Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 03-051796

Employee: Michael Klein, deceased

Dependents: Pamela Krause on behalf of Austin Klein, minor

Employer: Community Asset Management Company
Colonial Village Partnership, LP

Insurer: Cincinnati Insurance Company

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

Date of Accident: May 28, 2003

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs of the parties, heard oral argument and considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated February 23, 2006. The award and decision of Administrative Law Judge Cornelius T. Lane, is attached hereto solely for reference.

I. Preliminary Matters

Pamela Krause in behalf of her minor son, Austin Klein, dependent, filed a claim for compensation due to the death of Michael Klein, decedent, alleging he is a dependent entitled to receive workers' compensation death benefits from alleged employer, Community Asset Management Company, CAMCO, pursuant to the provisions of section 287.240 RSMo.

The alleged employer/insurer, CAMCO/Cincinnati Insurance Company, filed an Answer denying that Austin Klein was entitled to receive any workers' compensation benefits due to the death of the decedent.

The administrative law judge determined that no workers' compensation death benefits were due dependent. Dependent timely filed an Application for Review with the Commission.

II. Disputed Issues

The issues in dispute are as follows: (1) is Austin Klein a dependent entitled to receive workers' compensation death benefits pursuant to the provision of sections 287.240 RSMo, due to the death of the alleged employee, Michael Klein, decedent; (2) was there an employment relationship established between Michael Klein, decedent, and the alleged employer, CAMCO, pursuant to the statutory employment provision of section 287.040.1 RSMo; and (3) compensation rate.

III. Stipulations

The parties stipulated to the following: (1) Michael Klein was an individual/sole proprietor conducting business at Colonial Village Apartments also known as St. Michael's Apartments, which was owned by Colonial Village Partnership, LLP; (2) Michael Klein was paid by checks issued by CAMCO upon completion of personal services at Colonial Village Apartments/St. Michael's Apartments; (3) CAMCO issued payments to Michael Klein, the

decedent, without any withholding; (4) Michael Klein, the decedent, had various employees assisting him in performing work and/or services at the Colonial Village Apartments; (5) Michael Klein set his own work schedule for himself and his employees at Colonial Village Apartments; (6) Michael Klein owned the equipment he used while performing services at Colonial Village Apartments; and (7) Michael Klein died due to an accident while performing services at Colonial Village Apartments on May 28, 2003.

IV. Facts

Trial Witness

The only witness to present live trial testimony was Pamela Krause, mother of dependent. In summary fashion, Ms. Krause testified to the following: the dependent, her son, was born July 17, 1996; the only person with whom Ms. Krause had sexual relations with for the year next preceding her son's birth was the decedent; Ms. Krause and decedent never married; and Ms. Krause testified that claimant's Exhibit A, a certified birth certificate of her son, contained accurate information.

Between March 25, 2003 and May 28, 2003, Ms. Krause observed decedent performing maintenance duties at Colonial Village Apartments; Ms. Krause also occasionally performed labor and services at the apartment complex at the request of decedent and she received remuneration from the decedent for labor performed; Ms. Krause did not have access to any personal or business bank accounts of decedent; Ms. Krause was aware that decedent did not file state or federal income taxes for several years; Ms. Krause did not possess any documentation concerning remuneration decedent received for performing labor and/or services at the apartment complex; Ms. Krause had no knowledge of the existence of any payroll records concerning decedent, and Ms. Krause did not have any knowledge concerning expenses incurred by decedent in the operation of his business.

Ms. Krause testified that the decedent performed the following maintenance duties at the apartment complex: cutting grass; installing bathroom/toiletry items; various repairs such as installing a new door; repairing a faucet; repairing a kitchen countertop; painting; etc. The activities performed by Ms. Krause were cleaning apartments for decedent in order to ready the apartment for a would be tenant.

Decedent and Ms. Krause also both worked at what she termed, other CAMCO facilities at other locations; Ms. Krause further testified that decedent's business was remunerated by CAMCO for services performed.

Exhibits

Dependent offered into evidence Exhibits B-F which were admitted without objection. Dependent offered Exhibit A, the certified birth certificate of the dependent, and employer/insurer objected to its admission. The administrative law judge made no ruling as to the admissibility of Exhibit A.

As to the instant appeal, Exhibit A, the certified birth certificate of the dependent and Exhibit F, a summary of payments made by CAMCO to decedent, are the most relevant for purposes of this appeal.

V. Findings of Fact and Rulings of Law

A. Issue of Dependency

Section 287.240 (4)(b) RSMO provides in pertinent part as follows:

> The word '**dependent**' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his or her wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee, and any death benefit shall be payable to them to the exclusion of other total dependents:
> . . .
> A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon

> the parent legally liable for the support or with whom he, she, or they are living at the time of the death of the parent. . . .

Employer/insurer contends that the minor, Austin Klein, failed to prove that he was a dependent of the decedent, Michael Klein, as defined by the provisions of section 287.240 RSMo, as paternity was not established.

The Uniform Parentage Act provides means to which the issue of paternity may be determined. *VAMS,* sections 210.817-210.852. Furthermore, where there is no presumed paternity under the Uniform Parentage Act, the issue of paternity is ripe for decision prior to any workers' compensation order. *VAMS* sections 210.817-210.852.

The Commission, as well as the Division of Workers' Compensation (Division), is precluded from determining paternity. *Poole Truck Lines, Inc. v. Coates*, 833 S.W.2d 876 (Mo. App. E.D. 1992); *Mikel v. Pott Industries*, 896 S.W.2d 624 (Mo. banc 1995).

Claimant's Exhibit A, a certified copy of the birth certificate of dependent, was offered into evidence subject to objection made by the employer/insurer. The objection made by the employer/insurer was that the certified copy of the birth certificate did not comply with the statutory provisions of section 490.692 RSMo, concerning the offering of business records into evidence. The Commission overrules the objection made by employer/insurer and admits into evidence claimant's Exhibit A. The Commission is of the opinion that the statutory provisions of section 193.255.2 RSMo supersede the business records statute requisites contained in 490.692 RSMo. Section 193.255.2 RSMo provides as follows:

> A certified copy of a vital record or any part thereof, issued in accordance with subsection 1 of this section, shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts stated therein, provided that the evidentiary value of a certificate or record filed more than one year after the event, or a record which has been amended, shall be determined by the judicial or administrative body or official before whom the certificate is offered as evidence.

There was no evidence adduced at the hearing refuting the authenticity of the certified copy of dependent's birth certificate, claimant's Exhibit A. The mother of the dependent testified that all the information contained in claimant's Exhibit A was correct, including the decedent, Michael W. Klein, shown to be the father of Austin Klein.

The Commission, in reviewing the provisions of the Uniform Parentage Act as well as the statutes concerning vital statistics contained in Chapter 193, RSMo, is obligated to conclude that paternity has been properly determined. *See* sections 193.085 RSMo; 193.215 RSMo; 193.255 RSMo; and 210.823 RSMo. The Commission in concluding that minor dependent, Austin Klein, is the son of Michael Klein, decedent, is merely accepting the legal determination made pursuant to the Uniform Parentage Act.

It is clear that claimant's Exhibit A, dependent's birth certificate, could not include the name of the father, Michael Klein, unless either one of two events had occurred: there was an acknowledgement of paternity by the father; or paternity was determined by a court of competent jurisdiction or by an administrative order of the family support division. Section 193.085.7 RSMo. In reading sections 193.085 RSMo, 193.215 RSMo and 210.823 RSMo, in p*ari materia*, the Commission can come to no other conclusion. The paternity of the dependent has been properly determined by law and the Commission is obligated to accept the proper determination.

Consequently, the minor child, Austin Klein, is a total dependent of the decedent, Michael Klein, as defined by section 287.240 (4)(b) and there is no evidence of any additional total dependent or total dependents eligible for workers' compensation death benefits.

B. Employment Relationship Between Michael Klein and CAMCO

Every employer subject to the provisions of Chapter 287 is liable to furnish compensation under the provisions of this chapter for death of an employee by accident arising out of and in the course of the employee's employment. Section 287.120 RSMo.

In the instant case, the dependent is not contending that there was a direct employer/employee relationship between CAMCO and Michael Klein. Rather, the dependent contends the employment relationship existed due to

the fact that the decedent qualified as a statutory employee pursuant to the provisions of section 287.040.1 RSMo.

Paraphrasing section 287.040.1 RSMo, three conditions must be met to qualify one as a statutory employee: (1) the work must be performed under contract; (2) the injury must have occurred on or about the premises of the employer; and (3) the injury must have occurred while performing work normally done in the usual course of business of the employer.

1. Existence of a Contractual Relationship

The presence of a contractual relationship between the employee and the employer is to be liberally construed. The contract does not have to specify the scope of the work to be performed or expressly delegate the employer's usual business activity to the contractor, and it does not need to be in writing. *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532 (Mo. banc 1988); *Employers Ins. of Wausau v. Patton*, 842 S.W.2d 208 (Mo. App. E.D. 1992). The contract may be express or implied, oral or written. *McGuire*, 756 S.W.2d 535.

An unwritten unilateral contract was defined in *Ketcherside v. McLane*, 118 S.W.3d 631 (Mo. App. S.D. 2003), as follows:

> "A unilateral contract is a contract in which performance is based on the wish, will, or pleasure of one of the parties." *Cook v. Coldwell Banker*, 967 S.W.2d 654, 657[3] (Mo.App.1998). The promisor receives no promise in return as consideration for the original promise. *Id.* at 657[4]. The contractual relationship arises when the conduct of the parties supports a reasonable inference of a mutual understanding that one party perform and the other party compensate for such performance. *Commercial Lithographing Co. v. Family Media, Inc.*, 695 S.W.2d 936, 939[3] (Mo.App.1985). "An offer to make a unilateral contract is accepted when the requested performance is rendered." *Cook,* 967 S.W.2d at 657[6].

Also *see Marro v. Daniels*, 914 S.W.2d 16 (Mo. App. E.D. 1995), in which the appellate court stated:

> A contractual relationship may arise without an oral or written offer and acceptance. It arises where the circumstances, acts and conduct of the parties support a reasonable inference of a mutual understanding and agreement that one party perform and the other party compensate for the performance. *Kosher Zion Sausage Co. of Chicago v. Roodman's, Inc.*, 442 S.W.2d 543, 546 (Mo. banc 1969). The agreement between the parties arises from their intention, presumed from their acts, where there are circumstances which show a mutual intent to contract. *Id.*

In the instant case there is ample evidence to infer the existence of an implied contract. Claimant's Exhibit F, a vendor ledger of CAMCO, is a summary of decedent's work and performance completed in behalf of CAMCO at the apartment complex and payment received from CAMCO. In a time frame of approximately three months decedent performed 43 routine tasks or jobs at the apartment complex for which he was remunerated. The Commission further notes that decedent was remunerated posthumously for his work performance on the date of his death, May 28, 2003. This evidence consisting of the circumstances, acts and conduct of the parties, supports a reasonable inference of mutual understanding and an agreement that one party perform and the other party compensate for the performance. Thus, the Commission concludes there was a contract in existence between CAMCO and the decedent.

2. Premises of the Alleged Statutory Employer

The premises of the alleged statutory employer has been defined to mean any place under the exclusive control of the employer where the employer's usual business is being carried on or conducted. *Johnson v. Simpson Oil Company*, 394 S.W.2d 91 (Mo. App. S.D. 1965), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Furthermore, the term is not restricted to the permanent site of the statutory employer's business or to the property owned or leased by the employer; it applies to any place under the statutory employer's exclusive control where its usual business is being carried on or conducted. *Boatman v. Superior Outdoor Adver. Co.*, 482 S.W.2d 743 (Mo. App. 1972).

From the evidence presented the Commission determines that CAMCO was the apartment management company running the apartment complex, and indeed had exclusive control of the premises and was performing its usual business tasks of managing the property. The evidence supporting this conclusion was as follows: CAMCO issued payment checks to decedent for services performed at the apartment complex as delineated by claimant's Exhibit F, the ledger of payments for services; the testimony of Ms. Krause on several occasions that both she and decedent worked at the "CAMCO" facilities which was the apartment complex; and the further statement by Ms. Krause that the apartment complex was the "CAMCO" account. CAMCO adduced no evidence to the contrary.

In addition, the Commission notes the irrefuted statement by counsel for dependent on inquiry from the administrative law judge as to the role of CAMCO, which was that CAMCO was the management firm for the apartment complex. No additional evidence was adduced concerning this issue therefore by inference, the Commission determines that the apartment complex was under the exclusive control of the employer, CAMCO, as the management company for the apartment complex.

3. Acts Within the Usual Course of an Employer's Business

The Supreme Court of Missouri in *Bass v. National Super Markets, Inc.* 911 S.W.2d 617 (Mo. banc 1995), held that an employer's usual business is limited to the following activities that are: performed routinely; take place in accordance with a schedule that requires them to be performed both regularly and frequently; are contemplated in the agreement between the independent contractor and the alleged statutory employer to be repeated over a relatively short span of time; and the performance of which would require the alleged statutory employer to hire permanent employees absent the agreement with the independent contractor.

The Commission notes that the alleged statutory employer did not brief this aspect of the three prong test. Regardless, the Commission finds that decedent's routine and frequent performance of grass cutting, apartment cleaning, painting and light carpentry at the apartment complex were frequently performed and were contemplated to be repeated over a short span of time as evidenced from Exhibit F and from the testimony of Ms. Krause. As the management company of the apartment complex, CAMCO clearly would need to hire permanent employees to perform these functions had it not been for its agreement with decedent. Consequently, the third prong of the statutory employment test has been proven by the dependent.

C. Compensation Rate

Section 287.240(2) RSMo, requires an employer to pay a total dependent a death benefit based on the average weekly earnings of the deceased employee during the year immediately preceding the injury that resulted in the death of the employee, as outlined in section 287.250 RSMo.

Section 287.250 RSMo, sets forth the methods for computing an employee's average weekly wage earnings for the purpose of establishing compensation rates. Statutory formulas for calculating benefits are set forth in sections 287.250.1-.3 RSMo, and section 287.250.4 RSMo, prescribes how benefits are determined if an employee's average weekly wage cannot be determined by applying the statutory formulas.

Section 287.250.4 RSMo, states:

> 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.

In determining the applicable weekly wage rate under section 287.250 RSMo, "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 (Mo. banc 1981).

In the instant case, dependent did not adduce any evidence to base the determination of a compensation rate utilizing any of the provisions of sections 287.250.1-.3 RSMo. As stated above, if the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of section 287.250 RSMo, then the Commission is provided a catch-all provision for wage determination pursuant to section 287.250.4 RSMo. In the instant case, there is such a paucity of wage information adduced at trial, that the Commission cannot fairly and justly determine an average weekly wage even resorting to section 287.250.4 RSMo.

The only evidence adduced at trial which the Commission could possibly consider is claimant's Exhibit F, the vendor ledger of CAMCO, which is a summary of payments decedent received from CAMCO for work performed.

However, the Commission concludes that this evidence is insufficient to enable the Commission to fairly and justly calculate an average weekly wage as in order to do so, the Commission would engage in speculation, surmise and guess work. The evidence revealed that decedent never filed a federal or state income tax return; decedent had no financial records; no bank account; no payroll records; no expense records; and no such records would be available even if the Commission were to remand this case for production of additional evidence concerning this issue. Section 287.250.4 RSMo, does give the Commission considerable discretion in determining an employee's average weekly wage when there are exceptional facts. *Oberley v. Oberley Engineering, Inc.*, 940 S.W.2d 953 (Mo. App. S.D. 1997). However, the Commission cannot engage in speculation, surmise and guess work in order to determine a compensation rate. Based on the evidence presented, the Commission cannot fairly and justly calculate a compensation rate and would be speculating to do so. The Commission notes in the *Oberley* case, *supra,* there were federal and state income tax returns utilized in calculating a fair and just compensation rate. In the instant case, the Commission has no such evidence before it.

Section 287.240(2)(e) RSMo, further provides that "if the injury which caused the death occurred on or after September 28, 1981, the weekly compensation shall in no event be less than $40.00 per week." If the Commission is not provided sufficient evidence from which it can calculate an average weekly wage and corresponding compensation rate, then benefits must be paid at the statutory minimum rate. *Johnson v. City Duenweg Fire Dept.*, 735 S.W.2d 364 (Mo. banc 1987).

Consequently, the Commission determines that dependent's evidence concerning the issue of compensation rate was not sufficient to require a rate higher than the statutory minimum, i.e., $40.00 per week.

VI. Conclusion

In conclusion, the Commission finds that Austin Klein is a total dependent entitled to receive workers' compensation death benefits pursuant to the provisions of section 287.240 RSMo, due to the death of the employee, Michael Klein, decedent; that dependent proved there was an employment relationship established between Michael Klein, decedent, and the employer, CAMCO, pursuant to the statutory employment provision of section 287.040.1 RSMo; and the appropriate compensation rate for death benefits is the statutory minimum, $40.00 per week.

The compensation awarded to the dependent shall be subject to a lien in the amount of 25% of all payments ordered in favor of attorney Bernard McDonnell, for necessary legal services rendered the dependent.

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

Given at Jefferson City, State of Missouri, this ___30th___ day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____

William F. Ringer, Chairman

_____

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Michael Klein (Decedent)

Injury No.: 03-051796

Dependents: Pamela Krause on behalf of Austin Klein, minor

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

Employer: Community Asset Management
Colonial Village Partnership, LP

Additional Party: Second Injury Fund

Insurer: Cincinnati Insurance Company

Hearing Date: January 27, 2006

Checked by: CTL:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No – Community Asset Management
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes – Community Asset Management – Cincinnati Ins. Co.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
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: N/A
14. Nature and extent of any permanent disability: N/A
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: Unknown

19. Weekly compensation rate: N/A

20. Method wages computation: Unknown

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Klein (Decedent) Injury No.: 03-051796

Dependents: Pamela Krause on behalf of Austin Klein, minor

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

Employer: Community Asset Management
Colonial Village Partnership, LP
Additional Party: Second Injury Fund

Insurer: Cincinnati Insurance Company Checked by: CTL:tr

PREFACE

Austin Klein, named dependent of Michael Klein, the Decedent, by and through Austin Klein's mother, Pamela Krause, was represented by Attorney Bernard McDonnell, and the Employer, Community Asset Management and its insurance company, Cincinnati Insurance Company, were represented by Attorney Brian Weinstock.

STIPULATIONS

The parties stipulated to the following:

1. Michael Klein, while doing business as Klein Landscaping, was a sole proprietor conducting business at the Colonial Village Apartments also known as St. Michael's Apartments. Colonial Village Apartments was owned by Colonial Village Partnership, LLP, not a party named to these proceedings.

2. Michael Klein was paid by checks issued by Community Asset Management Company, the management company that ran Colonial Village Apartments, for his work done at the Colonial Village Apartments. (Colonial Village Apartments are also called "St. Michael's Apartments"). Further reference will only be to "Colonial Village Apartments". Community Asset Management Company, in making payments to Mr. Klein, the Decedent, did not withhold any taxes.

3. Michael Klein, the Decedent, has various employees doing work at the Colonial Village Apartments and also set his own work schedule for himself and his employees.

4. Michael Klein died at the Colonial Village Apartments on May 28, 2003 when the lawnmower on which he was riding on slipped over the edge of a wall throwing him onto the paved parking lot at the Colonial Village Apartments.

5. Michael Klein died as a result of being thrown from the lawnmower.

ISSUES

1. Whether Community Asset Management is the statutory Employer for Michael Klein, the sole proprietor doing business as Klein, Inc.

2. Whether Austin Klein, the dependent of Michael Klein, the Decedent, established that he was the dependent of Michael Klein, the Decedent, under Missouri law.

EXHIBITS

The dependent, through Pamela Krause, offered the following exhibits:

Exhibit A. Birth Certificate.
Exhibit B. St. Louis Medical Examiner's Report.
Exhibit C. EMS Report.
Exhibit D. Photo of location of Colonial Village Apartments and location where Decedent died.
Exhibit E. Photo of Colonial Village Apartments and location where Decedent died.
Exhibit F. Community Asset Management Company Vendor Ledger of Gross Revenue Payments to Michael Klein, Sole Proprietor, d/b/a Klein, Inc.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

1. Austin Klein, a minor, brought a claim through Pamela Krause, his mother.

2. Pamela Krause lives with her son, Austin Klein, who was born on July 17, 1996.

3. Michael Klein, the Decedent, did business as Klein, Inc., a sole proprietor performing various duties including repair and lawn cutting at the Colonial Village Apartments.

4. Michael Klein, the Decedent, in doing business as Klein, Inc., did various work at the Colonial Village Apartments, to wit: cutting lawns and repairing and occasional cleaning of apartments after a tenant left. This

work was performed by Michael Klein, the Decedent, and his other employees.

5. The Community Asset Management Company paid Mr. Klein, doing business as Klein, Inc., for his services and did not withhold any taxes.

6. Pamela Krause, the mother of Austin Klein, was never married to Michael Klein, the Decedent.

7. The dependent, Austin Klein, on behalf of Pamela Krause, brought the claim under RSMo 287.040.

8. Michael Klein, the Decedent, was a claimed to be a statutory employee of Community Asset Management Company.

9. The dependent did not establish any evidence tending to prove that Michael Klein, the Decedent doing business as Klein, Inc., performed any work for Community Asset Management under contract nor that his injury occurred on or about the premises of the claimed statutory Employer or that his work was in the ordinary and usual course of business of the statutory Employer.

10. The evidence only showed that the property upon which the employee died was owned by Colonial Village Partnership and not by Community Asset Management Company.

11. The alleged Employer, Community Asset Management, was merely a management agency for Colonial Village Partnership, the owner of said property where Michael Klein, the employee, died.

12. There was no evidence that the alleged Employer had any control over Michael Klein or that it furnished Michael Klein any equipment to do the work that he performed or that the alleged Employer had regulated any hours Michael Klein was to work or that the alleged Employer had any other control over Michael Klein.

13. With regard to paternity, the evidence quite clearly showed that Pamela Krause was never married to Michael Klein, the Decedent, and that Austin Klein was born out of wedlock and further there was no court order adjudicating the paternity of Austin Klein before the death of the Michael Klein, the Decedent. However, the evidence was quite clear that Michael Klein, the Decedent, was the sole sexual partner of Pamela Krause for twelve months before the birth of Austin Klein, on July 17, 1996. The evidence did show the Decedent paid child support to Pamela Krause in the amount of $125.00 per week as well as took Austin Klein on various weekend trips to go fishing, etc. and would buy him clothing.

RULINGS OF LAW

1. Michael Klein, the Decedent, was not a statutory employee of the alleged Employer, Community Asset Management Company. There was no evidence to show that Michael Klein performed work for the alleged statutory Employer pursuant to a contract or that the injury occurred on the alleged Employer's premises or that the work was in the ordinary course of the business of the alleged Employer. Nor was it shown that the alleged Employer at any time exercised the right to control the Decedent in how he did his work or when he was required to do the work or that the alleged Employer ever provided any equipment to Michael Klein in order to perform his duties.

2. Austin Klein, through Pamela Krause, failed to prove that Community Asset Management Company was a statutory Employer of Michael Klein.

3. The Court, having made the above-mentioned findings of law, finds that the remaining issues in the case are moot.

DISCUSSION

The Missouri Workers' Compensation law defines an employee as any "person in the service of any employer… The Missouri Worker's Compensation Law defines an employee as any "person in the service of any employer ... under any contract of hire, express or implied, oral or written." Section 287.020.1, RSMo 2004. In contrast, an independent contractor has been judicially defined as "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." *Vaselou v. St. Louis Realty & Securities Co.*, 344 Mo. 1121, 1126, 130 S.W.2d 538, 539 (1939). A claimant establishes an employer-employee relationship if the claimant worked in the service of the alleged employer and the employer controlled those services. *Gaston v. J.H. Ware Trucking Inc.*, 849 S.W.2d 70, 72 (Mo.App. W.D. 1993). "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." *Dawson v. Home Interiors & Gifts, Inc.*, 890 S.W.2d 747, 748 (Mo.App. W.D. 1995).

Although a claimant's employment status must be decided on the facts of each case, there are several factors that must be examined in order to determine whether a right to control existed. *Id.* These factors include: (1) the extent of control, (2) the actual exercise of control, (3) the duration of the employment, (4) the right to discharge, (5) the method of payment, (6) the degree to which the alleged employer furnished equipment, (7) the extent to which the work is the regular business of the alleged employer, and (8) the employment contract. *Leslie*, 947 S.W.2d at 100; *Dawson*, 890 S.W.2d at 748. No one of these factors is dispositive, however, and each is relevant to the issue of whether an employer-employee relationship existed. *Watkins*, 924 S.W.2d at 21.

In the instant case, there is no showing that the Employer and Michael Klein had a contract nor that his injury occurred on or about the premises of the claimed statutory Employer or that the work was in the ordinary and usual course of business of the statutory Employer.

Michael Klein, doing business as Klein, Inc., furnished his own equipment to do his work, worked the hours he wished, and there was no regulation of what hours Michael Klein had to work or what days he had to work and there was no evidence that the alleged Employer had any control over Michael Klein doing business as Klein, Inc.

Date: _____ Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Patricia "Pat" Secrest
Director
Division of Workers' Compensation