a funeral home in Temple, Texas. Worker would use the van owned by Employer, which had been altered so it could hold a casket or cot for the purpose of transporting dead bodies. Worker agreed to meet at the Clinton, Missouri funeral home at 8:30 a.m. on April 17, 2017, to pick up the van and body. Worker was to transport the body to the funeral home in Temple, Texas by the end of the day. Employer agreed to pay Worker $500.00, plus expenses, meals, and motel lodging. Employer encouraged Worker to take his time back and suggested that Worker travel with his spouse to make a vacation out of the trip. Worker's spouse was not able to accompany Worker.

When Worker arrived at the Clinton, Missouri funeral home, the owner of Employer provided a map and directions to the Temple, Texas funeral home. Worker then left with the van and body. Employer did not call Worker during the day until around 8:00 p.m. that evening after the funeral home in Temple, Texas called asking where Worker was. At that time, Worker was around twenty miles away from the Temple, Texas funeral home. Worker informed Employer at that time that he had lost his way in Oklahoma and was therefore running late. During that call, Employer gave Worker the telephone number for the funeral home in Temple, Texas. Employer did not call Worker again. Worker subsequently crashed prior to reaching the Temple, Texas funeral home and died.[1]

Conclusions of Law

The dispositive issue in this matter is whether Worker was an employee of Employer. Here, Worker failed to meet his burden to establish that he was an employee.

Section 287.020.1, RSMo, provides, in pertinent part:

> The word **"employee"** as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations. Except as otherwise provided in section 287.200, any reference to any employee who has been

[1] We do not need to supply further details about Worker's death or accident because we do not need to reach the issue of causation in this matter.

> injured shall, when the employee is dead, also include his or her dependents, and other persons to whom compensation may be payable. (emphasis original)

Right to Control Test

"The pivotal question in determining the existence of an employer-employee relationship is whether the employer had the right to control the means and manner of the service, as distinguished from controlling the ultimate results of the service." *Chouteau v. Netco Constr.*, 132 S.W.3d 328, 332 (Mo. App. 2004) (inner citations omitted). The court in *Chouteau*, continued:

> If the alleged employer's actual control or right to control the work performance is not readily apparent from the evidence, several factors must be considered: (1) whether the work is part of the regular business of the employer; (2) whether the employment is a distinct occupation requiring special skills; (3) whether the alleged employee may hire assistants; (4) whether the work is usually done under supervision; (5) whether the alleged employee must supply his own tools, equipment, supplies, and materials; (6) the existence of a contract for a specific piece of work at a fixed price; (7) the length of time the person is employed; (8) the method of payment, whether by time or by the job; and (9) the extent to which the alleged employee may control the details of his work, except as to final results.

Chouteau, 132 S.W.3d at 332-33 (inner citations omitted).

Here, the application of the factors above are not necessary because the facts are readily apparent that this was not an employer/employee relationship. Employer controlled the ultimate results instead of controlling the means and manner of the service. The ultimate result in this case was to deliver the body to the funeral home in Temple, Texas by the end of the day on April 17, 2017. Employer provided the body and the van to Worker on that morning and provided basic directions. However, Employer did not monitor how fast or how slow Worker drove, whether he actually followed the directions or not, or, if or when he took breaks. The only time Employer actually called Worker was nearly twelve hours later, after the funeral home in Temple, Texas called asking where Worker was. The phone call was to ensure the ultimate results instead of controlling the manner or means of the service.

In any event, by reviewing the above factors, we reach the same result. Regarding the first factor, Worker was not requested to perform part of Employer's regular business. It was not Employer's regular business to transport bodies via automobile across state lines. Regular business only required Employer to transport bodies as far as an airport, but not actually across the state line. We are not persuaded with the argument that because Employer had to transport each body for some distance, either from the place of death to the funeral home or from the funeral home to the final resting place, that interstate transportation was a regular part of Employer's business. Employer regularly transported bodies locally and not across state lines. This factor strongly points towards an independent contractor relationship.

Regarding the other factors:

(2) Worker did not require special skills to transport the body to Texas. This factor points towards an employee relationship.

(3) Worker was told that he could have his wife accompany him. This indicates that Employer allowed Worker to have others assist him. This factor points towards an independent contractor relationship.

(4) The record does not clearly show if transportation across state lines is usually done under supervision. Therefore, Worker did not meet his burden with this factor. In any event, as the only hint of supervision during the trip was Employer's call nearly twelve hours into the trip, we conclude that there was effectively no supervision here. This factor points towards an independent contractor relationship.

(5) Employer did not require Worker "to supply his own tools, equipment, supplies, and materials." Employer allowed Worker to use its van. This factor points towards an employee relationship. However, we are not persuaded that this factor holds much weight in this matter, because Worker was only making this one-time trip. Employer's van was specially equipped to hold a body in a casket or on a cot. Because of the brevity of the contract, it was more reasonable for Worker to use Employer's van instead of obtaining his own means to transport the body. Had Worker transported bodies regularly with Employer's van, then this factor would have strongly indicated an employee relationship.

(6) There was an oral contract for a specific job at a fixed price. This factor points towards an independent contractor relationship.

(7) Employer contracted with Worker to perform work for a one-time trip that realistically involved an overnight stay. There was no other agreement to continue the working relationship upon the completion of this one-time trip. This factor points towards an independent contractor relationship.

(8) Employer planned to make a one-time payment for the single trip. This factor points towards an independent contractor relationship.

(9) Worker had full control over the details of the trip, "except as to final results." He could control which roads to take, how fast to drive, when to stop for breaks/lunch, etc., as long as he delivered the body by the end of the day. This factor points towards an independent contractor relationship.

The majority of the factors, including the more persuasive factors relating to this matter, point towards an independent contractor relationship focused on the results and not the manner or means of performance.

The administrative law judge also considered right to control factors listed in *Busby v. D.C. Cycle, Ltd.*, 292 S.W.3d 546, 550 (Mo. App. 2009). Specifically, that court decision stated,

> In determining if the employer had control over the employee, courts have examined a number of factors, including: 1) the extent of control; 2) the actual exercise of control; 3) the duration of employment; 4) the right to discharge; 5) the method of payment; 6) the degree to which the alleged employer furnishes the equipment; 7) the extent to which the work is the regular business of the employer; and 8) the employment contract.

Busby v. D.C. Cycle, Ltd., 292 S.W.3d at 550 (inner citations omitted). As we have discussed several of these factors with the factors in *Chouteau*, we need only to consider those unique to

the *Busby* decision. Neither of these additional factors support a finding of an employer/employee relationship.

Regarding the extent of control and actual exercise of control, Employer gave specific parameters for the end result and suggested a route, but did not have or exercise control from the moment Worker left the Clinton, Missouri funeral home. Employer did not contact Worker at regular intervals or track Worker to ensure that he followed the suggested route. Interestingly enough, Worker actually strayed from the suggested route when he got "lost" in Oklahoma, demonstrating a lack of control by Employer.

The right to discharge factor is not applicable in this matter due to the brevity of the one-day working relationship. Even if Employer wanted to discharge Worker before Worker reached Temple, Texas, there was no effective way for that discharge to occur. Worker had the body and was already traveling to Temple, Texas. Any action to "discharge" Worker would have likely resulted in the body not reaching its destination by the end of the day.

Relative Nature of Work Test

The administrative law judge also analyzed the working relationship by using the "relative nature of work test" as set forth in *Ceradsky v. Mid-Am. Dairymen, Inc.*, 583 S.W.2d 193, 198-99 (Mo. App. 1979), and used in *Phillips v. Par Elec. Contractors*, 92 S.W.3d 278, 282-84 (Mo. App. 2002). This test originated from Arthur Larson, The Law of Workmen's Compensation. § 43.20 (1978). The *Ceradsky* court stated,

> Where by the very nature of the work relationship or other circumstance, however, control is not conspicuous, the right to direct the detail of the work becomes only one indicium of control among others and the inquiry turns to the economic and functional relationship between the nature of the work and the operation of the business served. The inquiry, moreover, tends away from technical common law definitions to the public purpose of the scheme for workmen's compensation.
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> The treatment by Larson rests on the theory of workmen's compensation legislation that
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> "the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection." [Larson, at § 43.51]
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> Where the element of control in the work relationship does not emerge clearly, the relative nature of the work test determines employee status for purposes of workmen's compensation by
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> "the character of the claimant's work or business -- how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on -- and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the

> hiring of continuing services as distinguished from contracting for the completion of a particular job." [Larson, at § 43.52]

Ceradsky v. Mid-America Dairymen, 583 S.W.2d 193, 198-99 (Mo. App. 1979).

The "relative nature of work test" also points to an independent contractor relationship because Worker was not performing a task that was a regular part of Employer's regular work; the task was a one-time trip, or extremely intermittent; and the duration was insufficient "to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job."

Statutory Employee: § 287.040.1, RSMo

Finally, the administrative law judge analyzed the working relationship through the statutory employee test. "[A] contractor or employee of a contractor may be entitled to compensation under certain circumstances as a statutory employee under section 287.040. Section 287.040 constitutes an exception to the rule of non-liability of the principal to an independent contractor or its employees." *Chouteau*, 132 S.W.3d at 333 (inner citations omitted).

§ 287.040.1, RSMo, provides:

> 1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

As stated by the Supreme Court:

> [Section 287.040.1] is designed to prevent employers from evading the Act's requirements by hiring independent contractors to perform work the employer otherwise would hire ordinary employees to perform. . . . One is a statutory employee if (1) the work is performed pursuant to a contract, (2) the injury occurs on or about the premises of the alleged statutory employer and (3) the work is in the usual course of the alleged statutory employer's business.

McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473,480 (Mo. 2009) (citing *Bass v. Nat'l Super Mkts.*, 911 S.W.2d 617, 619 (Mo. 1995)).

Here, Worker performed work pursuant to an oral contract. However, we are not persuaded that Worker meets the other two criteria to be a statutory employee because the accident did not occur on Employer's premises and the work Worker performed was not in the usual course of Employer's business.

Regarding premises, the administrative law judge held that Worker was on Employer's premises because Employer owned the van Worker drove. We disagree.

Prior to the 2005 amendments, we construed the Workers' Compensation Law liberally. Under such construction, we might have found that Worker was on Employer's premises. Case law from before the 2005 amendments would support that conclusion. For example, in *Wilson v. C.C. Southern, Inc.*, 140 S.W. 3d 115 (Mo. App. 2004), an employee was killed on a public

highway while driving a tractor-trailer. The Court of Appeals held that the vehicle was the means by which the company conducted its usual business of transporting goods and concluded that the public highway was included in the company's premises.

The Court stated that the term premises "'should not be given a narrow or refined construction, but rather, in keeping with both the spirit and specific direction . . . of the [workers' compensation law,] should be liberally construed and applied. . . . 'Premises' as there used contemplates any place, under the exclusive control of the employer, where the employer's usual business is being carried on or conducted[.]" *Wilson*, 140 S.W. 3d at 118 (quoting *Sargent v. Clements*, 88 S.W.2d 174, 178 (Mo. 1935)).

However, after amendments in 2005 to the Workers' Compensation Law, § 287.800.1, RSMo, requires "[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts [to] construe the provisions of this chapter strictly." Therefore, we cannot apply a liberal definition of the word "premises" in this matter.

In light of the 2005 amendments and construing those provisions strictly, we find that Worker was not on Employer's premises at the time of the accident.

Similarly, and as discussed above, Worker was not performing services that were in Employer's usual course of business.

The Missouri Supreme Court defined "usual business" as

> "those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement." . . . This definition is designed to exclude "specialized or episodic work that is essential to the employer but not within the employer's usual business as performed by its employees."

McCracken v. Wal-Mart Stores E., LP, 298 S.W.3d 473, 480 (Mo. 2009) (quoting *Bass v. Nat'l Super Mkts.*, 911 S.W.2d 617, 621 (Mo. 1995)).

Here, Worker transported a body to Temple, Texas, a trip necessitating an overnight stay. Employer did not routinely make such out-of-state transports on a regular or frequent schedule. On the contrary, this trip constituted specialized or episodic work that was not within Employer's usual business as performed by its employees. We are not persuaded that such a trip made Worker an employee merely because one of the two owners would have had to make the trip if Employer did not contract with Worker. The performance of this single trip to Temple, Texas would not have been sufficient to require Employer to hire a permanent employee in the absence of the agreement with Worker.

We find that Worker was not a statutory employee of Employer. Because Worker was not an employee of Employer, we must deny Worker's claim. All other issues are moot.

Decision
We reverse the award of the administrative law judge.

Worker's claim against Employer is denied because worker failed to establish an employment relationship with Employer.

The award and decision of Administrative Law Judge Lisa Pottenger is attached solely for reference.

Given at Jefferson City, State of Missouri, this 14th day of January 2019.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

Reid K. Forrester, Member

SEPARATE OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Worker's Compensation Law, I believe the decision of the administrative law judge should be affirmed.

Covered "employee" and "employer" under Chapter 287
Section 287.120 RSMo 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 personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment.

(emphasis added)

Section 287.020, RSMo defines an "employee," in relevant part, as follows:

> The word "employee" as used in this chapter shall be construed to mean *every person in the service of any employer, as defined in this chapter, under any contract of hire*, express or implied, oral or written, or under any appointment or election, including executive officers of corporations.

(emphasis added)

Section 287.030, RSMo, meanwhile, defines an "employer" as follows:

> 1. The word "employer" as used in this chapter shall be construed to mean:
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> (1) Every person ... using the service of another for pay; ...
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> (3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of this chapter as provided in subsection 2 of section 287.090, except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an employer for the purposes of this chapter if they have one or more employees. An employee who is a member of the employer's family within the third degree of affinity or consanguinity shall be counted in determining the total number of employees of such employer.

Finally, § 287.800.1, RSMo provides that:

> Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

Given that § 287.020.1, RSMo, includes, as a component of the definition of an "employee," a showing that the individual is in the service of an "employer," I deem it most logical to begin with an analysis whether Employer was an "employer" for purposes of § 287.030, RSMo, on April 17,

2017. On that date, Employer was engaged in the funeral home business, which included the transportation of bodies. Employer stipulated at the hearing that it was operating subject to the Missouri Workers' Compensation Act as of April 17, 2017.

I turn now to the question whether Employee was an "employee" as defined by § 287.020.1, RSMo. There is no contention that Employee was not a "person" on April 17, 2017, nor would there appear to be any reasonable argument that he was not "in the service of" Employer on that date, where he was unquestionably performing services in the context of furthering Employer's business operations. I also conclude that there was a qualifying "contract of hire" in this case, where it's uncontested the parties had a meeting of the minds at least as to Employer's offer to have Employee transport a body on April 17, 2017, in exchange for consideration in the form of pay at the rate of $500.00, plus expenses. Accordingly, I conclude that Employee was an "employee" for purposes of § 287.020.1, RSMo, when he was killed on April 17, 2017, because the uncontested facts of this case show that he was a "person in the service of [an] employer ... under [a] contract of hire."

Under strict construction, the analysis would seem to end there, as I have concluded that both of the relevant statutory definitions are satisfied in this case. However, as referenced by the Commission majority, the courts have historically construed the word "service" in § 287.020.1, RSMo, to mean *controllable* service: "[t]he employer-employee relationship by the statutory definition rests on service, *construed by judicial definition to mean controllable service*." *Ceradsky v. Mid-America Dairymen*, 583 S.W.2d 193, 197 (Mo. App. 1979)(emphasis added). In other words, the courts have added the word "controllable" to the definition of "employee" under § 287.020.1, RSMo; it is from this judicial amendment of the statute that the "right-to-control" test has been imposed. It has further been generally assumed that it is the *employee's* burden to present evidence sufficient to satisfy the right-to-control test, in order to avoid a finding that he was an "independent contractor." Indeed, the majority's award denying compensation expressly turns upon this very assumption, in that they have faulted employee for the dearth of evidence regarding the right-to-control factors. As further explained below, I am not prepared to join in this assumption, because I believe it conflicts with the 2005 legislative mandate of strict construction pursuant to § 287.800.1, RSMo.

The right-to-control test - whose burden?

It is well-settled in Missouri that the employee has the burden of proof on all essential elements of the claim. *Brooks v. General Motors Assembly Div.*, 527 S.W.2d 50, 53 (Mo. App. 1975). So, where there is a dispute over the existence of an "employment relationship," the employee will have the initial burden to prove the statutory definitions are satisfied. Where the fact-finder is persuaded those definitions are satisfied, the burden is then appropriately shifted to the putative employer to prove, as an affirmative defense, some reason the act shouldn't apply, because, pursuant to § 287.808 RSMo, "[t]he burden of establishing any affirmative defense is on the employer[,]" and "[i]n asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Here, as I have shown above, Employee has satisfied his initial burden of proof, in that he has shown he was an "employee" working for an "employer" pursuant to the *actual language* of the statutes in question. Consequently, the burden of proof should shift to Employer to prove some reason the act doesn't apply: namely, that Employee was an independent contractor.

To be clear, I am not proposing that we do away with the right-to-control test altogether, or that independent contractors should be deemed covered under the Missouri Workers' Compensation Law as a result of the 2005 amendments. But where § 287.020.1, RSMo, does not contain an

express requirement of "controllable service," or say anything at all about independent contractors,[2] I am convinced that where (as here) the employee makes a prima facie case that he was a "person in the service of an employer," the burden should shift to the employer, as the party claiming a "defense based on a factual proposition," to prove as an affirmative defense that the injured worker, despite being a "person in [its] service," was nevertheless not an employee, but an independent contractor.

It's worth noting that this result would mirror the burden-shifting framework under the Missouri Employment Security Law. See § 288.034.5, RSMo, instructing that "[s]ervice performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown ... that such services were performed by an independent contractor." It's also worth noting that this result would be far from the most unusual "side effect" of strict construction that we have seen over the years, from the imposition of co-employee liability for workplace injuries,[3] to the removal of occupational diseases from the exclusivity provision under § 287.120, RSMo.[4]

In sum, I conclude that the definitions under §§ 287.020.1 and 287.030, RSMo are satisfied in this case, and that Employee was working as an "employee" of an "employer" at the time of his accident and death. I further conclude that Employer failed to satisfy its burden of proving its affirmative defense that Employee was working as an independent contractor.

Statutory Employment

§ 287.040.1, RSMo, provides:

> 1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

Employee was also a statutory employee pursuant to § 287.040.1, RSMo. In *McCracken v. Wal-Mart Stores East, LP*, 298 S.W. 3d 473 (Mo. 2009), the Missouri Supreme Court noted that § 287.040.1, RSMo, "is designed to prevent employers from evading the Act's requirements by hiring independent contractors to perform work the employer otherwise would hire ordinary employees to perform." *McCracken*, 298 S.W. 3d at 480 (citing *Bass v. Nat'l Super Mkts.*, 911 S.W.2d 617, 619 (Mo. 1995). The court in *McCracken* continued, "[i]t does so by defining the company that hires the independent contractor as a statutory employer. This allows an injured employee to recover workers' compensation from the company if injured, *just as if the work had not been farmed out to an independent contractor.*" *McCracken*, 298 S.W. 3d at 480 (emphasis in original) (quoting *Huff v. Union Elec. Co.*, 598 S.W.2d 503, 511 (Mo. App. 1980)).

This matter is just the type of case § 287.040.1, RSMo, is designed to cover. Employer farmed out work to Employee that would have otherwise been done by Employer. Employer had an

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[2] In fact, the only explicit reference to "independent contractors" in the entirety of Chapter 287 is found within § 287.040.2, RSMo, which states that a premises owner is not liable under workers' compensation for injuries suffered by independent contractors wherever the "improvements exception" applies. In a 1935 decision, the Missouri Supreme Court read this as a generalized indication the legislature intended to exclude all independent contractors who are not otherwise qualified as statutory employees. See *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 912 (1935). However, the *Maltz* court was not bound, as we are now, to strictly construe § 287.020.1.

[3] See *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. 2010).

[4] See *Amesquita v. Gilster-Mary Lee Corp.*, 408 S.W.3d 293, 298 (Mo. App. 2013).

oral contract with Employee to use Employer's van (premises) to transport a body in the usual course of Employer's business.

The plain meaning of the term "premises" in the employment context is "The place of business of an enterprise or institution." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1789 (Unabridged, 2002). Many employers and businesses have more places of business than just brick and mortar buildings. Employer, specifically, has vehicles to perform its business of transporting bodies from places of death to the funeral home and then to the airport or final resting places. To make these transports, Employer uses specific vehicles that it owns and insures. Therefore, any of its work performed in connection with these vehicles must be considered to occur in Employer's place of business, subject to Employer's liability for workers' compensation. To hold otherwise could allow employers to avoid liability for accidents occurring during a significant portion of their regular business activities. Such would reach an absurd result.

Similarly, it was the usual course of business of Employer to transport bodies. I am not persuaded by the argument that the distance of the transport makes a difference here. Employer had to transport bodies for each client. It stands to reason that some distances are longer than others due to the location of the deceased at the time of death and the location of the final resting place. Regardless of the distance, one of the owners usually performs the transports. *Transcript*, pp. 23-24. However, Employer decided to allow Employee to use Employer's van to make the transport instead of Employer's employee.

Conclusion

Consequently, I conclude that the employment relationship between the parties was covered by the Missouri Employment Security Law, and that employer is liable, pursuant to § 287.120.1, RSMo, or pursuant to § 287.040.1, RSMo, to furnish compensation to employee for his death by accident arising out of and in the course of the employment.[5] I also agree with the administrative law judge that Employee's weekly wage was $500.00,[6] and that the death benefit to should be $333.33 per week.

I would affirm the administrative law judge's award allowing benefits. Because the Commission majority has decided otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

[5] I do not find persuasive Employer's argument and speculation that Employee suffered a cardiac event prior to the accident. There was no expert medical opinion supporting Employer's speculation. On the contrary, the autopsy report and the cause of death report both point to the accident as the prevailing cause of Employee's death.

[6] The only evidence in the record regarding employee's wage is the $500.00 agreement for the transportation job to Temple, Texas.

FINAL AWARD

Employee:	Eugene Henshaw (Deceased)	Injury No: 17-024570
Dependents:	Linda Henshaw (Spouse)	
Employer:	Vansant Mills Funeral Services, LLC	
Insurer:	United Fire & Casualty Company	
Additional Party:	N/A	
Hearing Date:	April 17, 2018	Checked by: LP/drl

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the law? Yes
4. Date of accident or onset of occupational disease: April 17, 2017
5. State location where accident occurred or occupational disease was contracted: Contract of hire in Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was delivering a body in a funeral home van from Missouri to Texas and sustained a car accident near the Texas funeral home
12. Did accident or occupational disease cause death? Yes Date of death? April 17, 2017
13. Part(s) of body injured by accident or occupational disease: Death

14. Nature and extent of any permanent disability: Weekly death benefits

15. Compensation paid to date for temporary disability: $0

16. Value necessary medical aid paid to date by employer/insurer? $0

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $500.00

19. Weekly compensation rate: $333.33

20. Method wages computation: 287.250.4

COMPENSATION PAYABLE

21. Amount payable: The employer is liable to Linda Henshaw for weekly death benefits beginning April 18, 2017 and continuing until remarriage or her lifetime pursuant to 287.240(4)(a).

The compensation awarded to the Employee shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mark E. Kelly for the necessary legal services rendered to the Employee.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eugene Henshaw (Deceased) Injury No: 17-024570

Dependents: Linda Henshaw (Spouse)

Employer: Vansant Mills Funeral Services, LLC

Insurer: United Fire & Casualty Company

Additional Party: N/A

Hearing Date: April 17, 2018 Checked by: LP/drl

On April 17, 2018, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Eugene Henshaw (deceased), was represented by counsel, Mark E. Kelly. The Employer/Insurer was represented by Brian K. McBrearty.

STIPULATIONS

The parties stipulated that:

1. Vansant Mills Funeral Home was an Employer operating under Missouri's Workers' Compensation Statute on April 17, 2017;
2. United Fire & Casualty Company was their insurer;
3. Missouri jurisdiction is proper;
4. A claim was filed within the time prescribed by statute;
5. Proper notice was given; and
6. Linda Henshaw was married to Claimant on April 17, 2017.

ISSUES

The issues to be addressed by this award are as follows:

1. Whether on or about April 17, 2017, Eugene Henshaw was an employee of Vansant-Mills Funeral Services LLC (hereinafter Vansant-Mills);
2. Whether an accident occurred within the course and scope of employment on April 17, 2017;
3. Wage rate;
4. Whether the dependent spouse, Linda Henshaw, is entitled to weekly death benefits pursuant to 287.240; and
5. Whether the employer is liable to Claimant for funeral expenses pursuant to 287.240.

STATEMENT OF FACTS AND FINDINGS OF LAW

In October 2013, Curtis and Shelley Mills became the owners of Vansant-Mills Funeral Services, LLC, a funeral home and cremation provider, when they bought the business from Curtis' father. Vansant-Mills is located in Clinton, Missouri. Mr. Mills' job duties at Vansant-Mills include embalming bodies, transporting bodies, making funeral arrangements with families, and entering into preplanned funeral agreements.

In the claim at hand, Vansant-Mills entered into a preplanned funeral agreement on December 30, 2016, with Kay Phillips prior to her passing. The contract provided that upon Ms. Phillips' death, Vansant-Mills would transport her body by motor carrier to Scanio-Harper Funeral Home in Temple, Texas because she specifically did not want her body flown to Texas. The contract specifically charged for mileage and the transport of her remains, which included removal from her place of death, embalming, filing of the death certificates, and obtaining certified copies for her family.

Kay Phillips passed away on April 13, 2017. Mr. Mills contacted the Texas funeral home that evening to confirm the arrangements and schedule transport of the body. Mr. Mills also called Mr. Henshaw on his cell phone the next day to see if he would transport a body to Temple, Texas on Monday, April 17, 2017, because the family did not want the remains to leave Clinton, Missouri, until that Monday, the day after Easter.

Mr. Henshaw and Mr. Mills were friends and had previously worked together at another funeral home. Also, Mr. Henshaw had performed these same duties on at least one prior occasion for Vansant-Mills. Approximately two weeks prior to the incident at hand, Mr. Mills testified he had spoken with Mr. Henshaw and he told Mr. Mills he had left his previous employer and was bored. Mr. Henshaw indicated to Mr. Mills that if he had anything for him to do that he would be glad to do it.

Mr. Mills would typically be the person to transport bodies for their funeral home business. In this specific instance, Mr. Mills did not want to be away from the funeral home for this out-of-state transport because they were very busy with other funerals. As a result, Mr. Henshaw was hired to perform the duties Mr. Mills testified were in the ordinary course of his funeral home business. Mr. Mills further testified he would have been the one to transport the body if he had not hired Mr. Henshaw to transport the body. Mr. Mills agreed to pay Mr. Henshaw five hundred dollars ($500.00) plus all of his expenses, including meals, fuel, and anything he might need to transport the body. Mr. Mills also told Mr. Henshaw he would be driving the Vansant-Mills van which was uniquely outfitted to transport the body and that it would require an overnight stay.

Mr. Henshaw arrived at Vansant-Mills on Monday, April 17, 2017, around 8:15 a.m. The workers from the funeral home loaded the body into the van. Mr. Mills provided Mr. Henshaw with directions on MapQuest to his destination in Texas and discussed the best route for Mr. Henshaw to take to the Texas funeral home. The MapQuest directions stated it was approximately a nine-and-a-half hour trip by car without stops. Mr. Mills also provided Mr. Henshaw with the Texas funeral home contact information and an out-of-state burial permit to be delivered with the body. The instructions Mr. Mills gave Mr. Henshaw also included that the body must be delivered to Texas on Monday, April 17, 2017, and a person would be waiting

for delivery of the body at the Texas funeral home. Mr. Mills testified that a special permit was required for the body to stay in the van overnight which he did not provide to Mr. Henshaw. Mr. Henshaw left the Vansant-Mills location at approximately 9 a.m. that morning.

Approximately 8 p.m. that evening, the Texas funeral home called Mr. Mills wanting to know where the gentleman was with the remains. At that time, Mr. Mills immediately called Mr. Henshaw on his cell phone. Mr. Henshaw answered the call and stated he was twenty minutes away. He further stated the road conditions were horrible with a lot of construction and it had been raining on and off all day. Mr. Henshaw did state he was tired but expressed no other concerns. Mr. Mills felt Mr. Henshaw was lucid and was not expressing any health issues to him during the phone conversation.

At approximately 11 p.m. that evening, the Temple Police Department contacted Mr. Mills to inform him that the driver of his van had passed away as a result of a car accident. The accident occurred about five minutes from the Temple, Texas funeral home and at an exit set out on the map Mr. Mills provided Mr. Henshaw.

Employer argues that Mr. Henshaw was an independent contractor because transporting bodies out of state is not within the usual course of business, Vansant-Mills did not exercise control, and the contract was for a one-time trip pursuant to a one-time contract. Section 287.020, RSMo, provides in part, "the word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written. An independent contractor, on the other hand, "is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of his work." *Miller v. Hirschbach,* 714 S.W.2d 652, 656 (Mo. Ct. App. S.D. 2000), superseded by statute on other grounds in *Booth v. Trailiner Corp.*, 21 S.W.3d 869 (Mo.App. S.D.2000).

A claimant establishes an employer-employee relationship if the claimant worked in the service of the alleged employer and the employer controlled the services. *Chouteau v. Netco Construction*, 132 S.W. 3d 328, 332 (Mo. Ct. App. W.D. 2004). The pivotal question whether a claimant is a worker employed and entitled to receive benefits under the law is whether the employer had a right to control the means and manner of the service instead of just controlling the ultimate results of the service provided. *Watkins v. Bi-State Development Agency,* 924 S.W.2d 18, 21 (Mo. Ct. App. E.D. 1996) overruled on other grounds by *Hampton V. Big Boy Steel Erection*, 121 S.W. 3d 220 (Mo. Banc 2003); DiMaggio *v. Johnston Audio/D & M Sound*, 19 S.W. 3d 185, 188 (Mo. Ct. App. W.D. 2000), overruled on other grounds by *Hampton V. Big Boy Steel Erection*, 121 S.W. 3d 220 (Mo. Banc 2003).

Although a claimant's employment status must be decided on the facts of each case, there are several factors that must be applied in order to determine whether a right to control existed. *Dawson v. Home Interiors & Gifts, Inc.,* 890 S.W. 2d 747,748 (MO. App. W.D. 1995) overruled on other grounds by *Hampton V. Big Boy Steel Erection*, 121 S.W. 3d 220 (Mo. Banc 2003). To determine if an employer had control over an employee, the courts have used a number of factors that include: 1) the extent of control; 2) the actual exercise of control; 3) the duration of employment; 4) the right to discharge; 5) the method of payment; 6) the degree to which the alleged employer furnishes the equipment; 7) the extent to which the work is the regular business of the employer; and 8) the employment contract. *Busby v. D.C. Cycle Ltd.*, 292 S.W.3d 546, 550 (Mo.

Ct. App. S.D. 2009) (citing *Burgess v. NaCom Cable Co.*, 923 SW2d 450, 452 Mo. Ct. App. E.D. 1996). The court further found that "no one factor is dispositive, but each is relevant to the issue." *Id.*

Regarding the factor of the extent and actual exercise of control, I find Vansant-Mills exerted sufficient control over Mr. Henshaw to meet the employee-employer relationship. Mr. Mills had contracted with the claimant and provided specific instructions regarding transporting the body at her death to Scanio-Harper Funeral Home in Temple, Texas. Vansant-Mills exerted complete control with specific instructions as to where, when and how Mr. Henshaw was to transport the body. Mr. Mills instructed Mr. Henshaw to use the Vansant-Mills van that is specially equipped to transport the body and provided a map for the route to the funeral home. Mr. Mills instructed Mr. Henshaw that the body had to be delivered the same day and provided paperwork that had to be delivered with the body at the funeral home. Mr. Mills also provided all the fuel and additional expenses for Mr. Henshaw to transport the body. In addition, Mr. Mills called Mr. Henshaw enroute to specifically check on his status to ensure Mr. Henshaw was on track to deliver the body on the same day.

Mr. Mills testified he or an employee of the funeral home would have transported the body if Mr. Henshaw had not done it. Mr. Mills did not defer to Mr. Henshaw's expertise in ascertaining the ultimate result but gave Mr. Henshaw specific instructions on where, how and when his work must be accomplished. Mr. Henshaw followed each specific directive from Mr. Mills in order to deliver the body on Monday as required by Mr. Mills. The extent and actual exercise of control by Mr. Mills over Mr. Henshaw was substantial. As such, I find these two factors are in favor of employee status.

Mr. Henshaw's duration of employment was for one job. Although, Mr. Henshaw had performed these same job duties at least one time in the past for Vansant-Mills making his employment irregular, I find this factor leans strongly in favor of an independent contractor.

Concerning the right to discharge, it appears from the oral contract that either party had the right to cancel the employment contract without repercussion. The case law says the right of any employer to terminate a relationship without incurring breach of contract liability is generally an indication of an employer-employee relationship. *Cope v. House of Maret*, 729 S.W.2d 641, 643 (Mo. Ct. App. E.D. 1987), overruled on other grounds by *Hampton V. Big Boy Steel Erection*, 121 S.W. 3d 220 (Mo. Banc 2003); *Dawson* at 749. Therefore, this factor leans in favor of employee status.

In regard to method of payment, Mr. Henshaw was paid a sum of $500.00 plus expenses, which included his fuel, meals and lodging. This method of payment, I find is indicative of an independent contractor relationship. However, Mr. Henshaw performed duties necessary to the operation of the funeral business, which would have been done by a regular employee and most likely Mr. Mills himself would have performed the work. This method of payment is also more like a substitute teacher where they are paid a specific amount per day rather than by the hour. *See Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193, 197 (Mo. Ct. App. W.D. 1979). In addition, Mr. Henshaw was actually paid to do the work a regular funeral home employee would have done. This factor does not appear to lean in favor of either status. *Id.*

In the instant case, the degree to which the alleged employer furnished equipment is also indicative of an employer-employee relationship. Vansant-Mills provided the van that was specially equipped to transport the body and valuable equipment for the funeral home. The courts have found where an employer provides valuable equipment like the van for performance of the work this invariably implies employment status. *Id.* at 200; *Busby* at 551. The rationale is that an employer that furnished expensive equipment as a matter of sound business practice will protect their investment by control and direction in the way it is used. *Id.* Vansant-Mills also provided Mr. Henshaw all the needed supplies, such as the permit, maps, contact information, meals, lodging and fuel. In addition, Vansant-Mills provided workers to load the body on to the van. I find this factor is in favor of employee status.

Another factor that must be taken into consideration is the extent to which the work is the regular business of the alleged employer. Vansant-Mills is in the funeral home and cremation provider business. Mr. Mills testified that transporting bodies is work in the regular and ordinary course of his business. In fact, Mr. Mills testified he would have most likely been the person to transport the body if Mr. Henshaw had not done so. In *Ceradsky,* the court provided. "[t]hus that the work activity is of a kind necessary in the operation of the business so that if not done by the claimant would be done by a direct employee of the business, essentially establishes the renderer of the service an employee within the purposes of the compensation law." *Id.* 198. In addition, Mr. Henshaw did not use his skill as a driver as a separate calling or enterprise. He did not have an independent business for which he would be expected to bear the burden to carry accident insurance. Finally, the work Mr. Henshaw did for Vansant-Mills did not differ from the work the company's regular employees did. Although the transport on this occasion was out of state, I find transporting bodies is within the regular course of business of Vansant-Mills.

Lastly, the employment contract between the two parties must be considered. Mr. Henshaw personally had an oral employment contract with Vansant-Mills. The contract personally bound Mr. Henshaw to do the work without discretion of letting someone else fulfill his obligation and is indicative of an employer-employee relationship. *Id.* at 200-201. There was no indication in the oral agreement where Mr. Henshaw spoke about or agreed to be an independent contractor or could hire others to drive the van. This factor also leans in favor of employee status.

From the evidence, six of the eight factors either leans in favor of, or heavily in favor of, an employer-employee relationship, and I find based on the evidence presented in this unusual case that Mr. Henshaw is an employee of Vansant-Mills.

While I find six out of eight factors lean in favor of employee-employer relationship, there is a second analysis courts require if the evidence does not clearly demonstrate the employer's right to control. *Phillips v. Par Elec. Contractors,* 92 S.W.3d 278, 283 (Mo. Ct. App. W.D. 2002) overruled on other grounds by *Hampton V. Big Boy Steel Erection,* 121 S.W. 3d 220 (Mo. Banc 2003).

The relative nature of work test, utilizes the following factors:

> the character of the claimant's work or business---how skilled it is, or how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on---

> and its relation to the employer's business, that is, how much it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.

Id.

Drivers require a degree of skill but is not a unique or a special skill. In this case, Mr. Henshaw was driving a van that did not require any unique skill or special license to perform this type of work. In addition, Mr. Henshaw's dealings with Vansant-Mills were not a separate calling or independent business for which he would be expected to carry or bear the burden of accident insurance. Mr. Henshaw was not in the business of hiring himself out as a driver for different funeral homes. Mr. Henshaw had always been employed at funeral homes where he performed these types of services and not as a separate personal enterprise or business. In addition, the work Mr. Henshaw performed on April 17, 2017, was a regular and continuous part of the funeral business and not an independent business where the cost of work-related injury would be channeled to Mr. Henshaw. *Turner v. State,* 952 S.W.2d 354, 359 (Mo. Ct. App. W.D. 1997).

The work Mr. Henshaw did for Vansant-Mills did not differ from the work the company's regular employees did. Mr. Mills specifically testified that if Mr. Henshaw had not transported the body, Mr. Mills would have most likely been the one to make that trip. Mr. Henshaw was hired as a temporary employee to do work that would normally have been done by a regular employee of the funeral business. Accordingly, under the "relative nature of work test," Mr. Henshaw was an "employee" and entitled to compensation. *See Phillips* at 283; *Gaston v. J.H. Ware Trucking Inc.,* 849 S.W.2d 70, 74-76 (Mo. Ct. App. W.D. 993) overruled on other grounds by *Hampton V. Big Boy Steel Erection,* 121 S.W. 3d 220 (Mo. Banc 2003).

I also find Claimant was a statutory employee pursuant to 287.040.1. Statutory employment requires: (1) the work is performed pursuant to contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer. *Chouteau v. Netco Construction,* 132 S.W.3d 328, 334 (Mo. Ct. App. W.D. 2004).

The first element is satisfied, as there is no dispute that there was an oral contract for employment between Vansant-Mills and Mr. Henshaw. Mr. Mills himself testified to this fact.

Second, "[t]he premises of an alleged statutory employer includes any place under the exclusive control of the alleged statutory employer, where the general public does not have the same right of use as does the independent contractor." *Id.* The van in which Mr. Henshaw was killed was the means by which the funeral home conducted its usual course of business in transporting bodies. *Wilson v. C.C. Southern, Inc.,* 140 S.W.3d 115, 119 (Mo. Ct. App. W.D. 2004). Vansant-Mills required Mr. Henshaw to drive the van in fulfillment for work it had contracted. *Id.* The general public did not have a right to use Vansant-Mills' van. *Id.* Furthermore, Vansant-Mills maintained and owned the van that was used by Claimant on April 17, 2017. Therefore, I find the van is the premises of Vansant-Mills based on the facts of this case.

Third, the term "usual business" has been defined as activities that (1) are routinely done; (2) on a regular and frequent schedule; (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time; and (4) the

performance of which would require the statutory employer to hire permanent employees absent the agreement. *Chouteau* at 334. Vansant-Mills is in the business as a funeral home and cremation provider. Transporting bodies is work done in the funeral home's usual course of business. *Id.* The agreement between Mr. Henshaw and Vansant-Mills was to perform the delivery of a body to another funeral home which he had done on at least one previous occasion on behalf of Vansant-Mills. *Id.* If Mr. Mills had not hired Mr. Henshaw, a funeral home employee would have had to perform the work itself. *Id.* Accordingly, I find Mr. Henshaw a statutory employee.

Since I find Mr. Henshaw an employee of Vansant-Mills, the next issue is whether Claimant sustained an accident that arose out of and in the course of his employment on April 17, 2017. The employer argues that Mr. Henshaw sustained a heart attack not related to his employment which caused the accident. The employer argues the evidence shows that Claimant perished from a pre-existing cardiac condition prior to impact based on the accident reports. I disagree.

I find based on the evidence presented that Claimant was still breathing and had a weak carotid pulse when the Temple Fire Rescue arrived (Exhibit C). Although Claimant passed away moments after the first rescue team arrived, the Rescue Team initially deemed the scene as a rescue operation. This leads me to find Claimant's primary cause of death was the rebar in his abdomen.

The employer also argues the road had noticeable road closure signs along with no pre-impact braking prior to impact supports Claimant sustained an idiopathic heart attack causing the accident. However, the investigative report states the scene was very dark and noted another unknown male accidently drove through the same construction barricade and made his way down the same path as the deceased until stopped by officers (Exhibit C). As such, I find based on the evidence presented that Claimant accidently drove down the wrong exit and crashed into the rebar.

Most importantly, the autopsy report found the following:

I. I. Penetrating injury of the abdomen:

A. Entrance: irregular ovoid defect of the anterior abdominal wall.

B. Injuries: perforations of the skin and subcutaneous tissue of the abdomen and mesentery, penetration of the L-1-L-2 vertebral bodies into the spinal canal with minimal disruption of the dura and minimal epidural hemorrhage, stretching of the underlying spinal cord, and retroperitoneal soft tissue hemorrhage.

In the Autopsy Report Conclusions, the report found "[b]ased on the case history and autopsy findings, it is our opinion that Eugene P. Henshaw, died as a result of a penetrating injury of the abdomen." It was also their opinion 'that hypertensive and atherosclerotic cardiovascular disease contributed to his death." They further found that "[s]cene investigation, scene photographs and autopsy findings suggest that a natural cardiac event may have precipitated the motor vehicle crash."

Dr. Gwin also provided a Cause of Death Report. In his report he opines, "[a]n Autopsy was performed and the cause of death is: Penetrating injury of the abdomen." He also opines that "Part II (Other Significant Factors): Hypertensive and atherosclerotic cardiovascular disease."

Indeed, Claimant had pre-existing heart disease. The autopsy report reveals that Claimant had three cardiac arteries that were 90% to 98% occluded. Claimant underwent open heart surgery 15 years prior to the accident and underwent regular checkups for heart health. He was recently prescribed a new medication for atrial fibrillation but his wife believed it was prescribed for preventive care only. While the employer argues the facts support Claimant sustained a heart attack before the car made impact because the autopsy report states it was very possible that he had a cardiac event prior to the accident, other reports state there was no way to determine whether Claimant had a heart attack.

To obtain workers' compensation benefits, the Claimant must prove Mr. Henshaw was involved in an "accident" that was the "prevailing factor" causing an injury that arose out of and in the course of his employment. Claimant argues that Mr. Henshaw died as a result of an automobile collision which resulted in a penetrating injury to his abdomen. I agree with the Claimant based on the facts and evidence presented in this matter.

The collision occurred due to a poorly marked and unlit construction zone and was further contributed to by rainy weather conditions and a very dark night. Mr. Henshaw was 79 years old, not familiar with the area and had already been driving for approximately 9 ½ hours that day. Mr. Henshaw was alert which was confirmed by his telephone call to the Temple, Texas funeral home just minutes before the accident and his phone conversation with Curtis Mills approximately thirty minutes before the accident.

Section 287.020.2 provides:

> The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

There was clearly an "accident" because Mr. Henshaw was operating the funeral home van to transport a body when the van struck the rebar.

Section 287.020.3(1) provides that "an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." A "prevailing factor" is "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. *Malam v. State, Department of Corrections,* 492 S.W.3d 926, 929 (Mo. Banc 2016) (citations omitted).

The issue here is whether the Claimant has substantial and competent evidence that the accident was the prevailing factor causing Mr. Henshaw's death. "Medical causation, which is not within common knowledge or experience must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause." *Id. citing Gordon v. City of Ellisville,* 268 S.W.3d 454, 461 (Mo. App. 2008). Determining whether

Mr. Henshaw's workplace accident caused him to die clearly requires expert testimony and is very complicated.

The only scientific or medical evidence we have in this case is from the Autopsy Report and the Cause of Death Report and it is credible and persuasive. The Autopsy provides the conclusions and opinions of three different doctors: Dr. Frost, Dr. Gwin, and Dr. Barnard. All three doctors opine and conclude Mr. Henshaw "died as a result of a penetrating injury of the abdomen." The doctors further opine that his cardiovascular issues contributed to his death. In the Cause of Death Report, the opinion of Dr. Gwin as to cause of death is "Penetrating injury of the abdomen." He further opines that his heart was a significant contributing factor. It appears they are opining that his heart condition may have hastened his death or he might have been able to survive the collision absent his heart condition but are not concluding he had a cardiac event prior to the collision. This becomes clear when the autopsy report further opines a cardiac event may have preceded the accident but does not make the conclusion that this did occur.

A "contributing" factor is not the "prevailing" or "primary" factor in Mr. Henshaw's death. *See Cole v. Alan Wire Company, Inc.,* 521 S.W.3d 308, 315.-316 (Mo. App. 2017). The plain meaning of the credible autopsy report and cause of death report clearly opines and concludes that the "prevailing" factor and the primary reason Mr. Henshaw died was the result of the penetrating abdominal injury. *Treasurer of the State of Missouri v. Majors,* 506 S.W.3d 348, 353 (Mo. App. 2016). Furthermore, there is no medical evidence or any evidence that concludes Mr. Henshaw had a heart attack prior to the accident but only that it was a possibility which does not satisfy the standard of "prevailing" factor and is mere speculation. *Cole* at 315-316; *See Angus v. Second Injury Fund,* 328 S.W.3d 294, 300 (Mo. App. 2010).

Section 287.020.3(3) provides that "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable." To assert Mr. Henshaw's death was due to idiopathic causes disregards the only medical evidence as to the cause of his death which concludes he died as a result of the penetrating abdominal injury. *Campbell v. Trees Unlimited, Inc.,* 505 S.W.3d 805, 818 (Mo. App. 2016). Although, the autopsy report and cause of death report says Mr. Henshaw's heart was a contributing factor, it does not conclude his heart was the reason he died. The autopsy report further concludes a cardiac event may have preceded the accident but does not conclude that it preceded the accident and is mere speculation.

There are also multiple other factors which explain why Mr. Henshaw took the path he did. Mr. Henshaw called the Temple, Texas funeral home just minutes before the accident and there was no mention of him having any health issues. Police reports indicate the area was dark and unlit as well as noted another unknown driver drove down the same route. A mere possibility that a cardiac event was the cause of Mr. Henshaw's death does not justify an idiopathic conclusion especially in light of the medical evidence in the autopsy report, cause of death report and the facts surrounding his death. *Id.* at 818-819.

Based upon the substantial and competent evidence in this case, I find that Mr. Henshaw's death was a result of a penetrating injury to his abdomen as a result of the automobile collision and not due to an idiopathic cause. Therefore, I find that the work-related accident of April 17, 2017 was the prevailing factor causing Claimant's death.

The next issue to be determined is the rate of compensation under Section 287.250. In six

numbered subdivisions, Section 287.250.1 provides formulas for calculating the injured employee's average weekly wage which serves as the basis for compensation under the Workers' Compensation laws. *Hadley v. Beco Concrete Products, Inc.,* 505 S.W. 3d 355, 360 (Mo. Ct. App. S.D. 2016). To determine which formula to apply, one begins with the first formula and then descend in numerical order until a formula applies to the particular facts of each case. *Id.*

For the facts of this case, Section 287.250.1(1)-(7) do not apply based on the unusual facts of this case. Claimant's wages were not fixed by the week, the month or the year. Mr. Henshaw was injured in the only week he worked. The testimony at trial provided that the funeral home did not have an employee that was doing the same or similar employment because no other employees at the funeral home did just that job exclusively upon which you could calculate compensation. *Nielsen v. Max One Corporation,* 98 S.W.3d 585, 588 (Mo. Ct. App. S.D. 2003, overruled on other grounds by *Hampton V. Big Boy Steel Erection*, 121 S.W. 3d 220 (Mo. Banc 2003). The evidence did not establish a specific or defined work schedule. *Murphy v. Barbeque Wood Flavors, Inc.,* 244 S.W.3d 295, 299-300 (Mo. Ct. App. S.D. 2008). In addition, there was no agreement to a certain hourly wage.

However, Section 287.250.4 empowers the Commission to determine benefits in the event an employee's average weekly wage cannot be "fairly and justly" determined by applying the statutory formulas. The courts have given considerable discretion to the division in determining the average weekly wage where exceptional facts are present. *Hadley v. Beco Concrete Products, Inc.,* 505 S.W.3d 355, 361 (Mo. Ct. App. S.D. 2016).

This case also has exceptional facts because Mr. Henshaw only worked on a very sporadic basis with no set schedule. *See Ash v. Ahal Contracting Co.,* 916 S.W.2d 439, 441-443 (Mo. Ct. App. WD 1996). Mr. Henshaw had performed these same services on at least one other occasion but his employment was very irregular. Mr. Henshaw's factual situation is exactly what the statute contemplates when it allows the division the ability to determine the weekly wage when it cannot be done by using the statutory formula due to exceptional facts. *See Hadley* at 361.

The only evidence presented is that Claimant was compensated $500.00 for his work. Mr. Mills' undisputed testimony was Mr. Henshaw was to be paid $500.00 plus expenses to transport the body on behalf of the funeral home. After consideration of the exceptional facts of this case, the Court finds within its discretion given by statute and supported by the evidence that Claimant's average weekly wage was $500.00 with an applicable compensation rate of $333.33 per week.

I next find that Linda Henshaw was married to Claimant at the time of his death on April 17, 2017. Mrs. Henshaw testified their three children were no longer dependent upon Mr. Henshaw for support. Mrs. Henshaw, however, testified she was living with Mr. Henshaw as well as was dependent on Claimant for support. As such, Linda Henshaw is conclusively presumed to be totally dependent on Claimant for support pursuant to 287.240(4) (a). The Employer/Insurer is liable to Mrs. Henshaw for weekly death benefits in the amount of $333.33 for her lifetime or remarriage, then weekly payment will cease pursuant to 287.240(4)(a).

The next issue to be addressed is whether the employer is liable to Mrs. Henshaw for funeral expenses not exceeding five thousand dollars ($5,000.00) pursuant to 287.240(1). Mrs. Henshaw and Curtis Mills testified a casket and expenses were paid for by Vansant-Mills exceeding five thousand dollars ($5,000.00). Indeed, both parties credibly testified the casket provided by Vansant-Mills Funeral Home for Claimant's funeral was approximately five thousand seven hundred dollars ($5,700.00). Therefore, I find Vansant-Mills has properly paid funeral expenses exceeding five thousand dollars ($5,000.00) and is not liable for the expenses outlined in Exhibit E.

The Employer/Insurer is liable to Claimant's dependent, Linda Henshaw, for weekly death benefits of $333.33 beginning April 18, 2017 and continuing for her lifetime or until she remarries, then weekly benefit payments will cease pursuant to 287.240(4)(a).

The compensation awarded to the Employee shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mark E. Kelly for the necessary legal services rendered to the Employee.

I certify that on June 1, 2018, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By _____

Made by: _____
Lisa Pottenger
Administrative Law Judge
Division of Workers' Compensation

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL RELATIONS