

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

Injury No.: 08-076473

Employee: Christopher Lowe

Employer: Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction
Sani-Clean System, LLC
Ben Kelly
Nathan Kelly

Insurer: Michigan Millers Mutual Insurance Company (for Kelly Cattle
Company, Inc.)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 3, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued January 3, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Christopher Lowe

Injury No. 08-076473

Dependents: N/A

Employer: Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction
Sani-Clean System, LLC
Ben Kelly
Nathan Kelly

Insurer: Michigan Millers Mutual Insurance Company (for Kelly Cattle Company, Inc.)

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

Hearing Date: October 20, 2011

Checked by: LTW

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: The alleged accident occurred on July 22, 2008
5. State location where accident occurred or occupational disease was contracted: The alleged accident occurred in Willow Springs, MO.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes, as to Sani-Clean System, LLC; No, as to Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction; No, as to Ben Kelly; No, as to Nathan Kelly
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, as to Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction; No, as to Sani-Clean System, LLC; No, as to Ben Kelly; No, as to Nathan Kelly
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? N/A 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: None

Employee: Christopher Lowe

Injury No. 08-076473

- 16. Value necessary medical aid paid to date by employer/insurer? N/A
- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: N/A
- 20. Method wages computation: N/A

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
 - Unpaid medical expenses: N/A
 - Weeks of temporary total disability (or temporary partial disability): N/A
 - Weeks of permanent partial disability from Employer: N/A
 - Weeks of disfigurement from Employer: N/A
- 22. Second Injury Fund liability: N/A

TOTAL: None

- 23. Future requirements awarded: No

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Christopher Lowe

Injury No. 08-076473

Dependents: N/A

Employer: Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction
Sani-Clean System, LLC
Ben Kelly
Nathan Kelly

Insurer: Michigan Millers Mutual Insurance Company (for Kelly Cattle Company, Inc.)

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on October 20, 2011. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about November 21, 2011.

The claimant, Christopher Lowe, appeared personally and through his attorney, Randy Charles Alberhasky, Esq. The alleged employer Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction (hereinafter "Kelly Cattle") and its Insurer appeared through their attorney, William D. Powell, Esq. The alleged employer Sani-Clean System, LLC (hereinafter "Sani-Clean") appeared by its attorney, Travis Elliott, Esq. The alleged Employers Nathan Kelly and Ben Kelly appeared in person and likewise by their attorney Travis Elliott, Esq. The Second Injury Fund appeared by its attorney, Susan Colburn, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulations are as follows:

- (1) On or about July 22, 2008, Sani-Clean was a business not insured under Chapter 287, RSMo. (Sani-Clean contends it was not subject to the requirements of Chapter 287, RSMo.)
- (2) On the alleged injury date of July 22, 2008, Christopher Lowe was an employee of Sani-Clean.
- (3) On or about July 22, 2008, Kelly Cattle was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Michigan Millers Mutual Insurance Company.
- (4) The alleged accident of July 22, 2008, allegedly occurred in Willow Springs, Missouri. The above-referenced employment was principally localized in Missouri. The parties agree to venue lying in Greene County, Missouri, and venue is proper.

- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) Temporary disability compensation has not been provided to the claimant.
- (7) The alleged employers and/or insurer have not provided medical care to the claimant.

The issues to be resolved by hearing include:

- (1) Whether the alleged employer Sani-Clean was an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008?
- (2) Whether the alleged employer Ben Kelly was an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008? (As to this issue the claimant seeks to pierce the corporate veil of Sani-Clean and/or Kelly Cattle and hold Ben Kelly personally liable.)
- (3) Whether the alleged employer, Nathan Kelly was an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008? (As to this issue the claimant seeks to pierce the corporate veil of Sani-Clean and/or Kelly Cattle and hold Nathan Kelly personally liable.)
- (4) Whether the claimant was an employee of Kelly Cattle on July 22, 2008, and was operating under and subject to the Missouri Workers' Compensation Law?
- (5) Whether the claimant was an employee of Sani-Clean on July 22, 2008, and was operating under and subject to the Missouri Workers' Compensation Law?
- (6) Whether the claimant was an employee of Ben Kelly on July 22, 2008, and was operating under and subject to the Missouri Workers' Compensation Law?
- (7) Whether the claimant was an employee of Nathan Kelly on July 22, 2008, and was operating under and subject to the Missouri Workers' Compensation Law?
- (8) Whether the claimant sustained an accident on or about July 22, 2008; and, if so, whether the accident arose out of and in the course of employment with each of the alleged employers?
- (9) Whether the alleged employee gave the alleged employer(s) proper notice of the injury, as required by Section 287.420, RSMo?

- (10) Whether the alleged accident of July 22, 2008, caused the injuries and disabilities for which benefits are now being claimed?
- (11) Whether the alleged employer(s) and insurer are obligated to pay for certain past medical care and expenses?
- (12) Whether the claimant has sustained injuries that will require additional or future medical care in order to cure and relieve the claimant of the effects of the injuries?
- (13) What is the applicable compensation rate?
- (14) Whether the claimant is entitled to temporary disability benefits?
- (15) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of past medical care and expenses pursuant to Section 287.220, RSMo, premised on a finding that one or more of the alleged employer(s) is not insured under Chapter 287, RSMo?
- (16) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for additional or future medical care, pursuant to Section 287.220, RSMo, premised on a finding that one or more of the alleged employer(s) is not insured under Chapter 287, RSMo?
- (17) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is entitled to reimbursement against one or more of the alleged employer(s) for payment of medical care and expenses, pursuant to Section 287.220, RSMo., premised on a finding that said alleged employer(s) is not insured under Chapter 287, RSMo?
- (18) Whether the medical condition for which the claimant seeks benefits was caused by an idiopathic condition?
- (19) Whether the Department of Social Services is entitled to payment on its medical services lien?
- (20) Whether the accident of July 22, 2008, was the prevailing factor for the cause of the claimant's medical condition and disability for which he may have sustained and seeks benefits?

EVIDENCE PRESENTED

Employee

The employee, Christopher Lowe testified at the hearing in support of his claim. The employee presented no other witnesses. In addition, the employee offered for admission the following exhibits:

- A. Cabool Medical Clinic-TCMH, 19 pages **bills and records** certified 8/7/2009
- B. Ferrell-Duncan Clinic, 10 pages certified 7/8/2009
- C. Kuwait Clinic records, 2 pages
- D. Orthopaedic Specialist of Springfield, 30 pages certified 7/13/2009
- E. Ozark Family Health Care, 2 pages certified 10/25/2009
- F. Physical Therapy Specialist Clinic, 208 pages certified 10/22/2008
- G. Physical Therapy Specialist Clinic, 226 pages certified 7/15/2009
- H. Texas County Memorial Hospital, 73 pages certified 10/10/2008
- I. Texas County Memorial Hospital, 24 pages certified 7/13/2009
- J. Cabool Medical Clinic-TCMH, 6 pages certified 7/11/2011 \$308.00
- K. Texas County Memorial Hospital, 2 pages certified 7/8/2009 \$2,476.85
- L. Claim 9/8/2008
- M. Answer, Second Injury Fund 9/15/2008
- N. Letter to insurer advising in default, 4/7/2009
- O. Answer, Employer/Insurer (Kelly Cattle Co., Inc.) 4/17/2009
- P. Answer, Employer/Insurer (Sani-Clean System LLC, Ben and Nathan Kelly) 10/01/2009
- Q. Disclosure of medical records, 6/22/2009
- R. RSMo. § 287-210 letter, 6/30/2009
- S. Disclosure of medical records, 8/12/2009
- T. RSMo. § 287.210 letter, 9/24/2009
- U. Disclosure of medical records, 10/29/2009
- V. Disclosure of medical records, 1/21/2011
- W. RSMo. § 287.210 letter, 3/8/2011
- X. RSMo. § 287.210 letter, 5/10/2011
- Y. Disclosure of records, 7/12/2011
- Y2. Pay check stub of Employee
- Z. Dr. Truett Swaim deposition taken May 16, 2011 with exhibits
 - 1. IME report dated 5/5/2009 & CV
 - 2. IME addendum report dated 8/20/2009
 - 3. IME addendum report 5/9/2011
- AA. Deposition of Benjamin G. Kelly taken July 23, 2010 with exhibits
 - 1. First Amended Notice to Take Deposition
 - 2. Documents: Lease Labor Agreement 6/23/2009, Chris Lowe's Application for Employment, 2007 form W-4 of Chris Lowe, three quarterly contribution and wage reports, second, third and fourth quarters 2008.
- BB. Deposition of Nathan Kelly taken July 23, 2010 with exhibits
 - 1. First Amended Notice to Take Deposition
 - 2. Quarterly contribution and wage report detail, second quarter 2008
 - 3. Quarterly contribution and wage report detail, third quarter 2008
 - 4. 2008 W-2 form, Chris Lowe
 - 5. Lease Labor Agreement, 6/23/2008

The exhibits were received and admitted into evidence.

Alleged Employer – Kelly Cattle Co., Inc. d/b/a Wright County Livestock Auction

Kelly Cattle Co., Inc. d/b/a Wright County Livestock Auction, and insurer, Michigan Millers Mutual Insurance Company, presented one witness at the hearing of this case, Nathan Kelly. In addition, the employer and insurer offered for admission the following exhibits:

- Exhibit 1 Certified Record of Secretary of State for Sani-Clean Services, LLC
- Exhibit 2 Certified Records of Secretary of State for Kelly Cattle Company, Inc.
- Exhibit 3 Certified Records of Secretary of State – Fictitious Name Record of Kelly Cattle Company
- Exhibit 4 Wage Record of Christopher Lowe
- Exhibit 5 Certified Records of Texas County Memorial Hospital – 24 pages – Certified 7/13/09
- Exhibit 6 Certified Records of TCMH – Cabool Medical Clinic – 19 pages – Certified 8/7/09
- Exhibit 7 Certified Records of Stephen Hawkins, M.D./Cabool Medical Clinic – 51 pages – Certified 6/21/11
- Exhibit 8 Records of U.S. Department of Labor/Longshore and Harbor Workers’ Compensation
- Exhibit 9 Certified Records of David B. Rogers, M.D./Orthopaedic Specialists of Springfield – 30 pages – Certified 7/13/09
- Exhibit 10 Certified Records of Physical Therapy Specialists Clinic – 226 pages – Certified 7/15/09
- Exhibit 11 Functional Capacity Evaluation of Physical Therapy Specialists, Inc. – 7 pages – dated December 8, 2006
- Exhibit 12 Certified Records of Ferrell-Duncan Clinic/Stephen D. Armstrong, M.D. – 13 pages – Certified 9/26/11
- Exhibit 13 Deposition of Christopher Lowe
- Exhibit 14 Deposition of Michael P. Nogalski, M.D.
- Exhibit 15 Deposition of Kathy Stilling – Cabool Medical Clinic
- Exhibit 16 Deposition of Amy Thompson – TCMH
- Exhibit 17 Notice of Hearing Letter to MO HealthNet

The exhibits were received and admitted into evidence.

Alleged Employer - Sani-Clean System, LLC; Ben Kelly; and Nathan Kelly

Sani-Clean System, LLC; Ben Kelly; and Nathan Kelly, presented two witnesses at the hearing of this case, Ben Kelly and Nathan Kelly. In addition, Sani-Clean offered for admission the following exhibits:

- SC Exhibit 1 Sani-Clean System, LLC – Certificate of Good Standing;
Sani-Clean System, LLC – Certificate of Corporate Records;
Sani-Clean System, LLC – Articles of Incorporation;
Sani-Clean Systems, LLC – Certificate of Organization

- SC Exhibit 2 Sani-Clean, LLC Application for Employment - Christopher Lowe
- SC Exhibit 3 Form W-4 – Christopher Lowe
- SC Exhibit 4 Lease Labor Agreement – Christopher Lowe, June 23, 2008
- SC Exhibit 5 Kelly Cattle Co., Inc. Division of Employment Security – Second Quarter 2008
- SC Exhibit 6 Kelly Cattle Co., Inc. Division of Employment Security – Third Quarter 2008
- SC Exhibit 7 Sani-Clean System, LLC Division of Employment Security – Second Quarter 2008
- SC Exhibit 8 Sani-Clean System, LLC Division of Employment Security – Third Quarter 2008
- SC Exhibit 9 Form W-2 – Christopher Lowe
- SC Exhibit 10 Form 941 – Sani-Clean System, LLC - 2008

The exhibits were received and admitted into evidence.

Second Injury Fund

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

Legal File

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Report of Injury
- Claim for Compensation
- Answer – Kelly Cattle Co., Inc. d/b/a Wright County Livestock Auction
- Answer – Sani-Clean System, LLC; Ben Kelly; Nathan Kelly
- Answer – Second Injury Fund
- Division of Workers Compensation entry combining injury no. 08-121257 and 08-076473
- Notice of Hearing
- Medicaid Services Lien

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

In addition, the undersigned took administrative or judicial notice of Chapter 287, RSMo; Section 207.020, RSMo; Section 208.001.3, RSMo; Section 208.152, RSMo; Section 208.153, RSMo; 13 CSR 70-4.030; and 42 CFR 447.15.

DISCUSSION

Background

The alleged employer Kelly Cattle Co., Inc. d/b/a Wright County Livestock Auction (“Kelly Cattle”) is a corporation organized under the General and Business Corporation Law of Missouri. It is organized primarily for the purpose of engaging. As part of its business operation Kelly Cattle operates a sale barn. This activity involves people bringing cattle to the sale barn and Kelly Cattle selling the cattle by auction. Kelly Cattle receives a commission on cattle sold. Additionally, Kelly Cattle operates a food and beverage concession during the auction, and transports cattle.

Kelly Cattle is a family owned corporation. Nathan Kelly is a corporate board member, President of Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction. The other officers and board members include Reggie Kelly, Vice President / Member; Karen Kelly, Secretary / Treasurer / Member; Ben Kelly, Member; and Zack Kelly, Member. Notably, at all times relevant to this case these family members operate two other businesses (a real estate company and Sani-Clean). The three businesses are separate legal entities organized as independent and separate corporations engaged in different business operations. Further, at all times relevant to this case, the three businesses operated their business at a single facility owned by Kelly Cattle. This facility was divided into separate and secured office spaces.

The employer Sani-Clean is a family owned corporation organized under the laws of Missouri. Sani-Clean is organized for the purpose of engaging in the portable toilet and septic business; including the buying, selling, leasing, maintenance, and repair of portable toilets and septic systems, as well as any other lawful business for which a limited liability company may be organized under the Missouri Limited Liability Company Act. This activity included weekly cleaning and servicing of the toilets, as well as removal of waste and refilling the toilets with water and sanitation material.

Sani-Clean System, LLC was organized on November 3, 2006 and is in good standing with the State of Missouri. Ben Kelly is the President of Sani-Clean System, LLC. The other officers and board members include Zack Kelly, Vice President / Member; Karen Kelly, Secretary / Treasurer / Member; Reggie Kelly, Member; and Nathan Kelly, Member. At all times relevant to this case the company was engaged in the business of renting and servicing portable toilets. As part of its business operation Sani-Clean would rent portable toilets, which included weekly cleaning and servicing of the toilets, as well as removal of waste and refilling the toilets with water and sanitation material.

The employee, Christopher Lowe, is 39 years of age. Mr. Lowe resides in Cabool, Missouri.

Mr. Lowe graduated from high school in Houston, Missouri in 1992. He subsequently attended Ozarks Technical College for one and a half years, and later attended a three week course at MCT Truck Driving School in St. Louis, Missouri. Subsequent to receiving his driver training and obtaining his DOT certification as an over-the-road truck driver, Mr. Lowe worked in various employment settings primarily as a truck driver. Mr. Lowe’s employment history included the following:

- He worked for Highway Carrier as an over-the-road truck driver for two months.
- He obtained employment with a ready-mix concrete company in Houston, Missouri, driving a concrete truck and worked for this employer for three to four months.
- He worked for Matherly Ready-Mix in Cabool, Missouri, on and off for five to six years performing similar work. Also, during this period he worked for Romines Motor Company in Cabool as a detail manager, and he worked for Wilbur Vault Company as a laborer / driver responsible for pre-casting vaults and delivering them to grave sites.
- He worked for Cabool Transport, transporting milk to and from Memphis, Tennessee.
- In 2000, he purchased his own dump truck and performed hauling work for road construction companies until 2004.
- In 2004, he obtained employment with Kellogg, Brown and Root as a truck driver in Kuwait/Iraq. He worked for KBR for approximately 14 months. Mr. Lowe injured his shoulder twice while working for KBR in Iraq. He was sent back to the United States due to his injuries.
- In 2007, Mr. Lowe opened a sports bar and grill in Cabool, Missouri, which he operated and later sold in 2008 to his mother-in-law.

Employment

In June 2008, Mr. Lowe applied for a job with Sani-Clean to drive a truck in order to deliver, service and maintain portable toilets. Leading up to Mr. Lowe's employment with Sani-Clean, Mr. Lowe spoke with Ben Kelly about working for Sani-Clean and filled out an application for employment. Mr. Lowe dealt with Ben Kelly in seeking employment with Sani-Clean and was hired by Ben Kelly to perform work for Sani-Clean on or about June 23, 2008. Mr. Lowe was paid \$8.00 per hour.

Sani-Clean System, LLC and Kelly Cattle Co., Inc. entered into a Lease Labor Agreement on June 23, 2008, in order for Mr. Lowe's paycheck to be processed and the proper withholdings made from his paycheck through Kelly Cattle Co., Inc.'s payroll system. Per the Lease Labor Agreement, Sani-Clean would then reimburse Kelly Cattle for Mr. Lowe's wages and payroll withholdings. Mr. Lowe continued in his employment with Sani-Clean, LLC through approximately July 22, 2008.

During the time of Mr. Lowe's employment with Sani-Clean, Sani-Clean had only one employee – Ben Kelly, in addition to Mr. Lowe. As evidenced by Sani-Clean's second and third quarter 2008 filings with the Missouri Division of Employment Security, Ben Kelly was the only employee of Sani-Clean. Similarly, Sani-Clean's Form 941 shows that Ben Kelly was the only employee of Sani-Clean.

As indicated by the testimony of Ben Kelly, Nathan Kelly, and Mr. Lowe at the hearing, the only individuals that performed work for Sani-Clean during Mr. Lowe's period of

employment were Ben Kelly and Mr. Lowe. Ben Kelly and Nathan Kelly both testified at hearing that his paycheck was processed through Kelly Cattle's payroll so that the proper withholdings were made from his paycheck. There were two days that Mr. Lowe performed work for Kelly Cattle – once on the first day that he started working for Sani-Clean and a second later day.

Mr. Lowe was hired to drive the route for Sani-Clean and service and maintain the portable toilets at various sites in southern Missouri. Sani-Clean serviced portable toilets at different sites each day of the week, Monday through Thursday. Because the portable toilets were located at a number of different locations, Ben Kelly went with Mr. Lowe the first one to two weeks that he worked for Sani-Clean to show him the route and locations where Sani-Clean's portable toilets were located that he needed to service. Ben Kelly also instructed Mr. Lowe on the proper maintenance procedures necessary to perform the job, which included removing the waste from a portable toilet using a small engine which pumped the waste from the unit into a tank on the truck, cleaning the portable toilets, and replacing water in the reservoir of the portable toilets.

Due to the fact that Ben Kelly had to show Mr. Lowe the route on his first week on the job, and the fact that Ben Kelly assisted with Kelly Cattle's weekly livestock sale on the day that Mr. Lowe started work, Ben Kelly asked that Mr. Lowe help with the livestock sale before going on the route. Mr. Lowe was also asked by Ben Kelly to assist with the livestock sale on one other occasion.

Ben Kelly, Nathan Kelly, and Mr. Lowe all testified at the hearing that Mr. Lowe did not perform any work for Ben Kelly or Nathan Kelly as individuals. During Mr. Lowe's employment, he performed work exclusively for Sani-Clean, except for the two occasions in which Mr. Lowe assisted with the livestock sale.

Prior Medical Condition

Medical records admitted into evidence showed Mr. Lowe was seen by Michael D. Ball, D.O. on January 10, 2002, for right shoulder pain arising from a motor vehicle collision on November 6, 2001. Dr. Ball diagnosed cervical strain and contusion of Employee's right shoulder.

Mr. Lowe was seen by Stephen Hawkins, M.D. on November 12, 2003, for right shoulder pain for four months in duration. The pain awakened Mr. Lowe at night because of sharp stabbing pain. He had associated numbness in his arm and hand. Dr. Hawkins ordered an MRI, which was performed on November 19, 2003, at Texas County Memorial Hospital. On November 24, 2003, Dr. Hawkins recommended an injection to the shoulder which Mr. Lowe refused. MRI of Mr. Lowe's right shoulder on November 19, 2003, noted mild supraspinatus tendinitis or subacromial bursitis; and mild subcortical marrow edema in the greater tuberosity of the humeral head.

Mr. Lowe sought employment as a civilian contractor with Halliburton/Kellogg, Brown & Root (KBR). In his Pre-Deployment Physical, Employee noted that within the previous 12 months he had surgery or medical care for shoulder pain on November 5, 2003.

Mr. Lowe sustained injury while deployed by Halliburton/KBR, and returned to the United States. Employee was initially seen by Dr. Ball on April 4, 2005, with history of injury on March 23, 2005, while in Iraq. Dr. Ball prescribed MRI at Texas County Memorial Hospital and referred Mr. Lowe to David B. Rogers, M.D. at Orthopaedic Specialists of Springfield.

Dr. Rogers initially saw Mr. Lowe on May 3, 2005, and treated Mr. Lowe's shoulder problems until November 28, 2006. When Dr. Rogers saw Mr. Lowe on March 3, 2005, Mr. Lowe provided history of being a civilian contractor driving trucks for the military in Iraq. In July 2004, Mr. Lowe fell out of the back of a truck and when he reached out with his left arm he felt immediate pain in the left arm. His left shoulder snapped, popped, and felt unstable. Mr. Lowe continued to have problems with his left shoulder and then on March 23, 2005, he was tying down a load on a truck and fell backward when the ratchet broke. He injured both shoulders on that occasion. Mr. Lowe had pain in both shoulders, at night and with overhead use.

Dr. Rogers ordered bilateral MRI shoulder arthrogram which was performed on May 11, 2005. This MRI arthrogram showed partial thickness tear of the right rotator cuff. The left shoulder indicated superior labral tear which extended into the posterior/superior labrum. Mr. Lowe was having more problems with his left shoulder, and on the May 16, 2005, office visit Employee wanted the left shoulder done first. Left shoulder arthroscopic surgery for repair of the labral tear was scheduled and performed on July 14, 2005. Mr. Lowe followed with Dr. Rogers, who prescribed physical therapy.

Physical therapy was initiated on August 29, 2005, at Physical Therapy Specialists Clinic. Mr. Lowe had continued complaints of moderate and severe pain. Physical therapy continued until November 4, 2005.

On November 7, 2005, Mr. Lowe was again seen by Dr. Rogers who noted he was not improving. Dr. Rogers diagnosed possible failure of the SLAP lesion to heal, or failure of the rotator cuff repair. Repeat arthroscopic surgery to Employee's left shoulder was scheduled. On December 28, 2005, Mr. Lowe had limited arthroscopic debridement and open bicep tenodesis.

Mr. Lowe continued to follow with Dr. Rogers who again prescribed physical therapy. Physical therapy through Physical Therapy Specialists Clinic was again commenced on January 31, 2006. Physical therapy continued through April 26, 2006.

Mr. Lowe returned to Dr. Rogers who ordered an MRI which was performed on July 19, 2006. This MRI was essentially negative, and Mr. Lowe was again seen by Dr. Rogers on July 25, 2006. Dr. Rogers was uncertain why Mr. Lowe continued to have such pain and recommended repeat arthroscopy of the left shoulder and possible repeat rotator cuff repair.

A third arthroscopic surgery to Mr. Lowe's left shoulder was performed by Dr. Rogers on August 9, 2006. At this time, Dr. Rogers performed arthroscopic rotator cuff repair to Mr. Lowe's left shoulder. Physical therapy was again commenced on September 13, 2006, and Mr. Lowe continued physical therapy through November 27, 2006.

On October 31, 2006, Mr. Lowe was seen in follow-up by Dr. Rogers. Dr. Rogers noted Mr. Lowe's left shoulder was improving, and Mr. Lowe inquired when Dr. Rogers was going to

do something with his right shoulder. Clinic record notes Dr. Rogers delayed treatment of the right shoulder until more progress was made with Mr. Lowe's left shoulder.

Mr. Lowe's next office visit with Dr. Rogers was November 28, 2006, for re-evaluation of Mr. Lowe's left shoulder. At that time, Mr. Lowe stated his shoulder continued to be painful. Mr. Lowe did not think there was any way he would be able to go back and do the kind of work he was doing before his injury in Iraq. Dr. Rogers opined Mr. Lowe reached maximum medical improvement with regard to the left shoulder, and that another surgical procedure would not provide Mr. Lowe with any further benefit. Dr. Rogers ordered a Functional Capacity Evaluation.

The Functional Capacity Evaluation was performed on December 8, 2006, and is set forth as Employer Kelly Cattle Exhibit 11.

As a result of Mr. Lowe's injury in Iraq, Mr. Lowe made claim under the Defense Base Act with the United States Department of Labor against KBR. As a result of this claim, Mr. Lowe sought compensation for injuries to both shoulders and arms. In that claim, Mr. Lowe received weekly compensation benefits in the amount of \$1,047.16 from March 24, 2005, until January 25, 2007, a period of 96 weeks or \$100,527.36. Medical expenses were paid in the amount of \$63,448.57. In concluding disposition of that claim, Mr. Lowe received an additional \$50,000.00, of which \$25,000.00 was for future medical benefits. In negotiating conclusion of the claim, Dr. Rogers provided a narrative report dated February 20, 2007. In that report, Dr. Rogers indicated most of his care for Mr. Lowe was toward the left shoulder. Mr. Lowe indicated his right shoulder remained symptomatic and may need possible arthroscopic repair of the partial thickness rotator cuff tear.

Accident

Mr. Lowe testified in his deposition and at hearing that on July 22, 2008, while engaged in employment and performing his work duties with Sani-Clean, he was at a site servicing a portable toilet. In performing this work Mr. Lowe removed the waste from the portable toilet utilizing a small engine and hose, and a five gallon bucket of water to fill the portable toilet's reservoir. As he was carrying this five gallon bucket of water he observed that the truck was rolling. Fearing that the truck would roll into and become stuck in a ditch, Mr. Lowe ran toward the rolling truck with the intent to stop the truck. In the course of running to the truck Mr. Lowe fell in the ditch and landed on both of his arms. As a consequence of this incident Mr. Lowe sustained an injury to his shoulders.

Medical Treatment

Initially, following the incident of July 22, 2008, Mr. Lowe did not seek or obtain medical care. The records reflect that not until August 20, 2008, did Mr. Lowe seek medical care. In this regard, on August 20, 2008, Mr. Lowe presented to Cabool Medical Clinic for treatment and received an evaluation from Terry Bruno, N.P. At the time of this visit, Mr. Lowe presented with complaints of significant left shoulder pain. He provided a history of having fallen on his left shoulder on July 22, 2008. The history further noted that he had three prior surgeries, had experienced intermittent pain in the shoulder, and was governed by restrictions that included lifting no more than 25 pounds.

The history provided by Mr. Lowe, as recorded by the attending physician, did not identify or relate the July 22, 2008, fall to Mr. Lowe's employment. In light of the examination occurring on August 20, and in light of Mr. Lowe having previously undergone prior surgeries to his shoulder, the attending physician recommended that Mr. Lowe undergo an MRI diagnostic study. This diagnostic study occurred in October 2008. The MRI showed evidence of a previous shoulder surgery and no recurrent tear. Specifically, the radiologist noted, "No recurrent tear of this structure [was] identified, but an MR arthrogram would be needed to exclude this."

Thereafter, Mr. Lowe received a referral to Stephen D. Armstrong, M.D. of Ferrell-Duncan Clinic, a rheumatologist. Dr. Armstrong saw Mr. Lowe on January 20, 2009. Mr. Lowe provided a history that his shoulder problems started while he was contracting for the Department of Defense in Iraq in 2005. Mr. Lowe failed to provide any history of injury on July 22, 2008. Dr. Armstrong diagnosed bilateral shoulder pain secondary to rotator cuff disease and mechanical lower back pain with evidence of mild degenerative disc disease at L4-L5 and L5-S1 levels.

Medical Opinion

Truett Swaim, M.D.

Truett Swaim, M.D. testified through medical reports consisting of Independent Medical Examination of May 5, 2009 (Employee's Exhibit Z1), and supplemental reports dated August 20, 2009 (Employee's Exhibit Z2), and May 9, 2011 (Employee's Exhibit Z3).

Dr. Swaim saw Mr. Lowe on May 5, 2009, at the request of Mr. Lowe's attorney. At this time, Mr. Lowe provided history to his examining physician:

Subjective History and Clinical Synopsis: Mr. Lowe was employed by Sani-Clean between approximately June 1, 2008, and July 22, 2008. This company provides port-a-potties to various locations, including construction sites, entertainment events, athletic events, etc. Mr. Lowe's occupational duties involved transporting port-a-potties to rental sites and from rental sites, and maintaining the port-a-potties. The main portion of his occupation was maintaining the port-a-potties. He would suction waste from the port-a-potties and replace water for the port-a-potties. He would have to replace water by carrying five gallon buckets of water. Each port-a-potty would take ten gallons. He would perform the maintenance component from early morning to afternoon, and occasionally into the evening.

He sustained occupational injury on or about July 22, 2008. He was maintaining port-a-potties at a rental site in Willow Springs, Missouri. As he was carrying a bucket of water to one of the port-a-potties, he noticed that the company vehicle was rolling forwards. (The company vehicle was a 1995 Dodge 1-ton four-wheeled truck with a manual transmission and history of emergency brake failure.) He [Employee] dropped the bucket of water and started running toward the truck. He ran into a ditch and fell forward. He tried to break his fall, with his

arms. He was able to get up and run to the truck. He was able to keep the truck from going into the ditch.

By history, Mr. Lowe told Dr. Swaim he followed with the nurse practitioner five days after the accident and was told Lowe needed to undergo an MRI scan of his left shoulder. This history was contrary to medical records of Dr. Hawkins, which noted Mr. Lowe was not seen until August 20, 2008, for a fall on his left shoulder.

Dr. Swaim diagnosed left shoulder impingement, left shoulder bicep tendinitis, and *possible* recurrent rotator cuff tear. On the right shoulder, Dr. Swaim diagnosed impingement syndrome, bicep tendinitis, with *possible* labral tear and/or partial rotator cuff tear. (Employee Exhibit Z1) In his opinion, Mr. Lowe had not reached maximum medical improvement, and recommended additional treatment to Mr. Lowe's left and right shoulders. To Mr. Lowe's left shoulder, Dr. Swaim recommended MRI/arthrogram and right shoulder MRI scan. As to Mr. Lowe's right shoulder, Dr. Swaim recommended an MRI scan. Dr. Swaim opined the injury of July 22, 2008, was the prevailing factor for Employee's injuries and for necessity of the additional medical treatment.

Mr. Lowe's Attorney provided Dr. Swaim with additional medical records, which generated an Addendum Report dated August 20, 2009. Dr. Swaim confirmed his previous opinions.

Final supplemental report was issued by Dr. Swaim dated May 9, 2011. Additional medical records caused Dr. Swaim to change his diagnosis to include left bicipital tendon subluxation involving anterior labral tear versus scar tissue. With regard to the right shoulder, Dr. Swaim diagnosed impingement syndrome, bicep tendinitis, with *possible* labral tear and/or partial rotator cuff tear. In this subsequent report, Dr. Swaim provided permanent partial disability rating of 5% of the left arm at the 232-week level, with pre-existing disability in the left arm of 35%. He provided permanent partial disability of 20% of the right shoulder at the 232-week level. Dr. Swaim provided a multiplicity factor of 5% to the body as a whole. He confirmed his previous recommendations for further medical treatment. Dr. Swaim issued work restrictions that Mr. Lowe was to avoid repetitive, prolonged or forceful use of the upper extremities above shoulder height, or with the arms extended away from the body. Employee should avoid heavy lifting with either arm.

On cross-examination deposition of May 16, 2011, Dr. Swaim testified he only saw Mr. Lowe on one occasion on May 5, 2009. Dr. Swaim never saw Mr. Lowe before July 22, 2008, and had no personal knowledge concerning Mr. Lowe's physical condition before the injury. Dr. Swaim was not a treating physician, and only saw Mr. Lowe for purposes of evaluation in this case. Dr. Swaim's medical practice was devoted to evaluations, and he no longer engaged in treatment of patients.

Dr. Swaim was not provided records of Michael D. Ball, D.O. of Ozark Family Health Care, which noted treatment to Mr. Lowe's right and left shoulders in 2002 and 2005.

Dr. Swaim also conceded on cross-examination that on May 11, 2005, Dr. Rogers ordered MRI of Mr. Lowe's right shoulder and diagnosed a partial thickness tear of the rotator cuff. Dr.

Swaim further conceded that when Mr. Lowe first saw Dr. Hawkins on August 20, 2008, he never mentioned any injury to his right shoulder. (Employee Exhibit Z, p 24)

Michael P. Nogalski, M.D.

Dr. Nogalski was the examining physician for Kelly Cattle, and testified by deposition on April 25, 2011. Dr. Nogalski saw Mr. Lowe on October 18, 2010, for evaluation of Mr. Lowe's left shoulder. Dr. Nogalski performed physical examination of Mr. Lowe's left shoulder, which noted Mr. Lowe's rotator cuff appeared to be good and solid. He had slightly less than normal strength and minimal loss of motion in the shoulder. X-rays of the left shoulder showed normal ball and socket joint relationship with some mild degenerative arthritis in the acromioclavicular joint and Type I acromion which would be the flat roof of the shoulder. There were no x-ray findings to suggest any issues with respect to the rotator cuff and labrum that could be seen on x-ray.

Dr. Nogalski opined that the injury of July 2008 was not the prevailing factor for Mr. Lowe's complaints and symptoms to his left shoulder. Dr. Nogalski based this opinion upon review of medical records and his physical examination of Mr. Lowe, which showed he had a solid shoulder function. As a result of the injury of July 22, 2008, Mr. Lowe merely sustained a strain or contusion of the shoulder. In his opinion, Mr. Lowe reached maximum medical improvement from his injury of July 22, 2008.

On cross-examination regarding whether Mr. Lowe needed further diagnostic testing of his left shoulder by arthrogram, Dr. Nogalski provided the following testimony:

Q. [By Employee's counsel] that an arthrogram in conjunction with an MRI is necessary in order to rule out a tear in the left shoulder?

A. I thought you used the past tense, I'm sorry. Anyone that's had previous rotator cuff surgery will have some abnormalities around their rotator cuff insertion site which depending upon the reading of the radiologist could be labeled as a tear or post surgical repair status.

I don't think that Mr. Lowe's examination findings support use of an arthrogram to look any closer at this situation, so I don't think that he needs an arthrogram to evaluate the rotator cuff or the shoulder.

Q. So when the radiologist in the October 20th, 2008, MRI states in his report that, "no recurrent tear of this structure is identified, but an MR arthrogram would be needed to exclude this," you disagree with that statement?

A. Gotcha. Yes. I don't think that it's indicated because I wouldn't operate on this guy if it showed a little defect around the rotator cuff repair site. There's nothing clinically that argues for that. It wouldn't change any of his treatment issues and it could reasonably be present after a shoulder strain or it could reasonably be present just after a rotator cuff repair.

The radiologist sits in a vacuum and looks at a bunch of pictures with his cup of coffee. The orthopedic surgeon is looking at the patient and the rubber meets the road when you look at the patient. There's people with small rotator cuff tears that are not candidates for surgery because they don't have any physical findings to suggest they'd be made better with surgery.

Dr. Nogalski testified further:

A. Well, again, it's one thing to throw out opinions if you don't have to act on them. Once again, too, I'd say looking at Mr. Lowe in the office, his exam findings did not at all support that some sort of intervention for his rotator cuff or shoulder in general would benefit him. So his exam findings do not support getting more tests on the shoulder. There are going to be post surgical artifacts, but his rotator cuff function is solid. I don't think it can be made better with surgery. I don't think that the arthrogram is going to contribute anything from a surgical perspective or treatment perspective in general.

Q. So if there was a large tear that showed up on the arthrogram, that wouldn't change your opinions?

A. Not with his exam as of October 2010.

Medical Bills

Mr. Lowe submitted medical bills of Cabool Medical Clinic-TCMH in the amount of \$308.00 (Employee Exhibit J), and Texas County Memorial Hospital in the amount of \$2,476.85 (Employee Exhibit K).

Kelly Cattle obtained the deposition of Cathy Stilley, clinic manager of Texas County Memorial Hospital (TCMH), Cabool Medical Clinic. For treatment of Mr. Lowe's injuries to his shoulders after July 22, 2008, Mr. Lowe was seen in the Clinic on August 20, 2008, October 8, 2008, June 1, 2009, and June 2, 2009. Mr. Lowe had total billings for that treatment in the amount of \$308.00. Of that sum, Mr. Lowe had out-of-pocket payments of \$61.00, and the remainder of the charges for the medical treatment was paid by Medicaid in the amount of \$247.00. Mr. Lowe's account for these treatments was fully paid, and Mr. Lowe was not obligated for payment of any charges for that treatment at Cabool Medical Clinic.

Mr. Lowe seeks reimbursement of medical expenses from Texas County Memorial Hospital in the amount of \$2,476.85. Those medical expenses were the subject of the deposition of Amy Thompson on August 25, 2011. On October 20, 2008, Mr. Lowe was treated for a foreign body in his eye in the amount of \$113.00. Mr. Lowe makes no claim for eye injury in this workers' compensation case.

Mr. Lowe was seen at Texas County Memorial Hospital on October 8, 2008, for x-rays to his left shoulder. Total billing was in the amount of \$373.85, which was fully paid by Medicaid.

Mr. Lowe was again seen at Texas County Memorial Hospital on October 20, 2008, for a foreign body in his eye and MRI of his left shoulder. Total billing for those treatments were \$2,103.00. Medicaid paid \$2,100.00 of that billing. The hospital wrote off the remaining \$3.00. There was a zero balance on the bill of Texas County Memorial Hospital, and the account at the hospital is fully paid and satisfied.

Alleged employer Kelly Cattle and its Insurer submitted statutory authority for proposition that once a healthcare provider receives payment for authorized medical charges for a Medicaid patient under MO HealthNet, except for certain deductibles, payment by MO HealthNet is in full satisfaction of the account of the Medicaid patient. Judicial notice was taken of these State statutes and Federal regulations.

Records from the Office of the Secretary of State of Missouri

Kelly Cattle admitted into evidence records of the Secretary of State of Missouri showing Kelly Cattle was incorporated December 26, 2002; its corporate charter forfeited on November 8, 2007, and reinstated on January 8, 2009, retroactive to the date of the forfeiture; and by virtue thereof on July 22, 2008, Kelly Cattle was a domestic corporation in good standing. See Section 351.488.3, RSMo., Cum. Supp. Kelly Cattle registered Wright County Livestock Auction as a fictitious name with the office of the Secretary of State of Missouri on March 3, 2003, which was in effect on July 22, 2008.

On July 22, 2008, Sani-Clean was a Missouri Limited Liability Company and was in good standing.

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

I.

Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction

Whether Christopher Lowe was an employee of Kelly Cattle on July 22, 2008?

The parties readily acknowledge that on July 22, 2008, Mr. Lowe was an employee of Sani-Clean. The employee, however, contends that on this date he was an employee of Kelly Cattle, as well. The employee relies principally upon a contract entered into by and between Kelly Cattle and Sani-Clean, and Mr. Lowe receiving his paycheck drawn on the checking account of Kelly Cattle. The adjudication of this issue requires consideration of the term "employee." Employee is defined in Section 287.020.1, RSMo. Cum. Supp., which provides, in part:

1. 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.

Undisputed and preponderance of the evidence showed Kelly Cattle and Sani-Clean were separate and independent businesses. Kelly Cattle was a domestic corporation which essentially operated Wright County Livestock Auction, a sale barn for the buying and selling of livestock. President of the corporation was Nathan Kelly. On the other hand, Sani-Clean was a domestic limited liability company engaged in the rental of portable toilets. Sani-Clean was under management of Benjamin G. Kelly. These business entities had interlocking shareholders and members, but were separate and distinct business operations.

Mr. Lowe answered an advertisement for employment in the portable toilet business. He completed an Application for Employment for Sani-Clean. Mr. Lowe was interviewed and eventually hired by Benjamin G. Kelly to work for Sani-Clean in the portable toilet business. Ben Kelly trained Mr. Lowe to install, maintain and service, and remove portable toilets from customers of Sani-Clean. Sani-Clean sent its own invoices and billings to its customers for work performed by Mr. Lowe.

Sani-Clean owned a truck, vacuum and tank, and all of the portable toilets used in the rental of portable toilets. Kelly Cattle had no interest in those items of property. Undisputed evidence was that Sani-Clean provided Mr. Lowe with all the tools and equipment for his work in installing, removing, and servicing of the portable toilets.

An employer is a principal who employs another to perform service in the business, and who controls or has the right to control the physical conduct of the Employee in the performance of the service. *Talley v Bowen Construction Company*, 340 S.W.2d 701 [1], 704 (Mo. 1960) Undisputed evidence was Mr. Lowe was hired by Sani-Clean to perform services and work on behalf of the limited liability company, and performed those services for customers of Sani-Clean.

The predominant factor in proof of Mr. Lowe's status is the right to control the detail of the work to be performed by the worker. In *Ceradsky v Mid-America Dairymen, Inc.*, 583 S.W.2d 193, 198 (Mo. App. W.D. 1979), the appellate court stated:

The right to control the detail of the work factor given predominance as proof of the employee's status shows through as merely an euphemism for worker activity of such a nature as to be a regular and continuous part of the manufacture of the product or other service. Thus, 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 direct employee of the business, essentially establishes the renderer of the service as an Employee within the purpose of the compensation law.

The employer-employee relationship by statutory definition rests upon services, construed by judicial definition to mean *controllable services*. *Id.* 197.

In this instance, Mr. Lowe was directed by Ben Kelly on behalf of Sani-Clean to maintain a portable toilet in Willow Springs, Missouri. Mr. Lowe was operating the truck owned by Sani-Clean to service portable toilets which were likewise owned by Sani-Clean. In performance of those duties, Mr. Lowe sustained an injury.

Kelly Cattle paid wages of Mr. Lowe, and Kelly Cattle and Sani-Clean entered into Lease Labor Agreement dated June 23, 2008. Although perhaps inartistically drafted, the document purports to provide Mr. Lowe was in the employ of Kelly Cattle. This was explained by both Nathan Kelly and Ben Kelly that the payment of Mr. Lowe's wages and the Lease Labor Agreement were an accommodation to Sani-Clean since Kelly Cattle already had the personnel and processes to perform weekly payroll functions. More importantly, Mr. Lowe's wages were, in fact, paid by Sani-Clean because the company reimbursed Kelly Cattle for all wages and taxes paid to or on behalf of Mr. Lowe. The Agreement specifically provides:

“Sani-Clean System, LLC agrees to reimburse Kelly Cattle Co., Inc. on a monthly basis for the hourly wages, as well as payroll withholding of Chris Lowe until we no longer have need for his services.”

Uncontradicted evidence was that Sani-Clean reimbursed Kelly Cattle for the wages paid Mr. Lowe.

Mr. Lowe testified he knew nothing of this agreement, and was not a party to that agreement. When asked who he worked for when he was hired, Mr. Lowe testified on oral deposition:

Q. Did you ever work for Ben Kelly and/or Nathan Kelly?

A. I worked for Ben Kelly.

Q. I thought you told me you worked for Saniclean [sic]?

A. Ben Kelly owns Saniclean [sic].

Q. I understand.

A. I work for Ben Kelly.

Q. I understand that but you filed a claim against Ben Kelly and I'm trying to separate in my mind as to if Ben Kelly is involved in the cattle company, if he is involved in a separate business, and if he is involved in Saniclean [sic]?

A. I personally don't know Ben Kelly's life and his employment, but Ben Kelly hired me to go to work for his business, which is Saniclean [sic], the rental toilet business, that's who I work for.

However, the designation of an employee's status in a contract is never controlling if there is evidence to overcome it, and the Division of Workers' Compensation should look to the evidence to determine employment status. *Tally*, 340 S.W.2d at 705. While the contractual designation of the work status of Mr. Lowe (as a purported employee) should not be ignored, it is

by no means conclusive. *Miller v Hirschbach Motor Lines*, 714 S.W.2d 652, 656 (Mo. App. S.D. 1986) The Administrative Law Judge should examine the facts of the case and the conduct of the parties in establishing the employment status of Employee. *Id.* 657.

In the case *Hutchison v St. Louis Altenheim*, 858 S.W.2d 304 (Mo. App. E.D. 1993), a nursing home resident's trust paid the wages of a nurse. The nurse was hired by the nursing home to be a special duty nurse for the resident, but also to assist other patients. The Court stated that payment of wages alone does not create an employer-employee relationship. *Id.* 306. The Court looked to other factors in determining the injured nurse was an employee of the nursing home, and stated:

“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.”

[*Hutchison*, 858 S.W.2d at 305]

In a case factually similar to this case, the Court in *Patterson v Engineering Evaluation Inspections*, 913 S.W.2d 344, 346 (Mo. App. E.D. 1995) addressed the significance of payment of wages in the determination of controllable services. In *Patterson*, the claimant was contacted by Steve Barnett to work on a remodeling project, and the claimant was paid by Barnett. In resolving the employment issue, and the affirming award against respondent Engineering Evaluation Inspections, the Court stated:

Missouri courts have developed a multi-factored approach for determining whether a worker is correctly classified as an employee for workers' compensation purposes, as distinguished from an independent contractor; the same analysis is useful in determining which of several entities actually employed the worker. [Cites Authority] We will mention those factors that apply to the present case, but essentially our inquiry is two-fold: whether the worker was performing services for the alleged employer, and whether those services were controllable by the alleged employer. *Hill v 24th Judicial Circuit*, 765 S.W.2d 329, 331 (Mo. App. E.D. 1989).

Appellant places great emphasis on the fact that respondent [claimant] was paid by Barnett. Payment of wages is one of the factors relevant to the existence of an employment relation, but is not itself determination. *Hill* at 331.

Mr. Lowe testified he only worked at the sale barn on two separate occasions, the first being the day he was hired. Mr. Lowe could not remember any other specific time he worked at the sale barn. Each time he worked at the sale barn, it was at the instruction of Ben Kelly. The day Employee was hired, he worked at the sale barn because it was a Monday and Ben Kelly assisted at the sale barn on those sale days.

In determining which of two parties are liable for a workers' compensation claim, the principal question is whether the employee was performing services essential for either of the two alleged employers. In *Reichert v Jerry Reece, Inc.*, 504 S.W.2d 182 (Mo. App. S.D. 1973), the court stated:

The principal question is not whether claimant remained the servant of Reece as to matters generally, but whether, when the accident occurred, he was performing services essentially for Tanksley which Tanksley had the right to control or direct. *Patton v Patton*, 308 S.W.2d 739, 747 (Mo. 1958). The evidence clearly shows that when claimant sought employment from Reece it was understood his commencing work was conditioned upon Tanksley's approval and that he would be dispatched by Tanksley. Also, from the beginning, after his employment was cleared through Tanksley, claimant reported to Tanksley regularly and not only consented to but did follow Tanksley's instructions as to when and where to go, what loads to pick up, where to make deliveries, and what temperatures to keep on the loads. Admittedly, Reece had no authority to direct those services. Hauling perishables was Tanksley's business, not that of Reece, and what Reece undertook by his contract with Tanksley was to simply provide additional facilities with which Tanksley could conduct its operations. It is while claimant was performing services for Tanksley within the course and scope of Tanksley's business and under the direction of Tanksley that the accident occurred and he was injured. Under such conditions the Industrial Commission reasonably could have found that claimant either made a contract of hire with Tanksley or entered into its services by appointment or election, that the work being done by claimant was essentially that of Tanksley, and that Tanksley had the right to control the details of claimant's work.

[*Reichert*, 504 S.W.2d 186-187]

That is simply the facts of this case. Accordingly, after consideration and review of the evidence I find and conclude that at the time of Mr. Lowe's injury, he was working within the scope and course of his employment with Sani-Clean and not Kelly Cattle. At the time of the July 22, 2008, incident claimant Christopher Lowe was not an employee of Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction under Chapter 287, RSMo.

Therefore, for the foregoing reasons, the Claim for Compensation, as filed against Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction, and its insurer Michigan Millers Mutual Insurance Company, is denied. All other issues that relate to Kelly Cattle Company, Inc. d/b/a Wright County Livestock Auction, and its insurer Michigan Millers Mutual Insurance Company, that are not specifically addressed herein are rendered moot.

II. Sani-Clean System, LLC

Whether the alleged employer Sani-Clean System, LLC, was an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008?

The parties readily acknowledge and the evidence is supportive of a finding that at all times relevant to this case the claimant Christopher Lowe was an employee of Sani-Clean. Yet, a question remains – were the parties operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008.

The adjudication of this issue requires consideration of Section 287.030.1(3), RSMo, which requires an employer to have “five or more employees” in order to be subject to the requirements of Chapter 287, RSMo. In this regard, the evidence is supportive of a finding, and I find and conclude that at all times relevant to this case, Sani-Clean had, at most, only two employees and was therefore not an “employer” under section 287.030.1(3).

Ben Kelly testified at his deposition, and at the hearing that he was the only person, other than Mr. Lowe that performed work for Sani-Clean during the relevant time period. At the hearing, Mr. Lowe corroborated Ben Kelly's testimony that he and Ben Kelly were the only individuals that performed work for Sani-Clean. There is no evidence whatsoever to suggest that Sani-Clean had five or more employees. Therefore, Sani-Clean was not an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008.

There are two possible exceptions to the five or more employees rule under the Missouri Workers' Compensation Act, neither of which applies here.

First, an employer with less than five employees may elect to be subject to the Missouri Workers' Compensation Law by purchasing and accepting a valid workers' compensation insurance policy or endorsement. § 287.030.1(3); § 287.090.2, RSMo. It is undisputed and there is no evidence to point to which shows that Sani-Clean purchased a workers' compensation policy.

Second, a construction industry employer who erects, demolishes, alters or repairs improvements and has one or more employees is deemed an employer for purposes of Chapter 287. See Section 287.030.3, RSMo. The evidence is undisputed that Sani-Clean was not a construction industry employer. The work that Mr. Lowe performed for Sani-Clean did not involve the erection, demolition, alteration or repair to improvements. Ben Kelly testified at his deposition and at the hearing that Mr. Lowe's work did not require him to perform any type of construction; Mr. Lowe did not build, construct, erect, demolish, alter or repair improvements in his work at Sani-Clean. At the hearing, Mr. Lowe confirmed that his job duties consisted of servicing and maintaining the portable toilets and that he did not perform construction work in his employment with Sani-Clean.

Accordingly, after consideration and review of the evidence, I find and conclude that at the time of Mr. Lowe's injury Sani-Clean System, LLC, was not an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008.

Therefore, for the foregoing reasons, the Claim for Compensation, as filed against Sani-Clean System, LLC, is denied. All other issues that relate to Sani-Clean System, LLC that are not specifically addressed herein are rendered moot.

III. Ben Kelly

Whether the alleged employer Ben Kelly was an employer of the claimant and operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008? (As to this issue the claimant seeks to pierce the corporate veil of Sani-Clean System, LLC and/or Kelly Cattle Co., Inc. d/b/a Wright County Livestock Auction and hold Ben Kelly personally liable as an employer).

The evidence is supportive of a finding, and I find and conclude that at all times relevant to this case Ben Kelly was not an employer of Mr. Lowe and was not operating under and subject to the Missouri Workers' Compensation. Under Section 287.030.1(1), RSMo., any person "using the service of another for pay" is an employer, but to be subject to the Act, the employer must have "five or more employees."

First, the evidence is uncontroverted that Ben Kelly was not an employer of anyone at all relevant times in this matter and it is clear that he was acting at all times as President of Sani-Clean, and not himself as an individual. Second, the evidence is undisputed that Ben Kelly did not have any employees. Therefore, because Ben Kelly had less than five employees, he was not operating under and subject to the Missouri Workers' Compensation Law.

Neither of the exceptions to the five or more employee rule applies to Ben Kelly. Ben Kelly did not elect to be subject to the Missouri Workers' Compensation Law by purchasing and accepting a valid workers' compensation insurance policy or endorsement and there is no evidence that he did so. Section 287.030.1(3), RSMo; Section 287.090.2, RSMo. Additionally, because Ben Kelly was not an employer, he could not be a "construction industry employer" subjecting him to the Missouri Workers' Compensation Law. Even if he was an employer, and as more fully discussed in Issue (1), above, the work that Mr. Lowe was performing at the time of the alleged accident did not consist of build, construct, erect, demolish, alter or repair improvements.

Furthermore, Mr. Lowe is not entitled to "pierce the corporate veil" of either Sani-Clean or Kelly Cattle and hold Ben Kelly personally liable as an employer. There is no provision in the Missouri Workers' Compensation Law that permits an employee to pierce the corporate veil in order to hold an individual liable as an employer. In addition, there are no cases which permit an employee to succeed on such a theory. Even if Mr. Lowe could attempt to "pierce the corporate veil," there are no facts supporting such a theory in this case.

The circumstances under which Missouri courts will pierce the corporate veil and hold the corporation's owner liable for the corporation's debt are narrow. *Patrick V. Koepke Constr., Inc. v. Paletta*, 118 S.W.3d 611, 614 (Mo. App. 2003). A court may pierce the corporate veil or disregard the separate corporate entity if the separateness is used as a device to defraud a creditor. *Sansone v. Moseley*, 912 S.W.2d 666, 669 (Mo. App. 1995).

A Missouri court will disregard the corporate entity and hold the corporate owners liable if the following can be shown: (1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the

transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) such control must have been used by the corporation to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of claimant's rights; and (3) the control and breach of duty must proximately cause the injury or unjust loss complained of. *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986); *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999).

None of the elements required in order to pierce the corporate veil are present in this case. In order to pierce the corporate veil, the claimant must show that the corporation is the alter ego of the defendant. *Id.* at 41. When a corporation is so dominated by a person as to be a mere instrument of that person, and indistinct from the person controlling it, the court will disregard the corporate form if its retention would result in injustice. *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 504-05 (Mo. App. E.D. 1999).

Ben Kelly did not have majority or stock control in either Sani-Clean or Kelly Cattle and there is no evidence that he exercised complete domination of finances, policy, and business practices with regard to either entity. While Kelly Cattle and Sani-Clean had common owners, the operation and management of Kelly Cattle was run by Nathan Kelly, while the operation and management of Sani-Clean was run by Ben Kelly. For example, Ben Kelly was not responsible for the bookkeeping at Kelly Cattle, but was responsible for the recordkeeping for Sani-Clean. As stated by Nathan Kelly, he and Cherrie Ellis handled the business affairs of Kelly Cattle, not Ben Kelly. There is no evidence that Ben Kelly exercised complete domination of finances, policy and business practices such that Sani-Clean or Kelly Cattle had no separate mind, will or existence of its own apart from Ben Kelly. As testified to by Ben Kelly and Nathan Kelly, Sani-Clean and Kelly Cattle had their own separate business, bank accounts, equipment, and filed their own taxes and employment security filings. The corporate forms of Sani-Clean and Kelly Cattle were respected and did not operate as the alter ego of Ben Kelly.

In addition, there is no evidence that either Kelly Cattle or Sani-Clean were undercapitalized or that Ben Kelly was using Kelly Cattle or Sani-Clean to avoid debts arising out of the respective businesses. Ben Kelly did not treat Kelly Cattle or Sani-Clean as his personal business without regard for the corporate form. As Ben Kelly and Nathan Kelly testified, Ben Kelly did not make the decisions as to the day-to-day operations of Kelly Cattle, and there is no evidence showing that he personally advanced money to Kelly Cattle or Sani-Clean. In sum, there is nothing showing that Ben Kelly totally dominated and controlled either Kelly Cattle or Sani-Clean or that he used the corporate cloak of protection as a subterfuge for the perpetration of any fraud on Mr. Lowe. In sum, Mr. Lowe has no evidence to show the required element of control in order to pierce the corporate veil.

Second, a claimant must show a breach of duty – that this control was used by the corporation to commit fraud or wrong, to perpetrate the violation of a statutory or other legal duty, or to commit a dishonest and unjust act in contravention of the claimant's legal rights. *66, Inc.*, 998 S.W.2d at 40. As to the second element required to pierce the corporate veil, Mr. Lowe has not alleged a breach of any violation of a statutory or other legal duty and there is no evidence to suggest the existence of any such duty. In fact, Sani-Clean was fully within its rights as a company with less than five employees to not carry workers' compensation insurance.

Finally, the claimant must show that the control and breach of duty proximately caused the injury or unjust loss. *Id.* at 40. With regard to the third element, there is no proximate cause in this case because Mr. Lowe has not shown the element of control or breach of a duty in order to pierce the corporate veil, and therefore, has not, and cannot show proximate cause between the two caused Mr. Lowe's injury.

Accordingly, after consideration and review of the evidence, I find and conclude that at all times relevant to this case Ben Kelly was not an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008, and Mr. Lowe cannot pierce the corporate veil of either Sani-Clean or Kelly Cattle and hold Ben Kelly liable as an employer.

Therefore, for the foregoing reasons, the Claim for Compensation, as filed against Ben Kelly, is denied. All other issues that relate to Ben Kelly that are not specifically addressed herein are rendered moot.

IV. Nathan Kelly

Whether the alleged employer Nathan Kelly was an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008? (As to this issue the claimant seeks to pierce the corporate veil of Sani-Clean System, LLC and/or Kelly Cattle Co., Inc. d/b/a Wright County Livestock Auction and hold Nathan Kelly personally liable as an employer.)

The evidence is supportive of a finding, and I find and conclude that at all times relevant to this case Nathan Kelly was not an employer of Mr. Lowe and was not operating under and subject to the Missouri Workers' Compensation. The reasoning identified in the section above and applicable to Ben Kelly is applicable to Nathan Kelly.

The evidence is uncontroverted that Nathan Kelly was not an employer of anyone at all relevant times in this matter and it is clear that he was acting at all times as President of Kelly Cattle and not himself as an individual. Moreover, the evidence is undisputed that Nathan Kelly did not have any employees. Therefore, because Nathan Kelly had less than five employees, he was not operating under and subject to the Missouri Workers' Compensation Law.

Similarly, neither exception to the five or more employees rule applies. Nathan Kelly did not elect to be subject to the Missouri Workers' Compensation Law by purchasing and accepting a valid workers' compensation policy or endorsement and there is no evidence that he did so. Because Nathan Kelly was not an employer, he could not be a "construction industry employer" subjecting him to the Missouri Workers' Compensation Law.

Mr. Lowe's attempt to pierce the corporate veil of Kelly Cattle or Sani-Clean and hold Nathan Kelly liable similarly fails. There is no evidence that Nathan Kelly exerted complete domination of finances, policy, or business practices of Kelly Cattle or Sani-Clean. Kelly Cattle was not being operated by Nathan Kelly as his alter ego. Nathan Kelly did not pay Mr. Lowe out of his personal funds. Each of Mr. Lowe's paychecks were paid out of a bank account of Kelly Cattle's and Sani-Clean reimbursed Kelly Cattle for Mr. Lowe's wages and withholdings out of

its separate account. Nathan Kelly and Ben Kelly testified that Kelly Cattle and Sani-Clean used separate banks accounts at separate banks for purposes of conducting business.

Nathan Kelly testified that he was the President of Kelly Cattle and that he managed the business. Nathan Kelly was not the President of Sani-Clean and did not manage, operate or run the business.

As to the second element required to pierce the corporate veil, Mr. Lowe has not alleged a breach of any violation of a statutory or other legal duty and there is no evidence to suggest the existence of any such duty. Ben and Nathan Kelly both testified that Nathan Kelly was not involved in the operation of Sani-Clean. As discussed above, Sani-Clean was fully within its rights as a company with less than five employees to not carry workers' compensation insurance.

Finally, the claimant must show that the control and breach of duty proximately caused the injury or unjust loss. *Id.* at 40. With regard to the third element, there is no proximate cause in this case because Mr. Lowe has not shown the element of control or breach of a duty in order to pierce the corporate veil, and therefore, has not, and cannot show proximate cause between the two caused Mr. Lowe's injury.

Accordingly, after consideration and review of the evidence, I find and conclude that at all times relevant to this case Nathan Kelly was not an employer operating under and subject to the Missouri Workers' Compensation Law on July 22, 2008, and Mr. Lowe cannot pierce the corporate veil of either Sani-Clean or Kelly Cattle and hold Nathan Kelly liable as an employer.

Therefore, for the foregoing reasons, the Claim for Compensation, as filed against Nathan Kelly, is denied. All other issues that relate to Nathan Kelly that are not specifically addressed herein are rendered moot.

V.

Second Injury Fund

The claim of Second Injury Fund liability is premised on an underlying claim being compensable. However, having determined that the employee failed to sustain his burden of proof in each of the underlying claims against Kelly Cattle, Ben Kelly, Nathan Kelly and Sani-Clean, the claimant did not sustain a compensable accident on July 22, 2008. Accordingly, the employee has failed to sustain his burden of proof in establishing Second Injury Fund liability.

Therefore, the Claim for Compensation filed against the Second Injury Fund is denied. All other issues not addressed herein are rendered moot.

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation