

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

Injury No.: 06-015783

Employee: Benjamin Marcak
Employer: West 160 Scrap and Salvage, L. L. C.
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: January 18, 2006
Place and County of Accident: Howell County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 5, 2008. The award and decision of Chief Administrative Law Judge Victorine Mahon, issued March 5, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 17th day of September 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Benjamin Marcak

Injury No. 06-015783

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: West 160 Scrap and Salvage, L.L.C.

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Insurer: Uninsured

Medical Fee Dispute: St. John's Physicians and Clinics

Hearing Date: January 4, 2008

Checked by: VRM/dlb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 18, 2006.
5. State location where accident occurred or occupational disease was contracted: Howell County, Missouri.
- Was above employee in employ of above employer at the time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? No.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was cutting steel when he burned his leg.
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: Right leg/ankle.
 - Nature and extent of any permanent disability: 10 percent Permanent Partial Disability to leg at the 155 week level.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? \$26,289.70.
18. Employee's average weekly wages: \$ 330.00
19. Weekly compensation rate: \$220.00
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$26,289.70.

To resolve the direct pay Medical Fee Dispute, \$3,033.00 is to be paid directly to St. John's Physicians and Clinics.

The remaining \$23,256.70 shall be paid directly to Claimant for reimbursement of medical bills.

No weeks of temporary total or temporary partial disability are awarded.

Employee is awarded 15.5 weeks of Permanent Partial Disability for a total of \$3,410 (10 percent at the 155 week level or 15.5 weeks X \$220 = \$3,410)

Total: \$29,697.70.

22. Second Injury Fund liability: Yes.

For uninsured medical benefits: \$26,289.70.

23. Future Requirements of the Award: None.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25 percent of all payments to Claimant in favor of the following attorney for necessary legal services rendered to Claimant: Randy Alberhasky.

FIINDINGS OF FACT and RULINGS OF LAW:

Employee: Benjamin Marcak

Injury No. 06-015783

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: West 160 Scrap and Salvage, L.L.C.

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Insurer: Uninsured

Medical Fee Dispute: St. John's Physicians and Clinics (Direct Pay)

Hearing Date: January 4, 2008

Checked by: VRM/dlb

The parties appeared for final hearing before the undersigned Administrative Law Judge on January 4, 2008. Claimant Benjamin Marcak appeared in person and with his attorney, Randy Alberhasky. The alleged employer, West 160 Scrap and Salvage, L.L.C., appeared by its attorney, Jacob Garrett. Assistant Attorney General Cara Harris represented the Second Injury Fund. The parties agreed to the following facts:

Stipulations

The parties stipulated to the following facts: On January 18, 2006, Benjamin Marcak (Claimant) was injured. The injury occurred in Howell County, Missouri, and West Plains is the proper venue location. The alleged employer, West 160 Scrap and Salvage, L.L.C., had proper notice of the injury, and the Claim for Compensation was timely filed. At the time of the injury, the alleged employer had no Workers' Compensation insurance and was not an authorized self insured employer. Claimant's average weekly wage was \$330, resulting in a compensation rate of \$220.00. No medical and weekly disability benefits have been paid. The bills being presented for payment which are causally related to the injury of January 18, 2006, are reasonable, and were necessary to cure or relieve the effects of the alleged employee's injury of January 18, 2006.

Issues

The following issues were listed by the parties as follows:

1. Was Claimant an employee of West 160 Scrap and Salvage, L.L.C. on the date of his injury—January 18, 2006?
2. If Claimant was an employee, was he working within the course and scope of his employment with West 160 Scrap and Salvage, L.L.C. on January 18, 2006, at the time of Claimant's injury?
3. Was the alleged employer, West 160 Scrap and Salvage, L.L.C., subject to the Missouri Workers' Compensation Act on January 18, 2006?
4. Is West 160 Scrap and Salvage, L.L.C. responsible for the payment of past medical expenses in the amount of \$26,289.70?
5. What is the nature and extent of Claimant's Permanent Partial Disability?

6. What is the liability of the Second Injury Fund?
7. What is the liability of the Second Injury Fund or West 160 Scrap and Salvage, L.L.C. for the payment of the direct Medical Fee Dispute filed by St. John's Physicians and Clinics in the amount of \$3,033.00?

Exhibits

The following exhibits were admitted on behalf of the alleged Employer:

- | | |
|-----------|--|
| Exhibit 1 | Payroll report for 2005 and 2006 |
| Exhibit 2 | Payroll tax report beginning February 22, 2006 to April 30, 2006 |
| Exhibit 3 | Payroll tax report beginning March 4, 2005 to April 29, 2005 |

The following exhibits were admitted on behalf of Claimant:

- | | |
|-----------|--|
| Exhibit A | Hospital Records – St. John's Health System |
| Exhibit B | Medical Bills – St. John's Hospital |
| Exhibit C | Medical Bills – Ozark Medical Center |
| Exhibit D | Medical Bills – St. John's Hospital |
| Exhibit E | Claim for Compensation and certified mail receipt |
| Exhibit F | Answer on behalf of West 160 Scrap and Salvage, L.L.C. |
| Exhibit G | Answer on behalf of the Second Injury Fund |
| Exhibit H | Deposition – Dr. David Paff |
| Exhibit I | Deposition – Joe Harris, Jr. |

FINDINGS OF FACT

The Accident

On January 18, 2006, Benjamin Marcak, Jr. (Claimant) was working at a scrap yard known as the West 160 Scrap and Salvage, L.L.C., located in West Plains, Howell County, Missouri. Claimant worked regular hours from 7:00 a.m. to 4:00 or 5:00 p.m., five days per week. Claimant was performing work as directed by the L.L.C.'s sole owner/member—Joe Harris. Claimant's usual job, along with a coworker named Don Coates, was to prepare cars for crushing and then crush the vehicles. Claimant removed parts, such as the gas tank, before the car was crushed. He also cut steel with a torch. Sometimes Claimant and Coates worked at the salvage yard of West 160 Scrap and Salvage, L.L.C.; other times the pair worked at a different job site at the direction of Joe Harris. Joe Harris owned the portable car crusher and all of the equipment that Claimant and Coates used. Joe Harris arranged for the transportation of the car crusher. He also taught the men how to use the car crusher, which Harris said was pretty straight forward.

On the date of his injury, Claimant was cutting steel, as directed by Harris, using a torch, when his pant leg caught on fire. The fire spread to Claimant's left leg at the ankle. Joe Harris drove Claimant to the hospital.

Medical Bills and Disability

Dr. David. Paff indicated that Claimant's medical treatment was necessary to cure and relieve Claimant of the effects of his injury. The bills incurred in obtaining the necessary treatment also were necessary and reasonable, and the charges were customary. These bills total \$26,289.70. Of that amount, St. John's Physicians and Clinics has filed a Medical Fee Dispute seeking direct payment in the amount of \$3,033.00.

The credible, uncontradicted opinion of Dr. Paff is that Claimant sustained a 10 percent Permanent Partial Disability to his left lower leg at the 155 week level.

Number of Employees

Harris indicated that the L.L.C. now has several employees, but at the time of Claimant's injury it only had one: Sharon Truman. In deposition, Harris was asked to identify quarterly contribution and wage reports that he had filed with the Missouri Division of Employment Security. These documents indicate that West 160 Scrap and Salvage, L.L.C. reported having only two employees in the fourth quarter of 2005: Sharon Truman and Jeff Stewart. Harris said that Stewart was not working for him at the time of Claimant's injury. When asked in deposition how many independent contractors worked at West 160 Scrap and Salvage, L.L.C. in the fourth quarter of 2005, Harris identified only two: Claimant and Donnie Coates (Ex. 1, p. 63-64). Harris specifically denied that there were any other contract workers at West 160 Scrap and Salvage, L.L.C. in the first quarter of 2006 (Ex. 1, p. 64).

At hearing, Harris contradicted his deposition testimony, admitting that there were other independent contractors at the job site when Claimant was working. Despite Claimant's request, Harris provided no documentation demonstrating the names of individuals who had purportedly worked as independent contractors. Harris also did not provide Claimant, Coates, or anyone else with a 1099 tax form. When asked how the independent contractors were supposed to pay his taxes, Joe Harris indicated that they should get an accountant.

In addition to Claimant, the following individuals were identified by various witnesses as potential employees of West 160 Scrap and Salvage, L.L.C. at the time of Claimant's injury:

Joe Harris

Although he did not consider himself an employee, Harris draws a salary and manages the day to day business of West 160 Scrap and Salvage, L.L.C. (Ex. 1, p. 15). He has worked for West 160 Scrap and Salvage, L.L.C. since the day it started on January 1, 2005.

Donnie Coates

Claimant and Donnie Coates began work at West 160 Scrap and Salvage, L.L.C. in the autumn of 2005, although Coates started earlier. They continued working for the alleged employer until they were discharged by Joe Harris sometime in January 2006, after Claimant's injury. Harris now performs the car crushing duties.

The facts relevant to Claimant's status as an employee or independent contractor are equally applicable to Coates. Joe Harris referred to the two men as "my car crush guys" (Ex. 1, p. 29). Harris treated the men as a team, although he paid them separately. Harris instructed the men how to use the car crusher, indicating that its use was fairly straight forward. Sharon Truman, the only person Harris identified as his employee in January 2006, indicated that Coates and Claimant worked every day. There was only once or twice that the two men failed to appear for work, but Harris said they "finally showed up and did the job." (Ex. 1, p. 41). Harris expected these workers to perform the work where and when it was assigned, and he could not afford to have them work at a "leisurely pace" (Ex. 1, p. 39).

Throughout his deposition and at the hearing, Harris vacillated regarding the payment arrangement between his company and Claimant and Coates. At different times he said the men were paid by the day, or by the ton, or by the job. They were paid by check. Harris said he thought Claimant "was supposed to have been a contract, supposed to be contract labor, but I guess he wasn't." (Ex. 1, p. 26).

Sharon Truman

Sharon Truman had been the clerk for West 160 Scrap and Salvage, L.L.C. from June 2005 until she quit in April 2006. She weighed metal and paid customers. Truman earned \$400 per week, and was paid by a check written on the West 160 Scrap and Salvage, L.L.C. Taxes were withheld. She worked

Monday through Friday from 8:00 a.m. to 4:00 or 5:00 p.m.

Truman said she was working the day Claimant was injured. She said Sheldon Turner and Donnie Coates also were present. This testimony is found credible. She could not state with any certainty whether Benjamin Marcak, Sr., and C.J. Christianson also were present the day of the injury.

Sheldon Turner

In deposition, Joe Harris said Sheldon Turner first began work for West 160 Scrap and Salvage, L.L.C. in March 2006. He said Turner processed metal about three weeks, working 40 hours per week, and then quit. Harris denied that Turner ever did any labor for West 160 Scrap and Salvage prior to becoming a weekly wage employee, although Harris did buy some "metals and stuff" from him (Ex. 1, p. 20). Prior to March 2006, Harris said he paid Turner solely by weight of the metal he bought.

Faced with the contrary live testimony of Sheldon Turner at the hearing, however, Harris altered his testimony. Harris admitted at the hearing that he had placed Sheldon Turner on the payroll on February 22, 2006 rather than in March. He admitted that prior to February 22, 2006 Turner was working at the West 160 Scrap and Salvage, L.L.C. facility. He admitted that Turner was at the West 160 Scrap and Salvage, L.L.C. scrap yard on January 18, 2006, the date Claimant was injured, but he denied that Turner had worked more than five and one-half consecutive days prior to being placed on the payroll, or that he was an employee prior to February 22, 2006.

Turner said he cut steel at West 160 Scrap and Salvage, L.L.C., five to six days per week, 10 hours per day, and was paid \$85.00 per day. While he did not need direction, he still answered to Joe Harris. Turner said he did not use his own tools, but merely stored some at that location. Harris disagreed. Harris did not provide Turner with a W-2 prior February 22, 2006. He never provided Turner with a 1099.

Turner testified that he was not good with dates, but he knew who was present at the scrap yard the date Claimant was injured. In addition to himself and Claimant, he identified at least four other persons: C.J. Christianson, Ben Marcak, Sr., someone named Robert, and Donnie Coates. Turner identified Donnie Coates as his ex-brother-in-law. Turner said he was showing Robert, who had been there only a week or two, how to cut steel when the accident occurred. Turner was next to Claimant when he caught on fire.

Harris's testimony regarding Turner is so conflicting that it is not credible. While Turner admitted to some confusion regarding dates and the time of year, he appeared most credible regarding his recollection of Claimant's accident.

C.J. Christianson

Christianson worked in the copper shed and received and sorted metal. Harris initially testified that Christianson started work sometime in February 2006. In deposition, Harris denied that he had any contract workers at the time of Claimant's accident other than Claimant and Donnie Coates. But when faced with the conflicting testimony of other witnesses at the hearing, Harris admitted that Christianson was working at West 160 Scrap and Salvage, L.L.C., prior to being placed on the payroll on February 22, 2006, but she did not work five and one-half days consecutively.

Harris adamantly denied, however, that Christianson was present on the day that Claimant was injured. He also claimed that Christianson was so inconsistent that he never knew when she was there. Harris's testimony regarding Christianson is not credible. Not only is his testimony inconsistent, a reasonable employer would not have placed a worker on the payroll at a flat rate of \$300, irrespective of the number of hours she worked, if he believed the worker was unreliable (Ex. 1, p. 19). Claimant said Christianson was working at West 160 Scrap and Salvage, L.L.C. prior to November 2005, and worked most every day. Claimant's testimony is more credible in this regard.

An Individual Named Robert and Robert Ellis

Joe Harris said he placed Robert Ellis on the payroll on May 5, 2006. He denied that Ellis had worked at his business prior to that date. At the time of his deposition on October 10, 2006, Harris listed Ellis as a current employee.

As noted above, Sheldon Turner said he was working with a man named Robert at the time of the accident. But there is insufficient evidence demonstrating that the Robert present at the time of Claimant's accident was Robert Ellis. Still, Sheldon Turner's testimony that there was an individual named Robert working beside him on the date of the accident is credible, but no particulars regarding the employment arrangement of the individual named Robert is known.

Benjamin Marcak, Sr.

Benjamin Marcak, Sr. is Claimant's father. He hauled metal and equipment for West 160 Scrap and Salvage, L.L.C., including the car crusher. He did not testify at the hearing, and he still works at West 160 Scrap and Salvage, L.L.C. Harris indicated that the elder Marcak worked as the "main hauler" for West 160 Scrap and Salvage, L.L.C., working most days. Joe Harris did not consider the elder Marcak to be an employee. Marcak Sr. supplied his own vehicle which was a Benjamin Marcak Farm Truck. In deposition, Harris said he sometimes paid the elder Marcak by check and either by the week or by the job, depending on the situation. As with all of the other workers, Harris provided no documentation as to how Marcak, Sr. was paid. The elder Marcak did not testify at his son's hearing. Joe Harris's testimony regarding Benjamin Marcak, Sr. is consistent and without contradiction. I find his testimony credible as to the elder Marcak.

The Yardleys

Amanda and Gary Yardley own two separate trucking companies and worked as contract haulers for West 160 Scrap and Salvage, L.L.C. Harris said they hauled away semi processed metal for his company, but also worked for a number of people. Harris used to haul away his own, but he quit on September 30, 2005 because he had incidents involving four tractor-trailers in one month. Now, West 160 Scrap and Salvage, L.L.C. has no trucks, except for one used for local pick-ups and deliveries. Harris's testimony in this regard is consistent and not substantially contradicted. His testimony is found credible as to Amanda and Gary Yardley.

Ted

Ted is a first cousin to Joe Harris, and has worked for Harris Industrial Sales since 2001. He draws a salary from Harris Industrial Sales and has employment taxes withheld. He works on the premises shared with West 160 Scrap and Salvage, L.L.C., but there was no evidence suggesting that Ted is an employee of West 160 Scrap and Salvage, L.L.C.

CONCLUSIONS OF LAW

Issues 1 & 2: Claimant was an employee of West 160 Scrap and Salvage, L.L.C., on January 18, 2006, the date of his accident, and was working within the course and scope of his employment at that time.

Whether a Workers' Compensation claimant is an employee is a question of law, not a finding of fact. *DiMaggio v. Johnston Audio/D & M Sound*, 19 S.W.3d 185, 188 (Mo. App. W.D. 2000), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Section 287.020.1, RSMo Cum Supp. 2005, defines an employee as "every person in service of any employer...under any contract of hire, expressed or implied, oral or written, or under any appointment or elections, including executive offers of corporations." 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 end result. *DiMaggio*, 19 S.W.3d at 188. By contrast, an independent contractor agrees to complete a piece of work using his own methods, without being subject to the control of an employer, except as to the final result of his work. *Cole v. Town & Country Exteriors*, 837 S.W.2d 580, 584 (Mo.App. E.D.1992), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

If the actual or right to control the work performance is not readily apparent, the appellate courts have considered the following factors: (1) is the work part of the regular business of the employer; (2) is the job a distinct occupation requiring special skills; (3) could the alleged employee hire assistants or must the work be performed by the individual personally; (4) is there supervision; (5) whose tools were used; (6) the existence of a contract for a specific piece of work at a fixed price; (7) the length of time the person is employed; (8) the method of payment, whether by time or by the job; and (9) who controls the details of the work, *Chouteau v. Netco Const.*, 132 S.W.3d 328, 332 -333 (Mo.App. W. D. 2004). Whether a claimant is an employee or an independent contractor is determined on a case-by-case basis. *Wilmot v. Bulman*, 908 S.W.2d 139, 142 (Mo.App. S.D.1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Here, car crushing is an integral part of the alleged employer's business. Car crushing is not a special skill normally used outside of the scrap metal business. Claimant was expected to perform the work as directed by Harris. There is no evidence to suggest that Claimant could have hired someone to perform his work for him. Joe Harris showed Claimant how to operate his machinery. Tools Claimant used were owned by the alleged employer. Claimant had an ongoing and not a sporadic relationship with the alleged employer. Harris expected Claimant to perform the work when and where it was assigned. Harris did not tolerate persons working at a leisurely pace. He reserved the right to discharge, as is evident by his decision not to continue the relationship with Claimant and Coates after the work accident. There is conflicting evidence on the method of payment, but all other factors support a finding that Claimant was an employee rather than an independent contractor. And even as to pay, Joe Harris provided no 1099 tax form, suggesting that Claimant was something other than an independent contractor.

Based on all of the evidence, I conclude that Claimant was an employee of West 160 Scrap and Salvage, L.L.C. on the day he was injured.

Issue 3: West 160 Scrap and Salvage, L.L.C. was an Employer subject to the Missouri Workers' Compensation Law on January 18, 2006 when Claimant was injured.

An employer includes a limited liability company using the service of another for pay. § 287.030.1(1), RSMo 2000. To come within the requirements of the Missouri Workers' Compensation Act, West 160 Scrap and Salvage, L.L.C., had to have at least five employees. § 287.030.1(3), RSMo 2000. Using the same analysis discussed above, I conclude that West 160 Scrap and Salvage, L.L.C., had the following employees.

1) As discussed above, Claimant was an employee of the West 160 Scrap and Salvage, L.L.C. at the time of his accident.

2) Donnie Coates' employment situation was identical to that of the Claimant. He, too, was an employee of West 160 Scrap and Salvage, L.L.C. on the date of the accident.

3) Joe Harris admitted that Sharon Truman was an employee of the L.L.C., that being West 160 Scrap and Salvage, L.L.C.

4) Sheldon Turner's testimony is sufficient to support the conclusion that he was an employee. He worked regular hours. He was paid by the day rather than by the job. He said he merely stored his tools at

the business and did not use his own tools. His job of cutting steel was integral to the scrap metal business. He answered to Joe Harris, the sole owner/member of the L.L.C., who had the right to control Turner's work. While Turner needed no training in how to cut steel, there is no evidence that the job required a special skill or education. Harris considered Turner an employee effective February 22, 2006, and there is no evidence that Turner's job changed in any way after that date. Turner is an employee.

5) Joe Harris admitted that he took a salary from the L.L.C., and that he worked every day in performing work that was integral to the company's business. Joe Harris is an employee of West 160 Scrap and Salvage, L.L.C.

6) C.J. Christianson was an employee of West 160 Scrap and Salvage, L.L.C. Harris admitted that Christianson was an employee at least as of February 22, 2006. She had a regular relationship with Employer. There is no evidence that her job required a special skill or knowledge. Sorting metal was integral to the salvage business. There is no evidence that she required or carried her own tools to perform the job. Harris's testimony that Christianson worked inconsistently is not credible in light of the contrary testimony of other witnesses, including that of Claimant.

Thus, without even discussing the status of Benjamin Marcak, Sr., the Yardleys, and the gentleman named Robert, it is evident that West 160 Scrap and Salvage, L.L.C., had the requisite number of employees on the date of Claimant's injury—January 18, 2006—and was an employer for purposes of Missouri Workers' Compensation Law.

Issues 4: Is West 160 Scrap and Salvage, L.L.C. responsible for the payment of past medical expenses in the amount of \$26,289.70?

Where an employer denies the allegations in an employee's claim, it also necessarily denies liability for medical aid to the employee, and the employee may be entitled to an award for the cost of medical services. *Wiedower v. ACF Industries, Inc.* 657 S.W.2d 71, 74 (Mo. App. E.D. 1983). West 160 Scrap and Salvage, L.L.C. has denied all liability. Claimant incurred \$26,289.70 in medical bills related to the treatment for his work-related injury. At the hearing, the parties did not contest the reasonableness and necessity of any of the medical bills. Dr. Paff's testimony also supports the conclusion that these bills were reasonable and necessary.

Based on all of the evidence, Employer is responsible for the payment of all of the medical bills.

Issue 5: Nature and Extent of Permanent Partial Disability.

Claimant has a 10 percent Permanent Partial Disability to the left lower extremity at the 155 level, consistent with Dr. Paff's opinion. There is no contrary opinion. Claimant is awarded 15.5 weeks of Permanent Partial Disability at the rate of \$220.00 per week, for a total of \$3,410.00.

Issues 6 and 7: Second Injury Fund Liability and the Medical Fee Dispute.

Harris improperly classified the workers at West 160 Scrap and Salvage, L.L.C. as independent contractors, despite overwhelming evidence that these workers were employees. It matters little whether Harris's classification of Claimant and his co-workers occurred as a result of ignorance, or arrogance, as Claimant suggests in his brief. West 160 Scrap and Salvage, L.L.C., is an employer who was subject to the Missouri Workers' Compensation Law on or about January 18, 2006 when Claimant was injured in the course and scope of his employment.

Employer was required to insure or self-insure by reason of § 287.280, RSMo 2000. West 160 Scrap and Salvage, L.L.C. had no insurance and was not authorized to self-insure. Section 287.220.5, RSMo

2000, provides that in those cases where an Employer has failed to insure or self-insure as required by § 287.280, RSMo 2000, the Second Injury Fund may cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of any injured employee in the employ of an uninsured employer. Such provision is applicable, and the Fund shall make the payment of \$26,289.70 for medical treatment.

The exhibits demonstrate that of the \$26,289.70 owed for medical treatment, \$3,033.00 was incurred in medical bills for skin grafts, hospital, and related care with St. John's Physicians and Clinics. That entity has filed a direct pay Medical Fee Dispute, and was present at the hearing to protect its interests. The Second Injury Fund shall pay directly to St. John's Physicians and Clinics \$3,033.00.

I see nothing in statute that precludes an award of the unpaid medical bills to Claimant rather than directly to the remaining health care providers. Thus, the remaining \$23,256.70 in incurred medical expenses shall be paid by the Second Injury Fund to Claimant.

Summary

Claimant is awarded 15.5 weeks of Permanent Partial Disability at the compensation rate of \$220.00 for a total of \$3,410.00.

Claimant is awarded reimbursement of medical bills in the total amount of \$26,289.70. Of this amount, \$3,033.00 shall be paid directly to St. John's Physicians and Clinics. The remaining \$23,256.70 shall be paid to Claimant.

Because West 160 Scrap and Salvage, L.L.C. was an employer subject to the Missouri Workers' Compensation Law and failed to insure as required by law, the Second Injury Fund is directed to make the payments for medical treatment as set forth in the preceding paragraph of this Award.

Randy Alberhasky shall have a lien in the amount of 25 percent of all amounts awarded for necessary and reasonable legal services provided to Claimant.

Date: March 5, 2008

Made by: /s/ Victorine Mahon
Victorine Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation

Joe Harris stated that C.J. Christianson, Sheldon Turner, and Donnie Coates did not work at the scrap yard five and one-half consecutive days, suggesting that such fact eliminated these workers from being counted as employees. Apparently, Harris had reference to § 287.020.6, RSMo 2000, which provision required individuals to be *employed* [not working] with an alleged employer at least five and one-half consecutive *work* days in order to be counted as an employee. *State v. Turner*, 952 S.W.2d 354, 360 (Mo. App., W.D. 1997). This provision was deleted from § 287.020.6 with the 2005 amendments to the Workers' Compensation Act. In any event, Harris' testimony in this regard is not credible in light of his own conflicting testimony and the

contrary testimony of other witnesses.