

**FINAL AWARD DENYING COMPENSATION**  
(After Mandate from the Missouri Court of Appeals  
for the Eastern District of Missouri)

Injury No.: 06-064603

Employee: Noneeka Massey

Employer: Marsha and Frank Spasser

Insurer: None

On July 13, 2010, the Missouri Court of Appeals for the Eastern District (Court) issued an opinion reversing the November 17, 2009, award and decision of the Labor and Industrial Relations Commission (Commission). *Massey v. Spasser*, ED94060, (Mo. App. E.D., July 13, 2010). By mandate dated September 23, 2010, the Court remanded this matter to the Commission for proceedings consistent with the Court's opinion. In particular, the Court ruled the Commission erred in awarding employee disability benefits and medical expenses.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record, we find that the administrative law judge's award finding that employee is a domestic servant and, therefore, excluded from workers' compensation coverage should be affirmed. As stated in the Court's opinion:

Black's Law Dictionary defines a domestic servant as, "a household servant." Black's Law Dictionary 501 (7<sup>th</sup> ed. 1999). A "servant" is defined as "a person who is employed by another to do work under the control and directions of the employer." [Employee] was employed by [Mr. and Mrs. Spasser] to take care of Mr. Spasser. She was formally interviewed by Mrs. Spasser. Mrs. Spasser required that [employee] be a CNA in order to be hired. After being hired, [employee] worked a set shift as designated by Mrs. Spasser and was paid by the Spassers. Clearly [employee] was under the control and directions of [Mr. and Mrs. Spasser]. Missouri Workers' Compensation law, strictly construed, was not intended to apply to work done in private homes to care for the members of private households."

*Id.* at \*5-6.

Under strict construction of § 287.090.1 RSMo, employee is a domestic servant and, therefore, exempt from workers' compensation coverage.

Pursuant to § 286.090 RSMo, we affirm the award and decision of the Administrative Law Judge John A. Tackes dated August 5, 2009. That award and decision is attached hereto and incorporated.

Given at Jefferson City, State of Missouri, this 15<sup>th</sup> day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee:	Noneeka Massey	Injury No.:	06-064603
Dependents:	N/A		Before the
Employer:	Marsha and Frank Spassesr		<b>Division of Workers'</b>
			<b>Compensation</b>
Additional Party:	None		Department of Labor and Industrial
			Relations of Missouri
Insurer:	None		Jefferson City, Missouri
Hearing Date:	May 14, 2009	Checked by:	JAT

### 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? **Yes**
3. Was there an accident or incident of occupational disease under the Law? **Yes**
4. Date of accident or onset of occupational disease: **May 7, 2006**
5. State location where accident occurred or occupational disease was contracted: **St. Louis County**
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? **Yes**
7. Did employer receive proper notice? **Yes**
8. Did accident or occupational disease arise out of and in the course of the employment? **Yes**
9. Was claim for compensation filed within time required by Law? **Yes**
10. Was employer insured by above insurer? **No**
11. Describe work employee was doing and how accident occurred or occupational disease contracted: **Employee injured her back while lifting a patient from one chair to another.**
12. Did accident or occupational disease cause death? **No**
13. Part(s) of body injured by accident or occupational disease: **Low back**
14. Nature and extent of any permanent disability: **None**
15. Compensation paid to-date for temporary disability: **None**
16. Value necessary medical aid paid to date by employer/insurer? **\$0.00**

Employee: Noneeka Massey

Injury No.: 06-064603

- 17. Value necessary medical aid not furnished by employer/insurer? **\$3,772.70**
- 18. Employee's average weekly wages: **\$600.00**
- 19. Weekly compensation rate: **\$400.00/\$365.08**
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$0.00
<b>0</b> weeks of temporary total disability (or temporary partial disability)	\$0.00
<b>0</b> weeks of permanent partial disability from Employer	
<b>0</b> weeks of disfigurement from Employer	
Permanent total disability benefits from Employer beginning <b>n/a</b> , for Claimant's lifetime	

22. Second Injury Fund liability: **No**

TOTAL: **\$0.00**

23. Future requirements awarded: **None**

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 % of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Matthew J. Sauter

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Noneeka Massey

Injury No.: 06-064603

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Marsha and Frank Spasser

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

Additional Party: None

Insurer: None

Hearing Date: May 14, 2009

Checked by: JAT

### PRELIMINARIES

The Matter of Noneeka Massey ("Claimant") and Marsha and Frank Spasser ("Employer") proceeded to final hearing on May 14, 2009 in the Saint Louis office of the Division of Workers' Compensation before Administrative Law Judge John A. Tackes. The Second Injury Fund is not a party in this Matter. Attorney Matthew J. Sauter represented the Claimant. Attorney Joseph Montecillo represented the Employer. The Employer is uninsured.

### STIPULATIONS

At the hearing the parties stipulated to the following:

1. Claimant's injury occurred May 7, 2006.
2. Claimant sustained 6% permanent partial disability of the low back.
3. Venue in the City of St. Louis is proper.

### ISSUES

The parties agreed that the following matters are in dispute:

1. Employment relationship
2. Notice
3. Accident
4. Medical Causation
5. Past Medical Expenses
6. Temporary Total Disability

### EXHIBITS

#### Claimant

- A. Christian Hospital emergency room (5/9/06)
- B. People's Health Clinic (5/19/06, 5/24/06)
- C. Gene Bell, D.C. (6/27/06-10/17/06)
- D. Dr. Robert Poetz report (3/17/09)
- E. Medical Expense Summary totaling \$3,772.70 with supporting bills
- F. Disability Certificates

- G. Deposition of Marsh Spasser (5/8/09)
- H. Missouri CNA Certification requirement

Employer

1. Deposition of Marsha Spasser

All offered exhibits were admitted into the record.

**FINDINGS OF FACT**

Based on the competent and substantial evidence I find the following:

*Work and Duties*

1. Claimant, Noneeka Massey, is presently a 36 year old resident of Florissant, Missouri. She currently works as a Certified Nurse Aide (“CNA”) for an employer other than the Employer of record in this matter. She obtained her CNA training at the North County Technical School in 1996. This three month program included training in charting, safety, preventive care, methods of handling and caring for the elderly, basic nursing skills, skin care, vital signs (temperature, pulse, blood pressure) and transfer techniques. She is certified as a CNA by the State of Missouri. Her certification included an examination and hours spent in practical on the job experience.
2. Frank and Marsha Spasser lived in a private, single family home in St. Louis County. Prior to working in the home of Frank and Marsha Spasser, Claimant worked seven years as a CNA at a skilled nursing facility. Marsha Spasser interviewed and hired Claimant in November 2004 to care for her husband at their home. Five other CNA’s were also hired by Marsha Spasser to provide 24 hour care for her home bound husband who is afflicted with a neurological condition (Parkinson Disease) making him unable to stand or walk. Mr. Spasser was hospitalized two times during Claimant’s employment. During these brief hospitalizations, Claimant worked her regular shift at the hospital providing the same care for Mr. Spasser that she provided while at the Spasser home.
3. Claimant worked for the Employer from November, 2004 until May 7, 2006. She was paid \$12.00 per hour for full time work five days per week. Ms. Spasser did not deduct any taxes or other amounts from Claimant’s remuneration. She was paid by check drawn on a personal bank account. All CNA’s working for the Spasser’s wore a uniform consisting of hospital scrubs.
4. All information regarding the day to day care of Frank Spasser was charted in a composition book provided by Employer. Data entered daily by each CNA included temperature, blood pressure, eating activities, sanitary activities, and general health. Claimant also provided preventative skin care, administered medication, and provided bathroom assistance. This information was recorded for periodic review by Frank Spasser’s doctor.

5. Claimant was not responsible for general housekeeping, shopping, cooking meals for the household, or laundry services. Claimant's sole responsibility was to care for Frank Spasser. Any and all household or housekeeping duties done by Claimant were directly related to his care. A separate housekeeper came to the home two times per month.

*Injury, Examination, and Treatment*

6. At 10:30 a.m. on May 7, 2006, about three and a half hours into her shift, Claimant was moving Mr. Spasser from one room to another using a wheelchair. While attempting to get him into his reclining chair, his knees buckled pulling the weight of his body down while Claimant was holding him. Claimant felt a sudden onset of pain in her back that grew worse with time during her shift. Claimant notified Marsha Spasser shortly after the injury occurred and let her know that she was leaving work early that day. The pain was in her lower back down to her tailbone making it difficult to sit. Claimant took the next two days off work and went to the People's Health Clinic. Marsha Spasser told her she should not return to work without a proper medical release. Claimant never returned to work for the Spasser's after May 7, 2006.
7. Claimant continued treatment for her back pain on her own by going to a chiropractic physician between June and October 2006. Within the first month of her injury, Claimant had difficulty with everyday living tasks such as making the bed, picking up things from the floor, and providing care for her family. She could not lift more than twenty pounds which prevented her from working as a CNA.
8. On May 9, 2006, Faquir Muhammad, M.D. evaluated Claimant at Christian Hospital Northeast for complaints of back pain. Claimant described the pain as an 8 out of 10 located in the bilateral lower back. She was released that day with directions to apply ice packs every few hours for the first 2-3 days and to use heat thereafter. Over the counter medication (Ibuprofen or Aleve) was prescribed as needed to reduce pain and inflammation. On May 19, 2006 Claimant was seen for back pain at the People's Health Center where she was diagnosed with a lumbar strain.
9. On June 27, 2006 Claimant was seen by Gene D. Bell, D.C. of Bell Chiropractic Center for lumbar disc disorder. Physical therapy and massage were recommended for her hip and low back. From June 2, 2006 to October 17, 2006 she was seen thirteen times for physical therapy. Her condition was described as better at the Oct. 17, 2006. Dr. Bell held Claimant off work through September 1, 2006.
10. Claimant returned to work in September, 2007 as a CNA at a skilled nursing facility. She worked the night shift at the new position because it required less standing and lifting. As of the date of the hearing Claimant still complains of trouble standing or sitting for long periods of time. She uses greater caution when working as a CNA.

*Medical Opinions and Evaluation*

11. On February 10, 2009 Robert P. Poetz, an Osteopathic Physician and Surgeon, evaluated Claimant for occasional lower back pain. Measurements of her lumbar spine showed that Claimant has less than full range of motion. Normal flexion is 60 degrees but Claimant had only 45. Normal extension, right and left lateral flexion, are all 25 degrees but Claimant rated 15, 20, and 20 respectively. (Exhibit D) Dr. Poetz opined the lumbar strain was caused by the May 7, 2006 accident. He recommended various treatments along with an MRI of the lumbar spine if symptoms persist. Based on a reasonable degree of medical certainty, the results of his evaluation as well as the patient's verbal history and review of the medical records, Dr. Poetz opined that the May 7, 2006 injury is the substantial and prevailing factor causing Claimant's disabilities.

*Medical Bills*

12. As a result of her efforts to cure and relieve the effects of her injuries, Claimant has accumulated medical bills. These are summarized as follows:

Summary of Medical Expenses: (Exhibit E)

Christian Hospital (May 9, 2006)	\$ 706.70
North County Emergency Physicians (May 9, 2006)	\$ 194.00
People's Health Clinic (sic) (May 14 to May 24, 2006)	\$ 171.00
Dr. Bell (June 27 to October 17, 2006)	<u>\$2,701.00</u>
<b>TOTAL</b>	<b>\$3,772.70</b>

**RULINGS OF LAW**

Based on a comprehensive review of the record, the facts found above, and the law of the State of Missouri, I make the following rulings of law:

Under Workers' Compensation law the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial care, ambulance, and medicines as may reasonably be required to cure and relieve the effects of the injury. §287.140 RSMo.

An "employer" as used in this chapter includes every person using the service of another for pay. §287.030.1(1) Such employer must have five or more employees to be deemed an employer for purposes of this chapter. §287.030.1(3). Certain employees, however, are specifically excluded from coverage by the Law. Those employees not covered and specifically exempt include Farm laborers; *Domestic servants employed in a private home*; Family chauffeurs; or occasional labor performed for and related to a private household. §287.090(1). Emphasis mine.

The question presented here is whether or not a full time CNA is a domestic servant employed in a private home and therefore exempt from coverage. Claimant's duties related directly to the care of one person. This person along with his wife owned and resided at the home. Claimant was not hired to perform housekeeping or any general household duties typically provided by a

domestic servant such as cleaning, cooking, and the laundry. She was hired for her particular ability to care for and provide nursing skill to the patient.

Each case must be decided on its particular and unique set of facts. There are no Missouri cases on point regarding whether a CNA in a private home is a “domestic servant”. The provisions of this chapter must be strictly construed. §287.800.1 RSMo. Black’s Law Dictionary defines domestic servant as a person hired or employed primarily for the performance of household duties and chores, the maintenance of the home, and the care, comfort and convenience of members of the household. (Black’s fifth ed. 1979)

Case law from other jurisdictions is informative but not controlling or particularly persuasive. In California a person hired to care for an elderly woman full time in her home was not exempt from the California Workers’ Compensation Act in part because she “did not perform, and was not expected to perform any services connected with the general operation and maintenance of the household or house...” and was therefore not engaged in household domestic service. McCallister v. Workers’ Compensation Appeals Board, 61 Cal.App.3d 524, 132 Cal.Rptr. 527 (Ca.App. 1976). Inherent in this definition of household domestic servant in California is the limitation to those who perform or are expected to perform general operation and maintenance services of the home itself without regard to those living in the home.

The California statute does specifically bring within the definition of household domestic service those employees who provide part-time care and supervision of children in a private residence. (See Lab.Code §3358.5). A footnote to the exemption brings within the coverage of the California Act any person engaged in household domestic service who is employed by one employer for over 52 hours per week. There is no such specific language in Missouri which strictly construed would bring Claimant under the coverage by the Missouri law.

In a similar case from Pennsylvania, a person was hired to care for an invalid woman in that woman’s home. Viola v. Workers’ Compensation Appeals Board (Welch), 549 A.2d. 1367 (Penn. 1988). In Viola the worker administered medication, fed, bathed, and helped the woman get in and out of bed. While preparing a meal for the woman (and presumably not the other members of the household as well) the worker cut her finger. The Pennsylvania court found that the worker was not a domestic worker because she was hired to provide duties solely to the unique needs of the elderly woman rather than the general needs of the household. Again, in Missouri the statute does not indicate that domestic service must be directed generally for the entire home or if it can be limited to the care of one person. It can be argued however that the care provided to Frank Spasser provided benefit to all in the home and therefore the home itself.

The daily operation of a residence or private home is distinct from the operation of a business enterprise. Work such as bartending, gardening, and laundry can be done at a home or a business. Why then as a matter of public policy does the law exempt domestic service from coverage? A home or private residence is not part of the general labor market or industry. The Spasser’s were not operating a skilled nursing center out of their home. Claimant was employed in a home, by a home owner, for the care of a home occupant. Whether she was preparing food, performing laundry services, or cleaning the house itself makes the work no less domestic. Missouri Workers’ Compensation law was not intended to apply to domestic work done in private homes. Some work done in private homes is specifically mentioned and excluded

(chauffeur and occasional laborers). No particular job however is specifically included in the coverage of the Act. If the legislature had wanted to include specific classes of workers or a greater number of exemptions under §287.190 they could have done so.

The number of CNA's utilized by Marsha Spasser for the care of her husband only becomes significant if the work is not found to be domestic service. If one CNA is a domestic servant under the Law then the rest are exempt as well. The Courts in McCallister and Viola both focus on the nature of the work as atypical of usual domestic servant work, and the fact that the work was provided or directed toward a particular member of the household rather than the household generally. Domestic service by statute in Missouri is not so narrowly defined. The distinguishing factor appears to be not what was done (duties) but where it was done (a private residence).

Ms. Massey, was hired and employed primarily for the comfort and convenience of a member of the household. The two occasions on which she performed her service for the Spasser's in the hospital do not destroy the basic character of the purpose for which she was hired, i.e. to provide in home care to a home bound patient. The work was primarily done at the home. This does not mean any cannot reasonably be construed to mean that any business which employs CNA's and sends them to a residence for private duty care is exempt from the laws because that person is now engaged in private duty work.

Skilled nursing centers and in home private duty nursing enterprises that employ CNA's in a private residence are not exempt. Those workers are not employed by a home or private residence; they are employed by a business. This is the very distinction the law intends to draw between private homes and companies operating in the labor and industrial marketplace. Domestic service done at a private home for the house of household members is not intended to be covered by Workers' Compensation Law.

### CONCLUSION

Claimant's employment by Marsha Spasser for the care of Frank Spasser in their private residence is domestic service exempt from coverage. Having found that Claimant is a domestic servant and therefore excluded from Workers' Compensation coverage, all other issues become moot.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

JOHN A. TACKES  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*

