

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

Injury No. 10-012313

Employee: Timothy McDaniel
Employer: Furniture 4 Less, LLC (Settled)
Insurer: Hartford Casualty Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This 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, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Employee's application for review is allowed

On October 8, 2015, the administrative law judge issued an award denying compensation to employee from the Second Injury Fund. On October 21, 2015, employee filed a timely application for review with the Commission.

On October 22, 2015, the Commission received the Second Injury Fund's "Motion to Dismiss Employee's Application for Review and in Opposition to Employee's Motion to Submit Additional Evidence." Therein, the Second Injury Fund argues that employee's application for review fails to comply with 8 CSR 20-3.030(3)(A), which provides, in relevant part:

An applicant for review of any final award, order or decision of the administrative law judge shall state specifically in the application the reason the applicant believes the findings and conclusions of the administrative law judge on the controlling issues are not properly supported. It shall not be sufficient merely to state that the decision of the administrative law judge on any particular issue is not supported by competent and substantial evidence.

Employee's application for review states, in its entirety, as follows:

Pursuant to 8 CSR 20-3.030(2) Claimant wishes to submit additional evidence to the commission. (See attached Motion to Submit Additional Evidence)[.]

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The attached Motion to Submit Additional Evidence states, in its entirety, as follows:

1. On October 2, 2015, Claimant presented evidence in his claim against the Second Injury Fund for 2nd job wage loss.
2. At the time the request for final hearing was made the only issue to be decided by agreement of the parties was “2nd job wage loss”. (See attached Exhibit A)
3. Neither party requested that the statutory requirements to fulfill the definition of “employer” was an issue for final hearing.
4. In the Judge’s award dated October 8, 2015, acknowledges [sic] in paragraph 6 that Claimant was employed by Pro Foods.
5. Claimant was not aware that the statutory requirements to fulfill the definition of “employer” was an issue in dispute, therefore, Claimant submitted no evidence on that issue.
6. Claimant wishes to submit additional evidence that employer has five (5) or more employees and can do so through affidavit of the Claimant and/or testimony.
7. Claimant will testify through affidavit and/or testimony that the employer has five (5) or more employees.

WHEREFORE Claimant respectfully requests the Labor and Industrial Relations Commission to allow additional evidence in this matter.

Employee’s application refers the reader to the attached Motion to Submit Additional Evidence. As a result, we consider the Motion to Submit Additional Evidence as incorporated into the application for review by reference. The Motion to Submit Additional Evidence suggests the administrative law judge erred by reaching an issue the parties did not place in dispute.

Cases should be heard and decided on their merits. To that end, statutes and rules relating to appeals, being remedial, are to be construed liberally in favor of allowing appeals to proceed. Accordingly we review claimant's application for review in light of a liberal construction of 8 CSR 20-3.030(3)(A).

Isgriggs v. Pacer Indus., 869 S.W.2d 295, 296 (Mo. App. 1994).

Consistent with the foregoing judicial admonition, we liberally construe the language of 8 CSR 20-3.030(3)(A) in favor of allowing appeals to proceed on their merits.¹ Although

¹ We acknowledge the “strict construction” mandate that, in 2005, replaced the prior “liberal construction” rule of § 287.800.1 RSMo. However, § 287.800.1 applies, by its own terms, to the language of Chapter 287 itself, and not to the Commission’s rules.

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employee's application for review and incorporated Motion to Submit Additional Evidence certainly could have more clearly identified employee's claim of error on the part of the administrative law judge, we conclude the application for review has minimally satisfied the requirements of 8 CSR 20-3.030(3)(A). Accordingly, the Second Injury Fund's Motion to Dismiss Employee's Application for Review is hereby denied.

Employee's motion to submit additional evidence is denied and the award is affirmed

Our rule 8 CSR 20-3.030(2) pertaining to the submission of additional evidence provides, as follows:

(A) After an application for review has been filed with the commission, any interested party may file a motion to submit additional evidence to the commission. The hearing of additional evidence by the commission shall not be granted except upon the ground of newly discovered evidence which with reasonable diligence could not have been produced at the hearing before the administrative law judge. The motion to submit additional evidence shall set out specifically and in detail--

1. The nature and substance of the newly discovered evidence;
2. Names of witnesses to be produced;
3. Nature of the exhibits to be introduced;
4. Full and accurate statement of the reason the testimony or exhibits reasonably could not have been discovered or produced at the hearing before the administrative law judge;
5. Newly discovered medical evidence shall be supported by a medical report signed by the doctor and attached to the petition, shall contain a synopsis of the doctor's opinion, basis for the opinion and the reason for not submitting same at the hearing before the administrative law judge; and
6. Tender of merely cumulative evidence or additional medical examinations does not constitute a valid ground for the admission of additional evidence by the commission.

(B) The commission shall consider the motion to submit additional evidence and any answer of opposing parties without oral argument of the parties and enter an order either granting or denying the motion. If the motion is granted, the opposing party(ies) shall be permitted to present rebuttal evidence. As a matter of policy, the commission is opposed to the submission of additional evidence except where it furthers the interests of justice. Therefore, all available evidence shall be introduced at the hearing before the administrative law judge.

Employee desires to submit additional evidence to show that Pro Foods (the "second" alleged employer in this second job wage loss claim) had five employees and was thus an

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“employer” for purposes of § 287.030.1 RSMo. As support for this request, employee suggests that he was surprised to face a dispute from the Second Injury Fund as to the issue whether Pro Foods was an “employer.”

The record created at the hearing before the administrative law judge sets forth the parties’ stipulations as well as the disputed issues the parties asked the administrative law judge to resolve:

Judge Fischer: It’s my understanding that on or about February the 18th of 2010, the Claimant, Timothy McDaniel, was in the employment of Furniture for Less, LLC.² It’s my understanding that Mr. McDaniel sustained an injury by accident and that the accident arose out of and in the course of his employment. It’s also my understanding that all of the facts relevant to Mr. McDaniel’s relationship with the employer/insurer are resolved in his favor in this pending claim against the Second Injury Fund. ... It’s my understanding that the only issue to be resolved as a result of today’s hearing is the liability of the Second Injury Fund for second job wage loss benefits. ... Mr. Lyskowski,³ do you concur with what I’ve indicated for the record?

Mr. Lyskowski: I do, Judge, with the addition that Mr. McDaniel was also of the employ of Pro Foods at the time of the injury.

Judge Fischer: Okay. And I’m assuming that there will be testimony taken with that?

Mr. Lyskowski: Correct, Judge.

Judge Fischer: Mr. Herman, do you agree?

Mr. Herman:⁴ Yes, Judge.

Transcript, pages 4-6.

Viewed in the most generous light in the context of employee’s Motion to Submit Additional Evidence, the foregoing is susceptible to a reading that employee’s counsel attempted to add an additional stipulation: that employee was “in the employ” of Pro Foods. The record does reveal some ambiguity as to whether the administrative law judge considered this an additional stipulation or an additional disputed issue; it would appear that she understood the latter, because of her expectation that the parties would provide testimony on that issue.

² The named, or “first” employer herein.

³ Employee’s counsel.

⁴ The Second Injury Fund’s counsel.

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But even if we assume that the above exchange reflects a legitimate misunderstanding among the parties and the administrative law judge as to the scope of the stipulations and disputed issues, we are not persuaded that this circumstance warrants the taking of any additional evidence in this matter. This is because a stipulation that employee was “in the employ” of Pro Foods is not the same as a stipulation that Pro Foods was an “employer” for purposes of § 287.030.1, and when the parties placed at issue the question of “the liability of the Second Injury Fund for second job wage loss benefits,” the issue whether Pro Foods was an “employer” unquestionably became a necessary element of employee’s case.

This is made clear in the case of *Davidson v. Mo. State Treasurer*, 327 S.W.3d 583, 588 (Mo. App. 2010), where the court declared that proof the second entity is an “employer” for purposes of § 287.030.1 is a “necessary element” of any claim under § 287.220.9 RSMo for second job wage loss benefits. Following *Davidson*, employee’s (alleged) lack of awareness that he needed to prove that Pro Foods was an “employer” is insufficient to convert any evidence so demonstrating into “newly discovered evidence” for purposes of Commission rule 8 CSR 20-3.030(2).

Employee’s Motion to Submit Additional Evidence is hereby denied. Because the administrative law judge correctly applied the law consistent with the *Davidson* case, we defer to her findings and conclusions and hereby adopt them as our own.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued October 8, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 4th day of February 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Timothy McDaniel

Injury No.: 10-012313

Dependents: N/A

Employer: Furniture 4 Less, LLC (previously settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri
Custodian of the Second Injury Fund

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

Insurer: N/A

Hearing Date: September 28, 2015

Checked by: HDF/scb

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: February 18, 2010
5. State location where accident occurred or occupational disease was contracted: Cole County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See Award
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: Left knee
14. Nature and extent of any permanent disability: 15% left knee
15. Compensation paid to-date for temporary disability: \$2,112.32
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? - 0 -
- 18. Employee's average weekly wages: ----
- 19. Weekly compensation rate: \$220.00 at Furniture 4 Less
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: N/A
- 22. Second Injury Fund liability: None
- 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.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy McDaniel

Injury No: 10-012313

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Furniture 4 Less, LLC (previously settled)

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

Additional Party: N/A

Insurer: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on September 28, 2015. Memoranda were submitted by October 2, 2015.

The parties stipulated that on or about February 18, 2010, the claimant, Timothy McDaniel, was in the employment of Furniture 4 Less, LLC. The parties stipulated that all facts relevant to Mr. McDaniel's relationship to his employer and its workers' compensation carrier are resolved in Mr. McDaniel's favor in his claim against the Second Injury Fund. The compensation rate is \$220.00 a week for all benefits. Temporary total disability benefits have been paid in the amount of \$2112.32, reflecting 9 and 4/7 weeks of benefits.

The issue to be resolved by hearing is the liability of the Treasurer of the State of Missouri as Custodian of the Second Injury Fund for second job wage loss benefits.

FACTS

The claimant, Timothy McDaniel, was employed by Furniture 4 Less, LLC, as a driver and furniture delivery person and by Pro Foods, driving a 26-foot straight truck and delivering food, in February of 2010. Mr. McDaniel said that the majority of his work for Pro Foods was driving. On February 18, 2010, Mr. McDaniel was delivering furniture for Furniture 4 Less, LLC, when he slipped, tearing his left ACL joint. Mr. McDaniel had immediate medical treatment followed by surgery on his left knee by Dr. Snyder. Mr. McDaniel testified that he was taken off work by both Furniture 4 Less and his second employer, Pro Foods, after the injury. Mr. McDaniel testified that the truck he drove for Pro Foods used a clutch mechanism operated by his left leg and that he could not use his left leg while recuperating from the February 18, 2010 accident and surgery. Mr. McDaniel referenced the stipulation for settlement of his workers' compensation claim against Furniture 4 Less, LLC, and testified that he was off work for 9 and 4/7 weeks following his accident through April 26, 2010.

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Mr. McDaniel worked about 44 hours a week for Pro Foods earning \$13.50 an hour.

There was some testimony that Mr. McDaniel worked at less than full duty when he initially returned to work at Pro Foods on April 26, 2010; however, exactly how long he was at less than full duty and how many hours of work were missed was not fully described.

Dr. Snyder's records indicate that he performed arthroscopic left knee surgery to repair the ACL on March 18, 2010. On April 16, 2010, Dr. Snyder returned Mr. McDaniel to light duty work with a prohibition against crawling, stooping, kneeling, or squatting and lifting more than 30 pounds. On May 5, 2010, Mr. McDaniel was allowed to return to work driving a clutch and the prohibitions were modified to include crawling and lifting more than 50 pounds (Dr. Snyder's record) or 75 pounds (Dr. Snyder's release).

APPLICABLE LAW

RSMo cum. supp. 2005 Section 287.220.9. Any employee who at the time a compensable work-related injury is sustained is employed by more than one employer, the employer for whom the employee was working when the injury was sustained shall be responsible for wage loss benefits applicable only to the earnings in that employer's employment and the injured employee shall be entitled to file a claim against the second injury fund for any additional wage loss benefits attributed to loss of earnings from the employment or employments where the injury did not occur, up to the maximum weekly benefit less those benefits paid by the employer in whose employment the employee sustained the injury. The employee shall be entitled to a total benefit based on the total average weekly wage of such employee computed according to subsection 8 of section 287.250. The employee shall not be entitled to a greater rate of compensation than allowed by law on the date of the injury. The employer for whom the employee was working where the injury was sustained shall be responsible for all medical costs incurred in regard to that injury.

RSMo Section 287.030.1. The word "employer" as used in this chapter shall be construed to mean:

(1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;

(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government;

(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of this chapter as provided in subsection 2 of section [287.090](#), except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an

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employer for the purposes of this chapter if they have one or more employees. An employee who is a member of the employer's family within the third degree of affinity or consanguinity shall be counted in determining the total number of employees of such employer.

2. Any reference to the employer shall also include his or her insurer or group self-insurer.

AWARD

The claimant, Timothy McDaniel, has failed to sustain his burden of proof that he is entitled to benefits from the Second Injury Fund as the result of his loss of wages from his secondary employer due to his work related accident and injury with his primary employer. The statute at issue refers to benefits for an employee employed by more than one "employer." An "employer" must have five or more employees, elect to be subject to the provisions of Chapter 287, or be in the construction industry and have one or more employees. Sec 287.030 RSMo. Cum. Supp. 2005. Mr. McDaniel offered no testimony indicating that Pro Foods had five or more employees, that it had elected to come under the provisions of Chapter 287, or that it is in the construction industry. Thus, there is no evidence that Pro Foods is an employer as defined by Chapter 287 and that Mr. McDaniel is entitled to benefits from the Second Injury Fund as the result of his secondary employment with Pro Foods.

Made by: _____

HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation