

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

Injury No.: 04-044941

Employee: Steven Meadows

Employer: 1) Havens Erectors, Inc.
2) The Austin Company

Insurer: 1) Self-Insured/The Missouri Private Sector Individual
Self-Insurers Guaranty Corporation
2) St. Paul Travelers

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

Date of Accident: May 3, 2004

Place and County of Accident: Kansas City, Jackson 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. We heard the oral arguments of the parties. We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the April 21, 2006, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Havens Erectors' Answer to Claim for Compensation was Timely

We take administrative notice of the pleadings as they appear in the Division of Workers' Compensation (Division) file. On October 12, 2004, employee filed his original claim for compensation. On October 21, 2004, the Division acknowledged the claim. On November 19, 2004, Haven's Erectors, Inc., (Erectors), filed a timely Answer to Claim for Compensation. On November 22, 2004, Erectors filed an Amended Answer to Claim for Compensation to correct the alleged accident date.

The administrative law judge erroneously found that Erectors filed an untimely Answer on November 22, 2004. Based upon that erroneous finding, the administrative law judge erroneously concluded that certain statements of fact were deemed admitted by Erectors pursuant to 8 CSR 50-2.010(8)(B). Our findings and conclusions regarding Erectors' liability are based upon the record developed at the hearing.

The Award of Costs Is Not Authorized by Statute

Relying on § 287.560 RSMo, the administrative law judge awarded costs from Erectors to employee in the amount of \$1,083.73. The administrative law judge wrote:

As noted, after filing its Answer, Havens did not defend the case or appear at the hearing. Havens not only failed to defend this case without reasonable grounds, Havens failed to defend it without any grounds. Therefore, I find it liable for costs under §287.560 RSMo.

The administrative law judge misapplied § 287.560 RSMo, which reads, in relevant part:

[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The administrative law judge concluded that Erectors did not defend the claim. Under the statute, costs may only be assessed if a claim is defended without reasonable ground. That is, costs may be assessed against a party who advances and persists with an unreasonable defense. The plain language of the statute does not authorize an award of cost where a party fails to defend a claim. We reverse the award of costs.

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.

The award and decision of Administrative Law Judge R. Carl Mueller, Jr., issued April 21, 2006, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 17th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

ORDER
CORRECTING AWARD

Injury No.: 04-044941

Employee: Steven Meadows

Employers: 1) Havens Erectors, Inc.
2) The Austin Company

Insurers: 1) Self-Insured/Missouri Private Sector Guaranty Corp.
2) St. Paul Travelers

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

Date of Accident: May 3, 2004

On January 17, 2007, the Labor and Industrial Relations Commission (Commission) issued a Final Award Allowing Compensation (Modifying Award and Decision of Administrative Law Judge).

The second sentence of the first paragraph of the Final Award incorrectly stated the Commission heard oral argument of the parties. That sentence is corrected to read:

The Commission reviewed the briefs filed by the parties.

Otherwise, the Final Award issued January 17, 2007, remains in full force and effect as originally written.

Given at Jefferson City, State of Missouri, this 25th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Steven Meadows Injury No: 04-044941

Dependents: N/A

Employer: Havens Erectors, Inc.
Insurer: Self-Insured

Additional Parties: The Austin Company (Alleged Statutory Employer)
Insurer: St. Paul Travelers

State Treasurer as Custodian of the Second Injury Fund

The Missouri Private Sector Individual Self-Insurers Guaranty Corporation

Hearing Dates: March 3, 2006 and January 10, 2006

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: May 3, 2004.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: The employee slipped while walking on a steel beam and injured his right shoulder.
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 upper extremity at the 232-week level.
14. Nature and extent of any permanent disability: Twenty-five percent (25%) disability of the right upper extremity at the 232-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? \$13,656.00
18. Employee's average weekly wages: \$980.00
19. Weekly compensation rate: \$653.33 for temporary total and \$347.05 for permanent partial disability.
20. Method wages computation: §287.250.1 (4).

COMPENSATION PAYABLE

21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred..... \$13,656.00

Temporary Disability

20 weeks (6/30/2004-11/17/2004)..... \$13,066.60

Permanent Partial Disability

25% disability at 232-week level (.25 x 232 weeks) x \$347.05 \$20,128.90

Costs Pursuant to §287.560..... \$1,083.73

Total Award:..... \$47,935.23

22. Second Injury Fund liability: None. The Claimant and the Second Injury Fund agreed to resolve the Fund Claim at a future proceeding.

23. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a twenty-four percent (24%) lien of the total of reimbursed medical expenses, temporary total disability and permanent partial disability for a fee totaling \$11,244.36 in favor of Keith Yarwood of Edelman and Thompson, attorney, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1 together with \$1,083.73 in costs pursuant to §287.560.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Steven Meadows Injury No: 04-044941

Dependents: N/A

Employer: Havens Erectors, Inc.
Insurer: Self-Insured

Additional Parties: The Austin Company (Alleged Statutory Employer)
Insurer: St. Paul Travelers

State Treasurer as Custodian of the Second Injury Fund

The Missouri Private Sector Individual Self-Insurers Guaranty Corporation

Hearing Dates: March 3, 2006 and January 10, 2006 Checked by: RCM/rcm

On January 10, 2006, the employee, Steven Meadows, and The Austin Company ("Austin") appeared for a final hearing. Mr. Meadows appeared in person and with counsel, Keith Yarwood. Austin appeared through its attorney, Charles R. Brown. The Second Injury Fund and the employee agreed to resolve the Fund claim at a future proceeding, therefore counsel for Fund did not appear.

Although both Havens Erectors., Inc. ("Havens") and the Missouri Private Sector Individual Self-Insurers Guaranty Corporation ("Guaranty Corporation") received notice of the January 10, 2006 hearing, neither appeared. The Guaranty Corporation entered its appearance in this case on November 19, 2004 and has been notified - along with Havens - of all proceedings. Both parties, on February 10, 2006, filed a "Motion for Stay of Proceedings" alleging that the Division lacked jurisdiction to conduct the hearing which, otherwise, had been completed a month earlier. With the consent of all parties (including the Employee and Austin), issuance of this award was delayed until a hearing on the Motion could be held.

The Motion hearing was held on March 3, 2005 with all parties present. Counsel for the Guaranty Corporation asserted that the Division was without jurisdiction to proceed in this matter because the "Claimant has failed to make a timely claim in a court of competent jurisdiction over the delinquency or bankruptcy of Havens Erectors as required by Section 287.865(5)." Motion at ¶ 4. In addition, the Guaranty Corporation asserted that it had the authority to declare Havens insolvent pursuant to §287.877 (Motion at ¶ 8) and that all proceedings would be automatically stayed for "up to three months or for such additional period from the date of an order of liquidation

. . . by a court of competent jurisdiction . . . “ (Motion at ¶ 7).

However, I note that:

1. No court of competent jurisdiction has declared Havens *Erectors* insolvent. Havens Erectors is a subsidiary of Havens Steel, and only the latter has filed bankruptcy.
2. §287.877.1 states only that the Guaranty Corporation may determine “by majority vote that any member employer *may* be insolvent . . .” not determine that a member *is* insolvent. The Legislature recently amended Missouri’s Workers’ Compensation Law (“MWCL”) adding the mandate that “Administrative law judges . . . the labor and industrial relations commission . . . and any reviewing courts shall construe the provisions of this chapter strictly.” §287.280.1, RSMo. (2005). Strictly speaking, §287.877.1 does not empower the Guaranty Corporation to declare a member insolvent. The Guaranty Corporation’s function, instead, is to “take the necessary actions to protect against the insolvency of a member of the corporation.” §287.870.2.
3. Even if the Guaranty Corporation did have the authority to declare a member employer insolvent, it notes that it found Havens to be insolvent on November 15, 2005 “well less than 90 days prior to the date of Hearing.” (Motion at ¶ 8). However, the March 3, 2005 hearing on the Motion was well more than 90 days after the November 15, 2005 insolvency. A 90-day automatic stay would have expired on February 13, 2006. The Guaranty Corporation had notice of the January 10, 2006 hearing and appeared before the Division on March 3, 2006. It cannot now argue that it did not have the opportunity to defend this claim or inform the Claimant of a claims procedure - either before or after the expiration of 90 days following Havens’ insolvency.
4. The Western District Court of Appeals ruled on March 21, 2006 in a case involving jurisdictional issues and the Guaranty Corporation in Tague v. Missouri Private Sector Individual Self-Insurers Guar. Corp. --- S.W.3d ----, 2006 WL 694378 (Mo.App. W.D.). The underlying premise in Tague is that a court of competent jurisdiction (the U.S. Bankruptcy Court) is adjudicating a self-insured’s insolvency. Again, in Mr. Meadows’ case, Havens has not filed bankruptcy and, therefore, there is no court of competent jurisdiction in which Meadows could file a proof of claim. Notwithstanding that fact, Mr. Meadows did file a proof of claim in the Havens Steel bankruptcy case on October 22, 2004. *See*, “Suggestions in Opposition to Havens Erectors’ Motion for Stay of Proceedings” at Exhibit A.. I note this to highlight the great effort Mr. Meadows has expended in trying to secure benefits for his workers’ compensation injury.
5. The Division already had transferred Havens’ security proceeds (Ex. 1) to the Guaranty Corporation before the January 10, 2006 hearing. (Ex. A). The Guaranty Corporation had notice of the January 10, 2006 hearing and appeared with counsel on March 3, 2006. Yet, the record is devoid of any direction on its part to Mr. Meadows on how to secure benefits for his injury.

I overrule the Motion and find that until Havens’ insolvency is adjudicated in a court of competent jurisdiction the Division retains jurisdiction to hear this case.

The primary issue the Employee and Austin requested the Division to determine was whether Austin was liable to provide Mr. Meadows with benefits as a statutory employer. I find that because Havens was insured, Austin was not required to provide Mr. Meadows with any compensation. However, I find Havens and the Guaranty Corporation liable and order payment to Mr. Meadows compensation and costs together totaling \$47,935.23.

STIPULATIONS

Mr. Meadows and Austin stipulated that:

1. On May 3, 2004, Austin was the general contractor for the construction project for which Havens employed Mr. Meadows;
2. On May 3, 2004, Havens was self insured;
3. On May 3, 2004, Austin was insured by St. Paul Travelers;

4. The Division acknowledged Mr. Meadows' claim on October 21, 2004; Havens filed its answer on November 22, 2004, two days late. In addition, Austin did not answer the claim until October 6, 2005;
5. On May 3, 2004, Mr. Meadows' wage was sufficient to result in the maximum weekly compensation rate of \$347.05 for permanent partial disability compensation;
6. Mr. Meadows does not seek additional medical treatment; and,
7. If Austin is found to be liable, the parties stipulate that claimant's permanent disability is twenty percent (20%) of the right upper extremity at the 232-week level for compensation totaling \$16,103.12. If Austin is not liable, there is no such stipulation.

ISSUES

The Employee and Austin requested the Division to determine:

1. What is the employee's average weekly wage and TTD rate?
2. Whether Mr. Meadows is entitled to TTD benefits from June 30, 2004 through November 17, 2004 (20 weeks)?
3. Whether \$13,656.00 in medical expenses must be reimbursed to Mr. Meadows?
4. Whether Austin is a statutory employer of Mr. Meadows?
5. Whether compliance with §287.040.4 relieves Austin from any liability?
6. If Austin is not liable for Mr. Meadows' benefits, then he requests that the nature and extent of disability be determined.
7. Whether Havens must reimburse to Mr. Meadows the costs of this proceeding for defending the claim without reasonable grounds pursuant to §287.560? And,
8. Whether Havens must reimburse to Austin the cost of this proceeding for defending the claim without reasonable grounds?

FINDINGS

Mr. Meadows testified on his own behalf and presented the following exhibits:

Exhibit A – Letter of Patricia Secrest, dated January 4, 2006

Exhibit B – Medical Records

Exhibit C – Letter of Keith Yarwood, dated October 7, 2004

Exhibit D – Medical Bills

Counsel for Austin objected that: there was no proper foundation laid for the admission of Exhibit B; that Exhibit C was hearsay; and, that Exhibit D was not submitted pursuant to the business record statute and that no proper foundation was laid as to the reasonableness of the charges in the exhibit. All objections were overruled and each exhibit was admitted into evidence.

Although Austin did not call any witnesses it presented two exhibits, Havens Erectors Certified Insurance Records (Exhibit 1) and the rating report of Allen Parmet, M.D., dated November 4, 2005 (Exhibit 3). Exhibit 2,

purportedly a wage statement, was not admitted as there was no proper foundation for its admission and it was not a certified business record.

Based on the above exhibits and the testimony of Mr. Meadows, I make the following findings. Mr. Meadows is a single, 53-year-old man who lives in Kansas City, Missouri. Havens employed him as a steel worker for approximately a week before he injured himself on May 3, 2004 while working on the Kansas City Star Building in downtown Kansas City, Missouri. He lost his balance while walking across a joist. As he was falling, he attempted to grab the beam to catch himself causing a dislocation of his right shoulder. His supervisor sent him to Truman Medical Center for an x-ray which revealed no fracture. However, the Emergency room doctor diagnosed him with a medial anterior dislocation of the humeral relative to the glenoid.

Several weeks later, Havens sent Mr. Meadows to Dr. Steve Smith of Northland Bone and Joint. A June 30, 2004 MRI revealed a possible bicep tendon dislocation, SLAP lesion and a Bankart lesion.

On August 5, 2004, Dr. Smith performed a right shoulder arthroscopy with a superior labral debridement, an anterior capsule labral repair and arthroscopic surgery.

Although Dr. Smith recommended therapy, Havens failed to provide the required treatment. Mr. Meadows sought physical therapy on his own under the direction of Dr. Smith at Heartland Therapy Center from September 7, 2004 through November 16, 2004.

Dr. Smith allowed Mr. Meadows to return to work without restrictions on November 17, 2004. Dr. Smith completely released Mr. Meadows from treatment on December 28, 2004.

From the date of injury on May 3, 2004 through June 29, 2004 Havens provided Mr. Meadows with accommodated work. However, Mr. Meadows was laid off on June 30, 2004 and was provided no accommodated work after that date. Mr. Meadows did not receive any temporary total disability payment nor did he receive any unemployment compensation nor did he find work within his restrictions on his own.

Havens was a sub-contractor for Austin and hired Mr. Meadows to work as a steel worker at a rate of \$24.50 per hour. Havens promised Mr. Meadows at least forty (40) hours a week in compensation.

RULINGS

Although not specifically stipulated to or enumerated by the parties as an issue, I find that Mr. Meadows was an employee of Havens working subject to the MWCL on May 3, 2004 when he sustained in injury arising out of and in the course and scope of his employment with Havens. In addition, I find that he immediately notified his supervisor of his injury. Although these matters were deemed admitted in that neither Havens nor Austin filed a timely answer, they also are supported by the evidence and testimony of Mr. Meadows. *Lumbard-Bock v. Winchell's Donut Shop*, 939 S.W.2d 456 (Mo. App. W.D. 1996).

The first stated issue regards a determination of Mr. Meadows' average weekly wage and temporary total disability ("TTD") rate.

Section 287.250.1(5) RSMo. (2004) states that if an employee has been employed for less than two calendar weeks immediately preceding the injury, the Division shall look to the prevailing wage for similar

employment unless the employer agrees to a certain hourly wage and the number of hours worked.

Section 287.250.4 RSMo (2004) gives the division the authority to craft its own method of determining the average weekly wage if it cannot be fairly determined by other methods described in the statute.

Havens hired Mr. Meadows less than two weeks before his injury. Austin agreed that Mr. Meadows was hired at an hourly rate of \$24.50. There was no agreement on the number of hours per week Mr. Meadows was hired to work.

Mr. Meadows testified that Havens promised him at least 40 hours a week of employment. There is no evidence to the contrary and I find Mr. Meadows to be a credible witness. Therefore, I choose to calculate his average weekly wage by multiplying \$24.50 times 40 hours per week which results in a \$980.00 average weekly wage.

Two-thirds of \$980 is \$653.33, which is less than the maximum rate allowed at the time of Mr. Meadows' injury. The parties agree that Mr. Meadows qualifies for the maximum permanent partial disability rate at the time of \$347.05 per week.

The second issue regards a determination of whether Mr. Meadows is entitled to TTD benefits from June 30, 2004 through November 17, 2004. Section 287.170 RSMo. (2004) reads in part:

1. For temporary total disability the employer shall pay compensation for not more than 400 weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being paid. The amount of such compensation shall be computed as follows:

* * * * *

- (4) for all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to $66 \frac{2}{3}$ of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this division shall not exceed an amount equal to 105% of the State average weekly wage;

On June 1, 2004, the authorized physician, Dr. Steven Smith, placed restrictions on Mr. Meadows of no use of the right arm. (Claimant's Exhibit B, p. 22). Mr. Meadows testified that he remained under restrictions until he was released to full duty on November 17, 2004. Havens provided Mr. Meadows with work within the doctor's restrictions from June 1, 2004 until June 29, 2004. However, Havens laid him off beginning June 30, 2004. Dr. Steven Smith did not release Mr. Meadows to return to work at full duty until November 17, 2004 - exactly 20 weeks after he had last worked. Mr. Meadows testified that he did not receive unemployment compensation during that time nor did he perform any work for any other employer during that period.

Daniel D. Zimmerman, M.D. examined the employee on March 7, 2005 at his attorney's request. In a report dated March 9, 2005, Dr. Zimmerman outlined the treatment Mr. Meadows underwent as a result of his injury. (See claimant's Exhibit B, pp. 3 - 8). Mr. Meadows underwent an MRI on June 30, 2004 with a follow up with Dr. Smith on July 13; Dr. Smith recommended surgery. The Employee underwent right shoulder surgery with superior labral debridement and anterior capsule repair for an anterior and superior labral tear on August 5, 2004. He continued to follow up with Dr. Smith on September 16, October 19 and October 26, 2004 when Dr. Smith released him to work with no use of his right arm. Dr. Smith did not release Mr. Meadows to full duty until November 16, 2004. (Ex. B – p. 15). In an addendum dated April 3, 2005, Dr. Zimmerman concluded that Mr. Meadows was temporarily and totally disabled from June 30, 2004 through November 16, 2004 at which time he was permitted to return to work without restrictions. (Claimant's Exhibit B, p. 9).

Allen J. Parmet, M.D. examined the Employee on November 4, 2005 at Austin's request. Dr. Parmet opined that Mr. Meadows was temporarily disabled from the date of his surgery, August 5, 2004, until August 12, 2004, but from that point until November 17, 2004, Dr. Parmet believed he was able to return to work with restrictions. (Ex. 3 – p. 3)

I find Mr. Meadows' testimony both credible and compelling. In addition, I find Dr. Zimmerman's opinions in this case to be more believable than those of Dr. Parmet. I conclude that Mr. Meadows was temporarily and totally disabled beginning on June 30, 2004 until November 17, 2004 when he was first able to return to work. I also find that there is no evidence that Havens or Austin paid TTD during that period and there is no evidence that Mr. Meadows received any compensation from any source during that period. Therefore, I award him TTD for the twenty week period from June 30, 2004 through November 17, 2004 for compensation totaling \$13,066.67.

The third issue is whether Mr. Meadows is entitled to be reimbursed \$13,656.00 in medical expenses. Mr. Meadows testified that he obtained treatment from Dr. Smith under the direction of Havens. Handwritten notes contained in claimant's Exhibit B on pp. 16, 17, 18, 19, 20, and 22 indicate that Dr. Smith's office was in contact continually with "Billie" at the Workers' Compensation insurer, and that Dr. Smith's office had obtained authorization from the employer for all of the treatment he recommended and provided for Mr. Meadows.

Mr. Meadows later discovered that the employer failed to pay Truman Medical Center \$1,911.00, Creekwood Surgery Center \$5,360.00, Heartland Therapy Center \$6,330.00 and Northland Bone and Joint \$55.00 for treatment of his work injury for a total of \$13,656.00.

Mr. Meadows submitted documentation for each of these charges. However, it appears that Truman Medical Center and Northland Bone & Joint administratively wrote off their charges. Creekwood Surgery Center and Heartland Therapy Center have not been paid for their services, and there is no evidence that either facility has written off any of its charges and there is no evidence either has been paid.

In *Farmer-Cummings v. Personnel Pool of Platte County Missouri*, 110 S.W. 3rd 118 (Mo 2003), the Missouri Supreme Court addressed the issue of whether original medical bills remain "fees and charges" collectable by the employer if the provider reduces or writes off the charges in the collection process. *Id at 821*. The Court noted that the statute specifically instructed it not to reduce an employer's liability by the amount of contributions to the employee from a source other than the employer. *Id at 822*. The Court reasoned that this section clearly intended to allow the employee to benefit from any collateral source available to him independent of the employer whether purchased or not. The Court said that to reduce an injured employee's award when he may still be liable for those reduced amounts "vitiates the policy behind workers' compensation - to place upon the shoulders of industry the burden of work place injury." *Id (citation omitted)*. The Court noted that the Commission had not found the injured worker had ceased to be liable to healthcare providers for write-offs and fee

adjustments. *Id at 823*. The Court concluded that if the injured worker remained personally liable for any of the reduction, he is entitled to recover them as “fees and charges” pursuant to § 287.140. *Id*

Without evidence to the contrary, I conclude that the credible evidence is that Mr. Meadows either is personally still liable or may become liable for a total of \$13,656.00 in medical charges. As such, I order him to be reimbursed for these charges.

The fourth issue is whether Austin is a statutory employer. The parties stipulated that Havens had employed Mr. Meadows to work on a project on May 3, 2004 for which Austin was the general contractor. They also stipulated that Mr. Meadows was injured while working for Havens while a subcontractor for Austin.

Section 287.040.1 (RSMo) 2004 states that the general contractor shall be deemed the employer of the employees of the subcontractors and their subcontractors when employed on or about the premises where the principle contractor is doing work.

The text of the statute makes clear that Mr. Meadows was a statutory employee of Austin at the time of his injury. Austin was the general contractor on the job on which Mr. Meadows was injured. Austin selected Havens as a subcontractor and Mr. Meadows worked for Havens. Therefore, I find that Austin must be “deemed to be the employer of the employees of his subcontractors.”

The fifth issue regards a determination of whether Havens’ compliance with §287.040.4 relieves Austin from any liability.

Section 287.040.4 reads in pertinent part:

. . . the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors . . . The liability of the immediate employer shall be primary, and that of the others secondary in their order, and any compensation paid by those secondarily liable may be recovered from those primarily liable . . . No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer. (Emphasis added)

As noted, the parties do not dispute the fact that on May 3, 2004, Mr. Meadows worked for Havens and that Austin was the general contractor on this construction project. However, the parties also stipulated that on May 3, 2004, Havens was self-insured in compliance with Missouri’s workers’ compensation law. Moreover, Ex. 1, a certified record from the Division of Workers’ Compensation, shows that Havens was self insured on the injury date.

The construction of a statute is a question of law, not a case of judicial discretion. *Harrison v. King*, 7 S.W.3d 558, 561 (Mo.App.E.D. 1999). When interpreting a statute, the court’s primary role is to ascertain the intent of the General Assembly from the language used in the statute and, whenever possible, to give effect to that intent. In determining legislative intent, courts consider the words used in the statute in their plain and ordinary meaning. If the language of a statute is clear and unambiguous, courts give effect to the language as written and do not resort to statutory construction. *Id*.

Therefore, because it is undisputed that Havens was self-insured at the time of Mr. Meadows’ injury, §287.040.4 RSMo unequivocally states that a subsequent employer, such as Austin, is not a statutory employer that has the associated workers’ compensation liabilities to injured workers. The General Assembly decided to allow employers to self-insure. Had the General Assembly intended to impose liability on a general contractor when a self-insured subcontractor became insolvent, it should have specifically provided for that exception. In addition, as previously noted, the fact finder now must construe the provisions of the MWCL “strictly.” §287.280.1, RSMo. (2005). As stated above, it is undisputed that Havens was self-insured on the day Mr. Meadows was injured. Given the exactness of §287.040.4 RSMo, there is no need for additional statutory construction, and Austin is not liable for Mr. Meadows damages.

The sixth issue is a determination of the disability Mr. Meadows suffered. Mr. Meadows submitted the narrative report of Dr. Zimmerman to support his claim of a 25% permanent partial disability to the right upper

extremity at the 232-week level. (Exhibit B, p.7). Dr. Parmet rated Mr. Meadows's disability at 15% of the right upper extremity at the 232-week level. Havens did not participate in the hearing and therefore did not submit any evidence.

Dr. Zimmerman's report was admitted without objection. Dr. Parmet's report was admitted for the purpose of mitigating Austin's liability regarding Mr. Meadows' claim for past due TTD as Mr. Meadows and Austin agreed to limit his recovery to 20% of the right upper extremity should Austin be found liable. Since I do not find Austin liable, I must assess Mr. Meadows' disability. I find that Mr. Meadows suffered 25% permanent partial disability to the right upper extremity at the 232-week level resulting in permanent partial disability compensation of \$20,128.90.

The seventh issue to be determined is whether Havens must reimburse Mr. Meadows for the costs of this proceeding for defending the claim without reasonable grounds. Pursuant to §287.560 RSMo, the Division may impose costs only when it "determines that any proceedings have been brought, prosecuted or defended without reasonable grounds." Awarding costs should be done with great caution and only when the case is clear and the offense egregious. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. banc 2003), overruled in part on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

The parties agree that Havens filed an Answer to Mr. Meadows' Claim for Compensation. Mr. Meadows also testified that Havens failed to pay any TTD and paid only a portion of his medical bills. As noted, after filing its Answer, Havens did not defend the case or appear at the hearing. Havens not only failed to defend this case without *reasonable* grounds, Havens failed to defend it without *any* grounds. Therefore, I find it liable for costs under §287.560 RSMo. On January 26, 2006, Claimant's counsel filed an Affidavit outlining his expenses - totaling \$1,083.73 - associated with the January 10, 2006 hearing. I find these expenses reasonable and necessary and order Havens, in addition to the other compensation awarded, to pay them to Mr. Meadows' attorney.

However, I find that Austin is not liable under §287.560 RSMo. Given my application of §287.040.4 RSMo., Austin's defense is legitimate and, therefore, its refusal to pay Mr. Meadows' claim was reasonable.

The final issue is whether Havens must reimburse Austin for its costs associated with this hearing. Counsel for Austin made a valid motion pursuant to §287.040.4 RSMo for reimbursement of its reasonable fees and expenses. Counsel for Austin referenced costs of \$5,120.00 in a post-hearing proposed award however did not provide any substantiation for that amount. This is almost five times the costs listed by Claimant's counsel in its detailed affidavit. While it would be difficult to envision Austin's defense requiring five times as much preparation as Mr. Meadows' pursuit of this claim I suppose that is possible. However, such speculation is an insufficient basis upon which to base an award of costs. Therefore, I am unable to ascertain just what Austin's reasonable costs in defending this matter total even though I do find that Austin is entitled to recover its costs since they resulted from Havens' failure to defend this case.

In summary, Havens and the Guaranty Corporation are ordered to pay Mr. Meadows \$13,656.00 in medical expenses, \$13,066.60 in temporary total disability benefits, \$20,128.90 in permanent partial disability benefits, and \$1,083.73 in costs for an award totaling \$47,935.23.

Claimant's counsel requested a fee equal to twenty-four percent (24%) of all amounts awarded. I find this fee request to be fair and reasonable. The compensation awarded to the claimant shall be subject to a twenty-four

percent (24%) lien totaling \$11,244.36 in favor of Keith Yarwood of Edelman and Thompson for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1. In addition, I order a lien attach to this award for the \$1,083.73 in costs associated with this hearing.

Date: _____ Made by: _____

R. Carl Mueller, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation