

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

Injury No.: 06-122640

Employee: James Merkerson

Employer: TAP Enterprises, Inc.

Insurer: Self-Insured – TPA: Alternative Risk Services, Inc.

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 4, 2009. The award and decision of Administrative Law Judge Victorine R. Mahon, issued November 4, 2009, 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 28th day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Merkerson

Injury No. 06-122640

Dependents: N/A

Employer: TAP Enterprises, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Not Applicable

Insurer: Self Insured - TPA: Alternative Risk Services, Inc.

Hearing Date: September 23, 2009

Checked by: VRM/db

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: August 9, 2006.
5. State location where accident occurred or occupational disease contracted: State of Pennsylvania.
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 happened or occupational disease contracted: Vehicular accident.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Multiple body parts.
14. Compensation paid to-date for temporary disability: \$15,805.14.
15. Value necessary medical aid paid to date by employer/insurer? \$213,103.22.

16. Value necessary medical aid not furnished by employer/insurer? None.
17. Employee's average weekly wage: \$ 344.93.
18. Weekly compensation rate: \$229.93.
19. Method of wage computation: Application of § 287.250, RSMo.

COMPENSATION PAYABLE

20. Amount of compensation payable:

For Permanent Partial Disability, the sum of 100.65 weeks at the rate of \$229.93 per week	\$23,142.45
For unpaid Medical Bills	<u>\$14,542.00</u>
Subtotal:	\$37,684.45
Minus credit for overpaid TTD	(\$ 3,757.28)
Minus subrogation to Employer	<u>(\$17,870.65)</u>
Total:	\$16,056.52

21. 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 hereunder in favor the following attorney for necessary legal services rendered to the claimant: Randy Alberhasky.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Merkerson

Injury No. 06-122640

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: TAP Enterprises, Inc.

Department of Labor and Industrial
Relations of Missouri
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Introduction

The parties appeared before the undersigned Administrative Law Judge for a Final Hearing on September 23, 2009 in Springfield, Greene County, Missouri. The parties stipulated to venue in Greene County. Randy Alberhasky represented James Merkerson (Claimant). Greg Carter represented TAP Enterprises, Inc., a self-insured entity (Employer).

Stipulations

On August 9, 2006, Claimant sustained injuries due to a vehicular accident near Clarion, Pennsylvania. At the time of the accident, Claimant was an employee of TAP Enterprises, Inc., and covered under the Missouri Workers' Compensation Law. Employer was self-insured and subject to the Missouri Workers' Compensation Law. The parties do not dispute notice. There is no issue with the statute of limitations. Temporary Total Disability was paid in the amount of \$15,805.14. Employer overpaid Temporary Total Disability in the amount of \$3,757.28. Employer furnished \$213,103.22 in medical benefits. Employer is entitled to \$3,757.28 as a credit for excess Temporary Total Disability. If Employer is entitled to subrogation as a result of a third party recovery, the parties agree that the subrogation amount is \$17,870.65. There are unpaid medical expenses in the amount of \$14,542.00.

Issues

1. Is there jurisdiction under the Missouri Workers' Compensation Law?
2. What is the Permanent Partial Disability rate?
3. Did Claimant's injuries arise out of employment?
4. Did Claimant's injuries occur within the course of employment?
5. What is the nature and extend of Claimant's permanent disability?
6. Is Claimant entitled to reimbursement of \$14,542.00 in medical bills?
7. Are Claimant's benefits subject to a 50 percent penalty due to a violation of Employer's policy regarding the use of alcohol?
8. Is Employer subject to a penalty for a safety violation?
9. Is § 287.120 RSMo, unconstitutional in that the penalties disproportionate affect employees?
10. Is Employer entitled to subrogation?

Findings of Fact and Conclusions of Law

Issue 1: Jurisdiction

I adopt the Findings of Fact and Conclusions of Law set forth in the Temporary Award I issued on September 11, 2007. In that Award, I found that Claimant was hired while he was in the State of Missouri. He subsequently was injured while he was traveling for Employer in the State of Pennsylvania. I concluded that jurisdiction is appropriate in Missouri. Employer continues to dispute jurisdiction.

The only new evidence presented on the issue of jurisdiction is the deposition testimony of Claimant's former supervisor, Mike Smithson. He denied having called Claimant to offer him a job while Claimant was in Missouri. Smithson recalled calling TAP Enterprises for a replacement employee. TAP Enterprises thereafter sent Claimant to him by bus while Smithson was working in Minnesota. Smithson testified, however, that Claimant "was already hired on with the company." (Ex. BB, pp. 94-95).

Smithson's recollection relates to the first time Claimant went to work for Smithson during Claimant's first stint with TAP Enterprises, Inc. Smithton only vaguely recalled that Claimant had a break in service with Employer. Finding no new evidence suggesting that Claimant was hired anywhere except in Missouri, my conclusion of law on the issue of jurisdiction does not change. Jurisdiction is appropriate in Missouri.

Issue 2: Wage and Permanent Partial Disability Rates

Likewise, I adopt the Findings of Fact and Conclusions of Law set forth in the Temporary Award on this issue. No new evidence was presented that would alter the calculation of Claimant's average weekly wage. Claimant's daily wage of \$80 was paid in two parts. He received \$20 as an advance while on the road and \$60 was paid through a payroll check or deposit. Exhibits P and 5 reveal that from April 8, 2006, through August 12, 2006, Claimant earned wages in the amount of \$4,700. This was paid in seven pay periods. Each pay period was two weeks in length. Neither party presented documentation of a payroll check having been issued for the second pay period in May 2006 or the last pay period in July 2006. Claimant presented no evidence that he performed any work during the weeks for which no payroll checks were issued. Therefore, the last two weeks of May and the last two weeks of July were not considered in any wage calculation. In addition, Claimant received \$129.06 in commission.

Claimant's earnings over a 14-week period immediately preceding Claimant's accident was \$4,829.06 (\$4700 + \$129.06 in commission). I continue to rely on *Adamson v. DTC Calhoun Trucking, Inc.*, 212 S.W.3d 207 (Mo. App. S.D. 2007) in determining the days that are to be included in the calculation. I continue to rely on § 287.250.4, RSMo 2000. It provides that if the average weekly wage cannot fairly and justly be determined by the formulas provided in § 287.250.1 through 3, RSMo, the Division may determine the average weekly wage in any fair manner based on the exceptional facts presented. The fairest method in this case is to divide Claimant's wages and commission in the amount of \$4829.06 by 14 weeks to yield an average

weekly wage of \$344.93 and a disability rate of \$229.93 (344.93 X 66 2/3%). The Temporary Total Disability and Permanent Partial Disability rates are the same.

Issues 3 and 4: Course and Scope of Employment

At the hardship hearing, Claimant offered uncontradicted evidence that he had been asked by his supervisor, Mike Smithson, to assist in running an errand to Wal-Mart to retrieve some supplies for the following day's tool sale. Claimant further testified that the two men also may have gone to a fast food restaurant for their evening meal. The deposition of Mike Smithson introduced at the final hearing substantiates Claimant's testimony that the men were performing job duties at a time and place that was reasonable. Nothing at the final hearing suggests that the two men were on a mere frolic rather than on a business errand. I continue to rely on *Shinn v. General Binding Corp, Koelling Mentals Div.*, 789 S.W.2d 230, 233-234 (Mo. App. E.D. 199), and *Cowick v. Gibbs Beauty Supplies*, 430 S.W.2d 626 (Mo.App. K.C.D. 1968). I conclude that Claimant's injuries arose out of and within the course and scope of his employment with TAP Enterprises.

Issue 5: Nature and Extent of Permanent Disability

A. Medical Evidence

I have accepted as credible the opinion of Dr. Paff who unequivocally drew the causal connection between the work accident and Claimant's need for medical treatment. Dr. Paff opined that Claimant had suffered a ruptured spleen, compound fracture of the left forearm, depressed skull fracture, sprain of the right ankle, brain injury with speech and memory problems, and depression. He had recommended that Claimant be evaluated for additional treatment. Because Claimant had moved to Arizona, Employer had Claimant seen there.

Dr. J. Michael Powers, M.D., Affiliated Neurologists, LTD, noted that Claimant had an MRI on January 22, 2008, a neurological consultation with Nicholas Theodore on April 22, 2008, and a neuropsychological evaluation of Dr. Youngjohn on January 7, 2008. Based on the

reports from these evaluations or tests and his own examination, Dr. Powers diagnosed Claimant with the following:

- a. Closed head injury with "very mild" residual cognitive sequelae.
- b. Depressed left parietal skull fracture, healed.
- c. Fracture of left ulna, resolved.
- d. Temporal bone fracture without identifiable residual hearing loss.
- e. Status post splenectomy.
- f. Lumbar transverse process fractures, asymptomatic.

Dr. Powers believed Claimant had made an excellent recovery with minimal cognitive sequelae. He said Claimant needed no additional treatment. He rated Claimant as having a one or two percent impairment to the whole person attributable to the brain injury and minor cognitive limitations.

Dr. John W. King, M.D., voiced his opinion in a single page report. He noted that Claimant had undergone surgery for a left forearm ulna fracture and was using a bone stimulator. He found, based on his examination and Claimant's lack of complaints, that Claimant suffered no disability in the left arm and no need for additional treatment. I do not find credible Dr. King's opinion that Claimant has no disability to his left arm.

Dr. Truett L. Swaim, M.D., a board certified orthopedic surgeon, diagnosed the following:

Head: Headaches and cognitive skills difficulties; status post left parietal-occipital skull fracture with bone depression, associated scalp laceration, and extradural hematoma; status post temporal which extended to the external auditory canal. Persistent EEG abnormality related to the head injury. Mild diplopia on left lower gaze;

Hearing: Temporary hearing deficit;

Splenectomy: Status post splenectomy;

Left elbow: Discomfort with mild weakness of the left hand, probably early arthritis of the left elbow. Status post left Monteggia with left ulnar shaft fracture and radial/humeral dislocation necessitating closed reduction of the elbow dislocation and open reduction with internal fixation of the left ulnar fracture;

Thoracic/Back: Sensory deficit in the right thoracic region. Status post left

transverse process fractures at L2 and L3 vertebra.

Anemia: Status acute blood loss anemia treated with transfusions.

Right ankle: Status post right ankle/foot sprain.

History of Depression.

Dr. Swaim rated Claimant as having the following permanent disabilities:

1. 20 percent at the 210 week level at the left elbow;
2. five percent to the body as a whole due to the back conditions;
3. 15 percent to the body as a whole due to the skull fracture, cognitive skills difficulties, headaches and persistently abnormal EEG.
4. Enhanced disability of 16 weeks due to the combined effect of all disabilities.

B. Claimant's Current Complaints

Claimant returned to employment in early 2008. He also attends a trade school. While he has some soreness and popping in his left arm at work, he can perform his job duties. He complains of numbness in his back near the shoulders. He believes he processes information more slowly than before the work accident, but he is being successful in his coursework to become a motorcycle mechanic. From my observations as a lay person, Claimant's memory and speech deficits appeared less pronounced than at the hardship hearing. I discount the opinion of Claimant's mother as it relates to Claimant's current condition as she lives in Missouri, and she no longer sees her son on a regular basis now that he lives in Arizona.

C. Award of Disability

Based on the testimony of Claimant and all of the medical evidence available, including the opinions of the physicians, I find and conclude that the true extent of Permanent Partial Disability is as follows:

Back: 2.5 percent to the body as a whole or 10 weeks of compensation.

Left arm: 15 percent at the level of the elbow or 31.5 weeks.

Head: 12.5 percent to the body as a whole or 50 weeks.

This results in a total of 91.5 weeks of Permanent Partial Disability. I accept Dr. Swaim's opinion that the combined effect of Claimant's disabilities is greater than each considered alone. I add a 10 percent loading factor, resulting in an additional 9.15 weeks of disability, for a total Permanent Partial Disability Award of 100.65 weeks. At the rate of \$229.93 per week, Claimant is entitled to \$23,142.45 in Permanent Partial Disability.

Issue 6: Reimbursement of Medical Bills

The parties agree that Claimant has outstanding medical bills in the amount of \$14,542.00. These bills were incurred in Pittsburgh, Pennsylvania immediately following the accident and resulted in emergency treatment when preauthorization was not possible. The bills had not been submitted at the hardship hearing and remain unpaid. Based on *Esquivel v. Day's Inn of Branson*, 959 S.W.2d 486,489 (Mo. App. S.D. 1998), Claimant's evidence is sufficient to award payment of the bills. Employer is liable for the \$14,542.00 in unpaid medical bills.

Issues 7 through 9: Alcohol and Safety Penalties

Claimant admitted that he drank alcohol the night of the accident. He said his supervisor, Smithson, provided the intoxicating beverage. Supervisor Smithson admitted that he drank two shots of an intoxicating beverage at the hotel that evening, but he could not recall whether any other employee had drunk alcohol that night. Smithson denied being drunk or having a positive BAC. Smithson denied having alcohol in his vehicle that was involved in the work accident. Both Claimant and Smithson denied knowing that Employer had any policy prohibiting the use of alcohol while working. Smithson said he had read Employer's policy manual and found nothing in it regarding alcohol. He said Employer's policy changed frequently, however. There is no evidence that Smithson was reprimanded by Employer for having drunk alcohol prior to the work accident or having violated any type of safety rule.

At the hardship hearing, Employer offered no evidence of a rule prohibiting the crew members from using intoxicating substances or mandating the use of any safety devices. At the

final hearing, Employer tendered a “Field Personnel Handbook” dated January 16, 2006 (Exhibit 1). The handbook states, in applicable part: “Tap prohibits the use, possession, sale, transfer, purchase or being under the influence of an alcoholic beverage...by any employee on company premises or while on company business.” (Exhibit 1, p. 7). It also includes a policy requiring employees to obey all safety rules. Employer submitted an acknowledgement page with Claimant’s signature (Exhibit 2). The acknowledgement page appears to have been signed on July 12, 2005, and faxed from the Days Inn - Missoula on July 14, 2005 (Exhibit 2). By signing the acknowledgement page, Claimant asserted that he had read and understood the information contained in “The Tap Enterprises, Inc. handbook.” It further indicates that other employees are not able to make representations regarding the handbook, but that the handbook may be modified by the company president without notice. Claimant adamantly denies, however, having received the handbook. Pursuant to § 287.120(6), RSMo Cum Supp. 2005, Employer seeks to impose a 50 percent penalty on all benefits for violation of the alcohol policy.

A. Exhibit 2 is Admissible.

Claimant contends that the acknowledgement page is inadmissible in that it is a “statement” that was not produced to Claimant as required by § 287.215 RSMo Cum Supp. 2005. A primary rule of statutory construction requires that each word of a statute is to be given meaning. *Crack Team USA, Inc. v. Am. Arbitration Ass'n*, 128 S.W.3d 580, 581-82 (Mo. App. E.D. 2004). Section 287.215 RSMo, specifically refers to a “writing made or given by an *injured* employee.” If the statute is given strict construction, as required by § 287.800 RSMo Cum Supp. 2005, and every word of the statute is given meaning, a writing made prior to an injury is not a “statement” within the meaning of § 287.215 RSMo. To hold otherwise would be to treat the term “injured” as mere surplus – something precluded by the rules of statutory construction. The acknowledgement page, signed by Claimant prior to the work injury, is not a statement and is admissible.

This view is consistent with the analysis by the Labor and Industrial Relations Commission in earlier cases. *See, e.g., Ross L. Case v. David Sherman Corporation*, Injury No: 99-130581 (LIRC 2001) (holding that an employment application prepared by the employee 15 years prior to the date of injury was not a “statement” requiring disclosure under the statute); *James Hayes v. H.J. Enterprises, Inc.*, Injury No. 02-065518 (LIRC 2005) (discussing the difference between statements in a personnel file made to obtain employment and those made regarding an injury); and *Paula Miller v. Roger Mertens Distributor, Inc.*, Injury No. 01-160830 (LIRC 2005) (rejecting contentions that a time card was a “statement”). Items that otherwise might have been considered “statements” using a dictionary interpretation, historically have not been considered statements requiring disclosure under § 287.215 RSMo, if executed or created prior to the work injury. I conclude Exhibit 2 is admissible.

B. Little Evidentiary Weight.

Despite its admissibility, Exhibit 2 has little evidentiary weight. While Claimant signed an acknowledgement page indicating that he received some type of handbook near the time of his initial hire in 2005, Employer did not produce a copy of the handbook that Claimant was to have received at that time. The handbook that was received into evidence (Exhibit 1) is dated six months *after* Claimant signed the acknowledgment. While Employer’s General Manager Christopher Lyon indicated that the alcohol policy in 2006 would also have been the same as the one in effect in July 2005, Mr. Lyon did not become general manager until January 2007. He was not the general manager in 2005 when Claimant was initially hired. He was not general manager in 2006.

As noted previously, Claimant’s supervisor testified that Employer frequently changed policies. As I found in the Temporary/Partial Award, Claimant had a break in service beginning in October 2005. Employer rehired Claimant in March 2006. There is absolutely no evidence suggesting that Claimant was given a new handbook at the time of his rehire. The overwhelming

weight of the evidence is that Claimant did not have actual knowledge of any alcohol and safety policies in effect on the date of the work accident in August 2006.

C. No Actual Knowledge Required.

Nothing in § 287.120.6 RSMo Cum Supp. 2005, relating to alcohol and drug policies, however, requires that an employee have actual or even constructive knowledge of any policy. The statute, as amended in 2005, does not even require that rules be posted on a conspicuous place.

E. No Evidence Policy Was Adopted.

Section 287.800 RSMo Cum Supp. 2005, however, requires that the Workers' Compensation Law be given strict construction. Giving a strict construction to § 287.120.6 RSMo Cum Supp. 2005, I conclude that it is not sufficient for an Employer to simply have printed a policy in a handbook. Rather, the policy has to have been **adopted**. The statute reads as follows:

(1) Where the employee fails to obey any rule or policy **adopted** by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced by fifty percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs [emphasis added].

§ 287.120.6 RSMo Cum Supp. 2005.

The term "adopt" is defined as:

1. to take (a child of other parents) as one's own child; 2. to take up and practice as one's own; 3. to accept formally and put into effect.

The New Merriam-Webster Dictionary, 28-29 (1989).

In this case, there is no evidence that Employer ever enforced, practiced, or put the policy into effect. To the contrary, Employer's General Manager Christopher Lyon said no committee ever approved the policy. Claimant alleges no knowledge of the alcohol policy. His personnel file demonstrates no receipt of the company handbook containing the policy subsequent to the

date of his rehire. Claimant's supervisor did not know of an alcohol policy. Claimant's supervisor certainly did not adhere to the policy or seek to enforce it. Claimant's supervisor, as an agent of Employer, even encouraged the use of alcohol on the job in that he, 1) used intoxicating beverages himself and, 2) purchased alcohol for Claimant. There is no evidence that Claimant's supervisor was reprimanded for having violated Employer's purported alcohol policy or having encouraged others to violate the purported policy.

I conclude Employer's evidence is insufficient to demonstrate that its alcohol policy had actually been "adopted." To conclude otherwise would mean an Employer could surreptitiously create a rule, never publish or distribute it to its employee, never enforce it, but use it solely as a tool to reduce the payment of Workers' Compensation benefits. Certainly, that was not the intent of the General Assembly when it amended § 287.120.6 RSMo.

F. No Penalty on Employer.

Employee seeks a 15 percent increase in total compensation as a result of Employer's failure to abide by safety statues, including § 311.310 RSMo (relating to the provision of alcohol to a minor), § 577.010 RSMo (relating to driving while intoxicated), and § 577.012 RSMo (relating to driving while under the influence). As noted above, Claimant's supervisor drank alcohol prior to traveling on a work errand with Claimant. He also supplied Claimant, a minor at the time, with alcohol. Claimant's contention fails because all of these statutory provisions speak to conduct occurring in Missouri. Claimant's injury occurred in Pennsylvania. Claimant introduced no evidence demonstrating a violation of any law of Pennsylvania.

Claimant also challenged the constitutionality of the penalty provisions for safety violations. The Administrative Law Judge has no authority to address constitutional issues. Moreover, no penalties have been assessed, so the issue is moot as it pertains to this case.

Issue 10: Subrogation

The issue with respect to subrogation is solely a legal one. The parties agree that there was a third party recovery. They agree as to the amount of any subrogation. But, Claimant contends that because subrogation is an equitable doctrine, Employer may not recover based on the equitable defense of unclean hands. Claimant argues that Mike Smithson, Claimant's supervisor, "allowed a culture of drinking and corruption of the under aged that ultimately caused or contributed to cause the accident." (Claimant's Brief pp. 34-35). The subrogation Employer claims is codified in Missouri Workers' Compensation Law, Chapter 287 RSMo. I find nothing in the Workers' Compensation statutes or related caselaw allowing for a denial of subrogation based on "unclean hands." Employer will be allowed a subrogation interest in the stipulated amount of \$17,870.65.

In summary, for past medical expenses and Permanent Partial Disability, minus the credit for the overpayment of Temporary Total Disability and the subgration interest of Employer, Claimant is entitled to an Award of \$16,056.52.

Claimant's attorney, Randy Alberhasky, is entitled to a lien in the amount of 25 percent of the award for necessary and reasonable legal services rendered.

Date: November 4, 2009

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

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation