

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

Injury No. 10-053380

Employee: Bobby Mock

Employers: Superclean Services Company, LLC
Superclean Services LTD
Klean Rite Maintenance, Inc.

Insurer: AmTrust Insurance Company of Kansas Inc.

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 read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing 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

Right to direct future medical treatment

The administrative law judge determined that employee is entitled to that future medical treatment under § 287.140 RSMo that may reasonably be required to cure and relieve the effects of his work injuries, based on an (implied) finding that there is a reasonable probability that employee has a need for future medical treatment that flows from the work injury. We defer to the administrative law judge's weighing of the evidence with respect to this issue, and for this reason we affirm the award of future medical treatment.

We note, however, that the administrative law judge suggested that employee may direct his own medical treatment going forward, based on a finding that because no treatment was ever authorized by Klean Rite or Superclean, those entities "waived" their statutory right to direct treatment. We must disclaim this finding by the administrative law judge, because it is not authorized under Chapter 287. Rather, § 287.140 provides, in relevant part, as follows:

1. In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. ...

...

Employee: Bobby Mock

- 2 -

10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses.

The foregoing language charges an employer with the duty to provide employee's treatment and unequivocally grants to the employer control over the selection of a medical provider. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). The section also states that an employee is allowed to select his own doctors, but if he does so, he assumes liability for those expenses.

An exception to this rule exists where an employer has notice of an employee's need for treatment but fails to provide it; in such circumstances the courts have held that the employee is entitled to pursue his own course of treatment while later seeking an order from an administrative law judge or this Commission holding the employer liable for his past medical expenses. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 847-48 (Mo. App. 2007). However, the courts have never recognized (and the plain language of the statute does not support) a theory that by once failing to provide care, an employer should be deemed as forever waiving the right to direct it in the future.¹

If, going forward, there are disputes with regard to the treatment that flows from the work injury, the parties may petition the Commission to resolve such issues. See *State ex rel. ISP Minerals, Inc. v. Labor & Indus. Rels. Comm'n*, 465 S.W.3d 471 (Mo. 2015). We note also that § 287.140.2 remains available to the parties in cases where the employee's life, health, or recovery may be endangered by the treatment (or lack thereof) furnished by Superclean and/or Klean Rite. We can envision circumstances wherein an employer's chronic failure to provide timely, reasonable and necessary medical care might warrant rescission of its right to direct medical treatment pursuant to the broad authority granted by § 287.140.2 RSMo, but we find insufficient evidence at this time to take such action.

Statutory employment

The administrative law judge determined that employee was a statutory employee of Superclean based on an application of § 287.040 RSMo, which provides, in relevant part, as follows:

1. Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed

¹ We acknowledge the case of *Balsamo v. Fisher Body Division-General Motors Corp.*, 481 S.W.2d 536 (Mo. App. 1972), which used the language of "waiver" to conclude that an employer was obligated to pay an employee's wife for future nursing services. A careful reading of *Balsamo*, however, reveals that the employer there actually "refused no medical care, and ... even paid for the doctor and hospital selected by the employee, something not required by the statute." *Id.* at 538. The court reasoned that after previously acceding to and paying for treatment selected by the employee, the employer could not reassert its right to direct treatment. *Id.* at 538-9. The *Balsamo* decision, in our judgment, does not support a theory that an employer's denial of treatment amounts to a de facto "waiver" of the right to direct it going forward.

Employee: Bobby Mock

- 3 -

on or about the premises of the employer while doing work which is in the usual course of his business.

2. The provisions of this section shall not apply to the owner of premises upon which improvements are being erected, demolished, altered or repaired by an independent contractor but such independent contractor shall be deemed to be the employer of the employees of his subcontractors and their subcontractors when employed on or about the premises where the principal contractor is doing work.

3. In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. 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, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.

Superclean appeals, arguing that the administrative law judge was prevented from finding employee was its statutory employee unless it was first determined that Klean Rite (the entity under whose immediate direction employee worked) was an "employer" for purposes of § 287.030.1 RSMo, which provides, in relevant part, as follows:

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;

...

(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 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.

Employee: Bobby Mock

- 4 -

We are not persuaded, for a number of reasons. First, we note that Superclean relies on the language set forth in the third subsection under § 287.040 that “[i]n all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable **as an employer**” (emphasis added) for its argument that employee cannot be its statutory employee unless every intermediate entity is proven to be an “employer” as defined under § 287.030. Superclean argues Klean Rite did not have five employees on the date employee was injured, and thus cannot be deemed an employer for purposes of § 287.030.1(3), and for this reason, § 287.040.1 cannot be applied to determine that employee was a statutory employee of Superclean.

The courts, however, have specifically considered and unequivocally rejected the argument that the language of § 287.040.3 in any way affects the determination whether a statutory employment relationship exists:

This subsection does not involve the determination of statutory employment and does not affect the statutory employer's liability as to the statutory employee. Instead, it merely serves to prioritize the obligations of contractors and subcontractors by determining the order of liabilities when more than one party is potentially liable for payment of workers' compensation benefits. The purpose of this subsection is to protect the employees of financially irresponsible subcontractors.

Chouteau v. Netco Constr., 132 S.W.3d 328, 335 (Mo. App. 2004)(citations omitted).

[T]he clause does not say that the immediate employer must be liable to the employee under the act in order to make the principal contractor liable to the employee. The obvious purpose and intent of the clause is, not to disturb or effect the liability of the principal contractor to the employee, as clearly provided for and defined by the other clauses of the subsections, but to merely give the principal contractor recourse on the immediate employer for compensation paid to the employee, in case the immediate employer is liable to the employee under the act. If the principal contractor does not have recourse in every case, it is because of a situation which the contractor itself has created by subcontracting with a minor employer who does not accept, and is therefore not subject to the provisions of the act. Of this the contractor has no right to complain.

Pruitt v. Harker, 43 S.W.2d 769, 772 (Mo. 1931)(citation omitted).

As the *Chouteau* and *Pruitt* courts make clear, § 287.040.3 has no bearing on the determination whether the statutory employment relationship exists given a particular factual situation; rather, it merely prioritizes the liabilities of the various entities involved. As the parties are undoubtedly aware, we are required to strictly construe the provisions of Chapter 287 by virtue of § 287.800.1 RSMo, and “a strict construction of a statute presumes nothing that is not expressed.” *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009). Consistent with this mandate, we cannot presume that the designator “shall be liable as an employer” under § 287.040.3 manifests an implied legislative intention to

Employee: Bobby Mock

- 5 -

incorporate the definition of employer from § 287.030, and thereby impose an additional, unstated prerequisite to a showing that a worker is a statutory employee. Instead, the comprehensive test for statutory employment is set forth at § 287.040.1 and includes the following three elements:

One is a statutory employee if (1) the work is performed pursuant to a contract, (2) the injury occurs on or about the premises of the alleged statutory employer and (3) the work is in the usual course of the alleged statutory employer's business.

Brito-Pacheco v. Tina's Hair Salon, 400 S.W.3d 817, 822 (Mo. App. 2013).

Notably, Superclean does not raise any argument before this Commission that the foregoing three elements are not met in this case. We find that they are. First, it is uncontested that the work employee was performing was pursuant to a contract between Superclean and Klean Rite. Second, the injury occurred on or about the premises of which Superclean (through its agent Klean Rite) had exclusive control at the time of the injury; it follows (and we so find) that the injury occurred on or about the premises of the alleged statutory employer. See *Boatman v. Superior Outdoor Advertising Co.*, 482 S.W.2d 743, 745 (Mo. App. 1972) (holding that the word "premises" in § 287.040.1 "include[s] locations that temporarily may be under the exclusive control of the statutory employer by virtue of the work being done"). Third, the work employee was performing when he was injured was in the usual course of Superclean's business: providing cleaning/maintenance services through contractors such as Klean Rite. We conclude that the three elements under § 287.040.1 are satisfied, and that employee was a statutory employee of Superclean at the time he suffered the work injury.

Assuming, *arguendo*, that it was necessary for employee to demonstrate that Klean Rite was an "employer" for purposes of Chapter 287, it would appear that because Klean Rite was engaged in the "erect[ion], demolish[ing], alter[ation] or repair [of] improvements" at the time employee was injured, Klean Rite "shall be deemed an employer for the purposes of this chapter if they have one or more employees" by operation of § 287.030.1(3). In its brief, Superclean concedes that Klean Rite had at least three employees on June 15, 2010.

Finally, even if employee was required to demonstrate that Klean Rite satisfied the five employee requirement under § 287.030.1(1), we agree with the administrative law judge's determination that Klean Rite did have five or more employees during the relevant time period. The definition of "employee" under § 287.020.1 includes "every person in the service of any employer," and does not require that the individual be paid, nor does it require that the individual perform services for any minimum amount of time in order to become an "employee." Under this definition, employee's girlfriend, Patricia Owensby, was arguably also an employee of Klean Rite, because she performed a service for Klean Rite when she drove Klean Rite's van and transported employee to Branson for the purpose of his performing services for employer. We would also find that the temporary workers Klean Rite used through the Labor Max staffing agency were employees for purposes of § 287.020.1. It appears (and we so find) that Klean Rite was using at least seven of these temporary workers in May and June 2010.

Employee: Bobby Mock

The provision making the principal contractor liable to the employees of subcontractors was inserted to prevent the principal contractor from escaping all liability and leaving such employees without protection, either under the Compensation Act or at common law, by a series of subcontracts with persons or corporations without financial responsibility. It is inconceivable that the Legislature intended that the principal contractor should be allowed to accomplish just this circumvention through a series of subcontracts with irresponsible minor employers who do not accept the provisions of the Compensation Act.

De Lonjay v. Hartford Acci. & Indem. Co., 225 Mo. App. 35, 38 (Mo. App. 1931).

In sum, we are persuaded that the administrative law judge properly found that employee was Superclean’s statutory employee. In our view, this result gives effect to the well-established purposes underlying § 287.040. Because we are not persuaded to disturb any other of the administrative law judge’s remaining findings, conclusions, analysis, or determinations in this case, we hereby affirm and 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 Margaret Ellis Holden, issued April 27, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm 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 14th day of January 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: Bobby Mock Injury No. 10-053380
Dependents: N/A
Employer: Alleged employers Superclean Services Company LLC and Superclean Services LTD and alleged employer Klean Rite Maintenance, Inc.
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: AmTrust Insurance Company of Kansas, Inc.
Hearing Date: 1/22/15 Checked by: MEH

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: 6/15/2010
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
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 EMPLOYER SUPERCLEAN, KLEAN RITE WAS UNISURED
11. Describe work employee was doing and how accident occurred or occupational disease contracted: FELL FROM LADDER.
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: UPPER EXTREMITIES AND BODY AS A WHOLE
14. Nature and extent of any permanent disability: PERMANENT TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$350
16. Value necessary medical aid paid to date by employer/insurer? NONE

Employee: Bobby Mock

Injury No. 10-053380

- 17. Value necessary medical aid not furnished by employer/insurer? \$73,675.34
- 18. Employee's average weekly wages: \$165
- 19. Weekly compensation rate: \$105/\$200
- 20. Method wages computation: ACCORDING TO LAW

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$73,675.34

21 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

12 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning 10/1/2012, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (N/A) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded: FUTURE MEDICAL TREATMENT AND PERMANENT TOTAL DISABILITY

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:

MIKE MERGEN

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Bobby Mock Injury No. 10-053380
 Dependents: N/A
 Employer: Alleged employers Superclean Services Company LLC and Superclean Services LTD and alleged employer Klean Rite Maintenance, Inc.
 Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
 Insurer: AmTrust Insurance Company of Kansas, Inc.
 Hearing Date: 1/22/15 Checked by: MEH

The parties appeared before the undersigned administrative law judge on January 22, 2015, for a final hearing. The claimant appeared in person represented by Mike Mergen. The alleged employer, Superclean Services Co. LLC and Superclean LTD, appeared represented by Jerry Harmison, and their insurer, AmTrust Insurance Company of Kansas Inc., appeared represented by Chris Moberg and Corey Kilburn. Alleged employer Klean Rite Maintenance, Inc. appeared by employer representative David Gertz represented by attorney Kendall McPhail. Health care provider Cox Health Systems a/k/a L.E. Cox Medical Center appeared represented by Jason Shaffer. The Second Injury Fund appeared represented by Skyler Burks. Memorandums of law were filed by February 20, 2015.

The parties stipulated to the following facts: Superclean Services Co. LLC and Superclean LTD are the same entity and will be referred to as “Superclean.” On or about June 15, 2010, Superclean was based in Texas and had five or more employees, and was an employer as defined by the Missouri Workers' Compensation Law. Alleged employer Klean Rite Maintenance, Inc. is referred to as “Klean Rite.” Superclean’s liability was fully insured by AmTrust Insurance Company of Kansas, Inc. The parties agree that this insurance covers any liability for Superclean in the state of Missouri. The parties agree that on or about June 15, 2010, an incident occurred which resulted in the claimant sustaining an

injury. The parties do not agree that the claimant sustained an accident which arose out of and in the course and scope of employment. The incident occurred in Greene County, Missouri. The claimant notified the employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. Temporary disability benefits have been paid to the claimant in the amount of \$350 from AmTrust, on April 18, 2013, representing disability benefits for the week of April 22, 2013. No medical benefits have been paid. The attorney fee being sought is 25%.

ISSUES:

1. Whether on or about June 15, 2010, Klean Rite was operating subject to the Missouri Workers' Compensation Law.
2. Whether the claimant was an employee of Klean Rite on June 15, 2010.
3. Whether the claimant was a statutory employee of Superclean on June 15, 2010.
4. Whether the claimant sustained an accident which arose out of the course and scope of employment on June 15, 2010.
5. Whether Klean Rite or Superclean is obligated to pay past medical expenses.
6. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
7. Who has the right to choose providers for future medical treatment.
8. What is the proper rate.
9. Any temporary total benefits owed to the claimant.
10. The nature and extent of permanent disabilities.
11. A Medical Fee Dispute filed by Cox Health Systems a/k/a L.E. Cox Medical Center to be ruled upon.
12. Disfigurement to be assessed.

13. Motion for Reverse Judgment filed by Alleged Statutory Employer and Employer's Insurer to be ruled upon.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

All claims regarding the Second Injury Fund were dismissed at the beginning of the hearing. All claims regarding alleged employer EZ Loan Services and their insurer, National Union Fire Insurance of Pittsburg, were dismissed prior to the hearing.

The claimant testified at the hearing. I find him to be a very credible witness. He is 45 years old. Although he quit school in the 9th grade, he later obtained his GED. He has no post high school education. In the past he worked in retail; kitchens; operating a variety of tools, machines and equipment; construction; and cleaning.

When he was 5 years old he was diagnosed with depression and took medication until he was 12 years old. He had no further treatment after that time. He has convictions for receiving stolen property and served two prison sentences. He does not have a driver's license, but is eligible to get one when he can obtain insurance.

Claimant began working for Labor Max in March 2009. This is a temporary agency for which he performed odd jobs such as housekeeping, minor construction and landscaping. In March 2010 he was assigned to work for Klean Rite at a building that was being refurbished to become an antique store. They were cleaning the carpets and floors, getting old grout out and power washing. He was again assigned to Klean Rite on June 9, 2010. Their job was to perform construction cleanup at a new CVS store.

At some point during the CVS job Mr. Gertz and the claimant discussed the fact that the claimant was paid minimum wage by Labor Max and Mr. Gertz paid over \$11 an hour for his work.

David Gertz is the president of Klean Rite. He also performs work and is responsible for the day to day operations of the business. Mr. Gertz testified in person at the hearing and his deposition was admitted into evidence. Klean Rite was incorporated in 2001. Pam Van Horn, his girlfriend, and Ruth Clayton, his mother, were named as officers but they never actually performed any work for the company.

The company performs commercial cleaning, mostly floors and windows. According to Mr. Gertz, he only had a couple of employees in 2010. Sarah Jury cleaned offices and Janie Eddings cleaned the Purina offices. He said if he needed more he would call Labor Max.

Klean Rite obtained some of their work through referrals from a Texas company named Superclean. Superclean would contact Klean Rite and determine if they could do the job for the agreed amount. If so, Klean Rite would be sent a work order. The work orders would be signed by the customer when the job was completed, then Klean Rite would submit them to Superclean for payment. Sometimes the Klean Rite representative doing the work would sign the order and sometimes they would not. From August 2009 to June 15, 2010, Klean Rite performed a total of 24 jobs for Superclean.

At the time Klean Rite entered into the agreement with Superclean, David Gertz signed a contract in which he agreed to provide and maintain "Statutory Workers' Compensation coverage for all of its employees, including occupational disease coverage, as required by applicable law and employer's liability." Mr. Gertz testified that he did not believe he was required to have workers' compensation coverage because he did not have 5 employees.

I do not find his testimony credible regarding the number of employees he had on the date of the injury. His testimony is inconsistent. Mr. Gertz testified in his deposition that all of the people who worked for him were considered employees, not independent contractors. He said that W-2 forms were filed for all the employees the company ever had.

Payroll records prepared by Mr. Gertz' accountant show that in 2010 W-2 forms were filed for Valerie Albuquerque, Janie Eddings, David Gertz, Glenn Highfill, and Sarah Jury. The payroll summaries and quarterly reports for Klean Rite show that in June 2010 only Janie Eddings and Sarah Jury were on the payroll. The evidence supports that Ms. Albuquerque and Glenn Highfill were not employed on June 15, 2010, but were at other times during that year.

Work orders for Superclean were signed by Damon Birmingham on January 11, 2010, and Corey Girds on February 24, 2010. Mr. Gertz claims Mr. Birmingham was a subcontractor. I do not find this credible. Nor do I find his testimony credible that Corey did not perform any work and that he was not an employee. I find claimant's testimony credible that he was paid cash by David Gertz, and I conclude that he was employing Corey in a similar fashion.

Mr. Gertz testified he told someone named Jennifer from Superclean that he did not have workers' compensation insurance. Jennifer Bryant, an account manager from Superclean testified by deposition. She started assigning him jobs in August 2009. She did not recall a conversation about workers' compensation insurance, and explained that it would not be something involving her department so she would not have discussed it.

Mr. Gertz contacted the claimant on June 11, 2010, and wanted him to meet him at a store named Game Stop. The claimant testified that when he arrived he believed it was on behalf of Labor Max. Mr. Gertz wanted to see if the claimant could operate a carpet cleaning machine. Mr. Gertz admitted claimant came to the Game Stop location and ran a carpet cleaner. Mr. Gertz and the claimant then discussed that Mr. Gertz had work he needed done and offered to hire the claimant. The arrangement was that he would call the claimant when he needed him and the claimant would be paid \$10 an hour in cash. The claimant testified that he operated the machine successfully and worked for an hour and a half. Mr. Gertz then paid the claimant \$15 in cash.

Mr. Gertz denied having a conversation with the claimant about paying him \$10 an hour in cash under the table. He testified in his deposition that it was tough to say whether he had hired claimant, but that he was planning to. He said he had gotten claimant's phone number from him at one of the Labor Max jobs and called him to come into Game Stop where they discussed claimant working for him.

On June 13, 2010, Mr. Gertz had claimant go to Joplin, Missouri, to clean a Lane Bryant and David's Bridal store. Mr. Gertz testified that he knew the claimant couldn't drive so he sent his cousin, Corey Girds, to drive him to Joplin. He said Corey never performed services or was paid by him. Corey went with the claimant and drove a truck owned by Klean Rite. Corey had the paper work for the job. Claimant testified that they both washed the windows at Lane Bryant and then went to David's Bridal and Corey helped with the carpet.

On Monday, June 14, 2010, the claimant met Mr. Gertz at the Purina plant in Springfield, Missouri. Klean Rite performed office cleaning, and since the person who had been doing the job was leaving, Mr. Gertz wanted the claimant to take it over. At the hearing, David Gertz testified that he considered claimant hired at the Purina plant; he had not started, but he was hired. He later testified that he considered claimant an employee at the time he performed the Joplin and Branson jobs.

At Purina, claimant was introduced to two managers at the plant and given a tour. Mr. Gertz gave claimant a key to the offices. Claimant performed some duties there such as sweeping, moping, and trash. This took about 45 minutes. It was to be a regular job of two hours a day, five days a week. Claimant was to be paid \$10 an hour in cash. He was to start the next day, on Monday, June 15, 2010.

Mr. Gertz then told the claimant he had plenty of work for him including a job in Branson, Missouri, that evening. Mr. Gertz then gave claimant \$50 for the Joplin job. Arrangements were made for the claimant's girlfriend, Patricia Owensby, to drive the claimant to Branson using the Klean Rite van. Later that evening claimant and his girlfriend went to Branson in the van and he cleaned three

stores at an outlet mall. He was to text Mr. Gertz the next morning to tell him what he needed to be paid.

On Monday, June 15, 2010, the claimant texted Mr. Gertz and arrangements were made for them to meet at the EZ Loan store where Klean Rite was doing a job. This was a job referred by Superclean. The job consisted of replacing ten water damaged ceiling tiles. Arrangements were made to meet at 1:00 p.m., and claimant planned to go to the Purina job after that. Claimant's girlfriend drove him to EZ Loan. She dropped the claimant off and went to a drive thru restaurant to get them lunch.

When he arrived, Mr. Gertz had already started on the job. He showed claimant the tiles. Claimant climbed onto a six foot step ladder, and Mr. Gertz cut the tiles and then handed them to the claimant to install.

Claimant was attempting to put the eighth tile up near a security camera. A wire going the camera was sticking out and they were having trouble getting it behind the tile. Mr. Gertz went into a room to get a broom so he could use the handle to push the wire and tile in place. At that time the claimant lost his balance and fell off the ladder.

David Gertz gave again conflicting testimony when describing regarding what occurred at EZ Loan. In his deposition, Mr. Gertz said he had called the claimant and arranged to meet at EZ Loan to discuss how much claimant was to be paid for the work he had already performed and to offer him a job cleaning Purina. At the hearing he at first testified that when the claimant arrived at EZ Loan they discussed his future employment. His first version was that claimant was there about 15 minutes and he did not ask claimant to help with the tiles or to get on the ladder. He left the area and heard a boom and came back to see claimant on the ground. He said the claimant had installed some tiles before he fell. In his deposition testimony he admitted that the claimant was helping him put the tiles up at EZ Loan.

When testifying at the hearing he said he estimated claimant was on the ladder between five and ten minutes while he was cutting tiles and bringing them to him.

When claimant fell it was obvious he suffered severe injuries to his right elbow and left wrist. The store manager called an ambulance. Before claimant left in the ambulance, Mr. Gertz placed a \$100 bill in claimant's shirt pocket. Mr. Gertz's version is that he put the \$100 in claimant's pocket and that is the only money he ever gave him. Since it did not appear claimant could work anymore that afternoon, his girlfriend took the Purina keys off claimant's key chain and gave them to Mr. Gertz. The claimant was then transported to the hospital.

Patricia Owensby, claimant's girlfriend, testified at the hearing. I find her to be a credible witness. She said that after the claimant fell, Mr. Gertz put money in claimant's pocket and took the Purina Keys. He later called her at the hospital and told her he was sorry for what happened and offered to help pay claimant's medical bills. He never called her back to follow up on that promise. Claimant testified that on June 21, 2010, Mr. Gertz called him at the hospital and again offered to pay his medical expenses. The claimant also said that Mr. Gertz suggested he declare bankruptcy to avoid paying his medical bills. Mr. Gertz denies making either of these offers or that he suggested the claimant declare bankruptcy. He does admit that he made an offer to claimant's girlfriend to pay for some medications but he never did so. Nor has he ever paid the claimant for the work that was performed in Branson.

After being taken to the emergency room by ambulance, x-rays of the right arm showed a fracture dislocation at the elbow and fracture of the radial head. The left wrist showed a fracture of the distal radius, comminuted with angulation. Claimant underwent a closed reduction of the right elbow in the emergency room. He was discharged with instruction to follow up with Dr. Edwin Roeder and Dr. Hugh Harris.

Dr. Roeder examined the claimant on June 18, 2010, to address his right elbow. He diagnosed him with a commuted fracture of the radial head with dorsolateral dislocation, dorsolateral of the radial head, a hairline nondisplaced fracture of the humerus, and multiple bony fragments. On June 21, 2010, he performed an open treatment for right radial head fracture with radial head prosthesis, open reduction and internal fixation of the right coronoid, and open repair of the right lateral ulnar collateral ligament.

Dr. Hugh Harris examined the claimant on June 23, 2010, to address his left wrist. He diagnosed him with a comminuted intra-articular displaced left distal radius fracture and median neuropathy of the left upper extremity. On June 25, 2010, Dr. Harris performed a closed reduction with percutaneous pinning of the left wrist with external fixation.

Claimant continued to treat with Dr. Roeder and Dr. Harris. Physical therapy was recommended for both extremities and claimant participated in extensive physical therapy from July through the end of December 2010.

On July 6, 2010, Dr. Roeder placed claimant's right arm in a posterior splint and prescribed pain medication. Dr. Harris removed the external hardware on the left arm on August 13, 2010. Dr. Harris notes state: "final x-rays were obtained which showed maintenance of overall very satisfactory alignment and position. The fracture hardware had been completely removed." Dr. Harris also diagnoses the claimant with peripheral neuropathy, carpal tunnel syndrome, and early reflex sympathetic dystrophy secondary to the fracture to the wrist.

On September 1, 2010, Dr. Roeder saw the claimant on follow-up for his right arm. His assessment was that the claimant was doing well, they discussed claimant's long term prognosis, and Dr. Roeder thought it was doubtful that the claimant would be able to use his right upper extremity for hard physical labor.

On September 20, 2010, Dr. Harris saw claimant and noted they discussed treatment options for the carpal tunnel condition. On that date he performed a corticosteroid injection, and felt that if that did not provide adequate relief a carpal tunnel release surgery would be warranted. In February 2011 Dr. Harris notes the reflex sympathetic dystrophy has essentially resolved with treatment and the claimant was showing gradual improvement, although he still had pain and neurologic symptoms in his left wrist and fingers.

On May 27, 2011, Dr. Harris released claimant from active medical treatment to return as needed. Dr. Harris noted claimant had “significant impairment of grip strength bilaterally with estimated 30% to 60% of anticipated grip strength with also limitation of left wrist flexion.” He found claimant had an impairment of 25% to both the right and left upper extremity, for both extremities combined, he stated it “would be 28% permanent physical impairment and loss of physical function to the body.” Dr. Harris continued the prescriptions for Norco, Tramadol, and Gabapentin.

The claimant was treated at Ferrell Duncan Clinic and Cox Hospitals. An Application for Direct Payment was filed by L.E. Cox Medical Center claiming a total of \$51,595.61. Medical bills contained in Exhibit E include this charge plus additional charges as follows:

L.E. Cox Medical Center	\$51,595.61
Cox Medical Center	2,696.23
Orthopedic Specialists of Springfield	6,370.00
Orthopedic Specialists of Springfield	274.82
Litton & Giddings	0 ¹
Ozark Anesthesia	910.00
	560.00
	840.00
	560.00
	490.00
Ferrell Duncan Clinic	215.00
	1,111.00

¹ Charges were adjusted to zero.

	224.00
	237.00
	1,192.00
	158.00
	138.00
	372.00
Advanced Hand Therapy & Ortho Rehab	2,635.80
	2,791.00
Mercy Clinic- Dr. Whetstone	304.88
Jordan Valley Community Health Center	<u>0²</u>
Total	\$73,675.34

After June 15, 2010, the date of the injury, claimant did not work for approximately five to six months. In November 2010 he went to work part-time, 12 – 15 hours a week, at offices for National Alliance of Mental Illness, hereinafter referred to as NAMI. He was paid \$7.25 an hour. He had worked there previously in August 2009 for several hours two or three days a week up until June 2010. He had no problems working before the injury in June 2010. At NAMI he worked answering phone calls for the non-crisis hotline. He did not have a headset, and holding the phone began to hurt his arms after his injury. His own depression and anxiety began affecting how he responded to people over the phone. The claimant testified that he felt the depression he was experiencing was the result of his work injury, not his prior problems. Because of the difficulty he was having returning to NAMI, he was sent for an evaluation with a neuropsychologist, Dr. Michael Whetstone.

After he returned to NAMI in November 2010 he could not work a set schedule or missed work entirely. NAMI tried to accommodate him. In March 2011 he took a break, and returned from July 2011 to February 2012. He again took a break in March 2012, and returned from July 2012 to September 2012 when they lost the grant and he could not be paid.

² Charges were adjusted to zero.

Dr. Whetstone saw the claimant on December 11, 2012. Dr. Whetstone testified by deposition. He interviewed the claimant and took a history as well as performing a personality assessment, which he refers to as a “protocol.” The claimant told him that he had suffered a work injury and had been dealing with the physical injury and limitations and was feeling stressed, anxious and depressed. They discussed his case including his medical treatment, his symptoms, and concerns regarding his psychologic status. He also took a history from the claimant of being diagnosed with schizophrenia and depression as a young child and was treated with medications prior to the age of twelve.

Dr. Whetstone testified that he reached the conclusion that the claimant had a “major depressive disorder, that the depression also contributed to the somatic concerns, his over concern regarding physical functioning, and had contributed to alcohol abuse. As I indicated, I think the antisocial personality characteristics are probably long-term – in essence, a lifelong personality disorder.”

He saw the claimant again on January 10, 2013. They discussed claimant’s current status and Dr. Whetstone recommended antidepressant medication and psychotherapy. They also discussed options to obtain this treatment as claimant was concerned that he had no money for co pays with Medicare or Medicaid. The claimant returned on March 25, 2013, and indicated that he had established care at Jordan Valley Medical Center. He was prescribed Mobil and Elavil, which helped him sleep but did not give much relief from the depression and stress. Dr. Whetstone again emphasized the need for psychotherapy. He was discharged at that time.

Dr. Whetstone found claimant had a preexisting psychologic disability of 20% of the body as a whole and a 10% psychologic disability to the body as whole as a result of the work injury, for a total psychologic disability of 30% of the body as whole. He found the work injury worsened claimant’s preexisting psychological condition. His prognosis was that if the claimant remains unable to work “there will be ongoing issues with depression, with antisocial personality, potential – strong potential

risk for substance abuse.” In his opinion claimant will more likely than not to “require lifelong psychologic treatment of some infrequent nature. It’s difficult to predict.”

Dr. Shane Bennoch examined the claimant, for purposes of an independent medical examination, on March 9, 2011. He testified by deposition. Dr. Bennoch took a history from claimant of standing on an aluminum ladder and trying to wrap some wires around a security camera when he fell and had immediate pain in both extremities. X-rays showed claimant with a fractured dislocation of the right elbow and a fracture of the radial head. The left wrist showed a fracture of the distal radius that was comminuted with angulation. He diagnosed a fall from a ladder at work with injuries to upper extremities; right elbow dislocation with radial head fracture and multiple bony fragments; open treatment of right radial head fracture with a radial head prosthesis and open reduction and internal fixation of the right coronoid with repair of the lateral ulnar collateral ligament; comminuted intra-articular displaced left distal radius fracture; median neuropathy of the left wrist area; closed reduction and percutaneous pinning of a Colles’ fracture with external fixation of a left distal radius; persistent median neuropathy left wrist involving the thumb and index finger; persistent pain right elbow with inability to fully extend at the elbow; and bilateral decreased grip with weak pronator supinator function.

He found claimant was at maximum medical improvement. Dr. Bennoch imposed permanent partial impairment ratings of 35% of the right upper extremity at the elbow and 30% to the left upper extremity at the wrist. He also felt claimant would have an additional 10% impairment due to the fact that both upper extremities were involved. He found that as a result of his injuries, claimant’s future work activity would be affected by the inability to fully extend the right elbow would significantly limit claimant’s activities, especially physical labor; decreased grip strength in his right hand; ongoing pain in his left wrist, and persistent median neuropathy to the left wrist may be related to significant decreased grip strength.

Dr. Bennoch imposed restrictions of lifting/carrying 20 pounds on the right and 30 pounds on the left, and no frequent lifting or carrying on the right and less than 10 pounds on the left. No pushing and pulling for both arms. Never to climb or balance on slippery or moving surfaces. Limited handling, fingering, and feeling in the left hand due to median neuropathy. Vibration is limited in both upper extremities.

Dr Bennoch testified that he found no preexisting medical conditions or injuries that would constitute a hindrance or obstacle to implicate the Second Injury Fund. He believed the claimant was capable of working with some restrictions. A telemarketer position was something he felt claimant could try. He explained, “you have to let the person try that and see. He may find that he does have some increased pain based on what he has to do as a telemarketer. For example, you know, if he’s using a keyboard, holding—you know, he doesn’t have a headset—he should have a headset so he doesn’t have to hold it, and so he might have some problems. But the only way you can get to know that is if you let him do the job for awhile. But yes, physically, I think he can do the job.”

On March 7, 2012, claimant saw Dr. Roeder for an independent medical evaluation. Dr. Roeder stated with a reasonable degree of medical certainty that the fall of June 15, 2010, was the prevailing factor of his injury and subsequent treatment to his left wrist and right elbow. Dr. Roeder assessed a permanent partial impairment of 12% to the right upper extremity and 10% left upper extremity impairment. He also stated, “I would suggest at this point that the patient be placed on a 10 pound lifting restriction for the right arm and a 5 pound lifting restriction for the left arm.” He also notes that the claimant is working part-time for NAMI, “and he is tolerating these activities well. I see no problems with him continuing.”

Phil Eldred, a certified rehabilitation counselor, evaluated the claimant on June 7, 2012. He testified by deposition. Mr. Eldred interviewed the claimant and took a history, reviewed medical

records, and performed vocational testing. The claimant gave him a history of having depression since he was 5 years old and taking medications until the age of 12, when he stopped the medication. In 1992 he fell off a ladder and cut his right hand, which healed. Mr. Eldred was not aware of any ongoing work, activity, or daily living restrictions due to a mental diagnosis before June 15, 2010. Claimant told him that his current problem was that on June 15, 2010, he fell from a ladder injuring his right and left upper extremity and face. He had surgery to the right elbow on June 21, 2010, and to the left wrist on June 25, 2010. Claimant gave a history of continued problems with constant pain in his right elbow; inability to straighten the right elbow; numbness, tingling, and aching in the left wrist; headaches, trouble focusing, and poor concentration. Claimant told him that he does work 10 hours a week but took a lot of breaks due to anxiety, depression and pain. Claimant also described difficulty sitting for longer than 20-25 minutes due to pain in his upper extremities.

Vocational testing showed claimant had reading and spelling abilities at a post high school level, although he had a 9th grade education he had received a GED.

Mr. Eldred found claimant had no transferable skills. Based on the restrictions of Dr. Roeder the claimant would be at a sedentary work level. While Dr. Bennoch's limitations were more specific, they still placed the claimant at a sedentary work level. Mr. Eldred thought that claimant was at a sedentary or less than sedentary level given his restrictions on handling, fingering, and feeling were at the occasional level. He said that reaching and handling are required for 92% of all jobs, and this knocks out a lot of even sedentary work for the claimant.

Mr. Eldred did not believe claimant could perform work as a telemarketer. He testified that the claimant would still be required to repetitively use his hands. That is why they are given a headset, so they can use their hands. He felt that a reasonable employer would not accommodate him as NAMI has done, as there are few employers that will accommodate a new employee. Mr. Eldred thought claimant

had the intellectual ability to be retrained, but could not be due to his inability to his upper extremity problems for note taking, and pain effects his ability to sit and concentrate.

Mr. Eldred concluded that the claimant was permanently and totally disabled as a result of the injury of June 15, 2010, alone, stating: “He is unemployable in the open labor market because of his functional limitations of the injury that he sustained and the functional limitations, really, that Dr. Bennoch specifically gave, which would keep him from performing any sedentary job, except for the one that he is doing on a part-time basis.”

James England, a certified vocational counselor, evaluated the claimant on April 2, 2013. He testified by deposition. As part of this evaluation, he interviewed the claimant, reviewed medical records, reviewed doctors' reports, and the prior academic testing performed by Mr. Eldred. He noted from Dr. Bennoch's report and specific restrictions of 20 pound lifting and carrying on the right, and 30 pounds on the left as well as no frequent lifting and carrying on the right, and less than 10 pound frequent lifting on the left. He also noted claimant's past history of depression and legal issues. He stated that a history of depressive and psychological issues could be a hindrance or obstacle to employment. He did not believe that psychological issues were interfering with claimant's ability to work up through the 2010 work injury.

When discussing claimant's past work history, Mr. England noted he had worked for temp agencies and in kitchens, including some kitchen management. Claimant had also worked for his father's store, has some computer knowledge, and has operated a variety of machinery and used a variety of tools. He found claimant to be at the sedentary to light level of work under either Dr. Roeder or Dr. Bennoch's restrictions. He stated that “under Dr. Roeder's restrictions, he could do a variety of other work activities such as cleaning offices, cashiering positions, retail sales, things of that nature. I thought that even under Dr. Bennoch's restrictions, there would still be some kinds of – from a physical

standpoint, some types of security work, customer service work, inside sales would still be possible even with the more-restrictive limitations that Dr. Bennoch had suggested.” He concluded claimant was not permanently and totally disabled.

The claimant testified that at present he cannot fully extend his right elbow. He continues to have pain in his right arm and elbow on a scale of 3-4/10 while at rest. If he tries to use his right arm his pain will increase to 10/10, especially with repetition or weight. He has constant pain in his left hand on an average of 3-4/10 while at rest. This includes pins and needles in his right thumb and index finger. This pain will increase with activities.

At the time of his deposition in 2011 he was taking Tramadol and Gabapentin. For two years afterwards he tried to avoid taking them and began using alcohol as a crutch. He recently started taking medication again which he obtains at Jordan Valley Clinic. These include Tramadol and Amitriptolene. He tries to not use them every day.

On a normal day he will lift 10 pounds easily and a maximum of 30 pounds. His range of motion and dexterity are also affected. He gave an example of doing laundry he will lift a total of 5 pounds and will fold with difficulty. He cannot vacuum. Cooking is difficult, especially lifting and pouring. He cannot perform any outside work nor walk his dogs. He can feed his dogs because the food is in a plastic tote and he scoops it with a small cup. He tried to drive in a parking lot but had trouble shifting and steering. When he sleeps he is often awoken by pain. He can sleep for four hours at the most. Pain causes him problems concentrating. He cannot sit over 20 minutes without moving and has trouble finding a comfortable position. He has difficulty with overhead activities and reaching, especially with his right elbow. He can no longer type because his fingers cramp.

He continues to work occasionally for NAMI as a volunteer. He may stay for a few hours or all day and chat. He has no schedule. He does not feel he could get another job.

Claimant's disfigurement was assessed at the hearing. He has incurred 7 weeks of disfigurement to the right elbow and 5 weeks of disfigurement to the left wrist for a total of 12 weeks disfigurement.

Superclean filed a Motion for Reverse Judgment pursuant to Section 287.040.3RSMo against Klean Rite and Labor Max in the event that Klean Rite is found liable for payments and Superclean is found to be a statutory employer.

After carefully considering all of the evidence, I make the following rulings:

1. Whether on or about June 15, 2010, Klean Rite was operating subject to the Missouri Workers' Compensation Law.

Section 287.030.1 defines an employer as:

(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.

(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 improvement shall be deemed an 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.

Section 287.040.1 RSMo defines the liability of an employer as:

Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

I do not find David Gertz' testimony credible regarding the number of employees he had on the date of the injury. In his deposition he testified that all of the people who worked for him were considered employees, not independent contractors, and that W-2 forms were filed for all the employees

the company ever had. Records admitted into evidence show that in 2010 W-2 forms were filed for Valerie Albuquerque, Janie Eddings, David Gertz, Glenn Highfill, and Sarah Jury. Payroll summaries and quarterly reports for Klean Rite show that in June 2010 only Janie Eddings and Sarah Jury were on the payroll. The evidence supports that Ms. Albuquerque and Glenn Highfill were not employed on June 15, 2010, but were at other times during that year.

No W-2 forms were filed for Damon Birmingham or Corey although Mr. Birmingham signed a Superclean work order on January 11, 2010, and Corey signed a Superclean work order on February 24, 2010. I do not find credible Mr. Gertz' explanation that Mr. Birmingham was a subcontractor. Nor do I find his testimony credible that Corey did not perform any work and that he was not an employee. I find the following facts support the conclusion that Corey was an employee: he drove the company vehicle at a specific time to the specific site specified in the work order, he was in possession and carried the work orders with him, he assisted the claimant performed specific cleaning duties on behalf of Klean Rite. I do find claimant's testimony credible that he was paid cash by David Gertz, and in light of the foregoing facts, I find it reasonable to conclude that he was employing Corey in a like fashion.

With the addition of Corey Girds, I find that Klean Rite had five employees in June 2010, and therefore qualifies an employer subject to the Missouri Workers' Compensation law.

2. Whether the claimant was an employee of Klean Rite on June 15, 2010.

Section 287.020.1 RSMo defines an employee as "every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations."

The claimant had entered into an oral contract for employment with David Gertz on behalf of Klean Rite. In fact, he had actually performed several jobs for Klean Rite in the week before the date of the accident. Therefore, I find that he was an employee of the employer.

3. Whether the claimant was a statutory employee of Superclean on June 15, 2010.

Section 287.040.3 RSMo further specifies the liability of an employer:

In all cases mentioned in the preceding subsections, the immediate contractor or subcontractor shall be liable as an employer of the employees of his subcontractors. All persons so liable may be made parties to the proceedings on the application of any party. 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, with attorney's fees and expenses of the suit. Such recovery may be had on motion in the original proceedings. No such employer shall be liable as in this section provided, if the employee was insured by his immediate or any intermediate employer.

The work being performed at EZ Loan replacing the ceiling tiles was at the direction of a work order provided by Superclean as a general contractor to their subcontractor, Klean Rite. I find that Superclean is a statutory employer because of the contractor-subcontractor relationship with Klean Rite. Therefore, pursuant to the statute, Superclean is secondarily liable to the claimant as he was an employee of the uninsured subcontractor Klean Rite.

4. Whether the claimant sustained an accident which arose out of the course and scope of employment one June 15, 2010.

On the date of the accident, claimant had made arrangements to meet Mr. Getz at EZ Loan. At the time the injury occurred, claimant was standing on a ladder installing ceiling tiles that Mr. Gertz had cut and brought to him. He had actually installed several of these tiles before he fell. While Mr. Gertz gave some conflicting testimony, he did ultimately admit to this scenario. I find claimant was clearly in the course and scope of employment when he fell from the ladder. He was performing work for Klean Rite in response to a work order received from Superclean at the location and at the direction of his boss, resulting in severe injuries to both his upper extremities.

5. Whether Klean Rite or Superclean is obligated to pay past medical expenses.

As the primary employer I find that Klean Rite is obligated to pay past medical expenses of \$73,675.34 sustained by the claimant as a result of his compensable accident. Superclean is obligated to pay these benefits as a secondary employer pursuant to Section 287.040.3 RSMo.

6. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

Numerous recommendations for future medical treatment is contained in the evidence. Claimant has continued to be prescribed medication by Dr. Harris. Although he has had difficulty paying for these medications at times, he is currently able to fill his prescriptions, which he continues to take at the time of the hearing. Dr. Whetstone recommended further psychological treatment. Furthermore, the claimant has retained prosthesis and hardware.

I find that the claimant will need future medical treatment as a result his injuries. Therefore, the primary employer, Klean Rite, and Superclean, as the secondary employer, are required to provide the claimant with future medical treatment to cure and relieve him of the effects of his injuries.

7. Who has the right to choose providers for future medical treatment.

Neither Mr. Getz, Klean Rite, nor Superclean has authorized or paid for any medical treatment at this point. I find that the employers have waived their right to choose the providers in the future. Therefore, the claimant may direct his own medical treatment.

9. What is the proper rate.

I find that the claimant and Mr. Gertz entered into an oral agreement that claimant would be paid \$10 per hour. Claimant only worked for Klean Rite a few days before he was injured. He testified he was paid \$15 for the Game Stop job, \$50 for the Joplin job, and was then given \$100 on the day of the injury. This is a total of \$165 actually paid to him in the week before his injury. Their arrangement was

claimant was to work a couple hours a day at the Purina job. Mr. Gertz also told claimant, that in addition to these hours, he would call him when he needed him, which is precisely what he did several times during the week of the injury.

For purposes of determining an average weekly wage for temporary total disability, Section 287.250.1 RSMo sets forth methods of computing the average weekly wage. I find that none of the formulas provided in subsections 1 to 3 apply due to the unusual facts presented. Rather, I am relying on Section 287.250.4 RSMo, which states that if “the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee’s average weekly wage.”

The only evidence of other employees is Janie Eddings and Sarah Jury, who were not employed for the same hourly rate or under the same agreement. They are not same or similar.

Under the exceptional facts of this case, I find that the amount the claimant was actually paid during the week preceding his injury is an accurate reflection of the employment agreement. Therefore, I find the claimant’s average weekly wage is \$165 which allows a weekly rate of \$105 for temporary disability purposes.

Section 287.250.3 RSMo provides that for purposes of permanent partial, permanent total, and death benefits, if the claimant is hired for less than the number of hours necessary to be classified as a full-time or regular employee, the wages of a full-time or regular employee shall apply, “but shall not be based on less than thirty hours per week.”

Pursuant to subsection 3 above, I find that for purposes of permanent disability, claimant average weekly wage is calculated at his hourly wage of \$10 based on a thirty hour week. Therefore, I find his average weekly wage for permanent disability purposes is \$300 allowing for a weekly rate of \$200.

10. Any temporary total benefits owed to the claimant.

Claimant testified that he was off work for 5-6 months after his injury. Dr. Roeder released him from treatment on November 9, 2010. Claimant testified that he went to work at NAMI in November 2010. Therefore, I find claimant was temporarily and totally disabled for 21 weeks, from the date of his injury to November 9, 2010, the date Dr. Roeder released him.

Claimant then worked at NAMI part-time until he took a break in March 2012. There is insufficient evidence to determine if he is entitled to any temporary partial disability during the time periods he worked for NAMI. There is no evidence to the exact dates he worked and did not work. He testified he returned in July 2012 and worked until September 2012. I cannot adequately determine from the evidence the specific periods of employment and unemployment to support an award of temporary disability during this time. Therefore none is awarded.

After claimant left NAMI in September 2012, he has not worked. Because claimant had been released by all of the physicians³ as of this date, I find his disability had become permanent rather than temporary at this time.

Therefore, I find that claimant is entitled to 21 weeks of temporary total disability at the rate of \$105, equaling \$2,205. The parties stipulated that AmTrust paid the claimant \$350 representing temporary total disability. They are entitled to a credit for this amount previously paid. Therefore, claimant is entitled to a net amount of \$1,855 for temporary total disability.

10. The nature and extent of permanent disabilities.

I have carefully considered all of the differing expert opinions regarding claimant's ability to return to work. Dr. Bennoch and Dr. Roeder gave restrictions that place claimant at the sedentary or light level of employment. Dr. Bennoch thought claimant could be employable as a telemarketer and that he should attempt to perform that job. Mr. England concluded claimant was employable at the sedentary to light level. Mr. Eldred testified that claimant was permanently and totally disabled as a result of the work injury, stating "He is unemployable in the open labor market because of his functional limitations of the injury that he sustained and the functional limitations, really, that Dr. Bennoch specifically gave, which would keep him from performing any sedentary job, except for the one that he is doing on a part-time basis." Mr. Eldred disagreed claimant could work as a telemarketer as claimant would still be required to repetitively use his hands. He also felt that a reasonable employer would not accommodate him as NAMI has done.

In addition, I considered the claimant's testimony regarding his current functioning and pain levels. I find it particularly significant that his pain level rises to 10/10 with increased activities, with repetition, or lifting weight. He also has difficulty concentrating and cannot sit for over 20 minutes. He can no longer type due to his injuries to his right hand.

I also considered the opinion of Dr. Bennoch that claimant should try to perform telemarketing. That is exactly what occurred. The claimant had a failed return to work at NAMI. I find this is a failed return to work for several reasons. Claimant could not maintain even part-time employment without missing time or taking breaks in his employment. NAMI was an extremely accommodating employer in

³ Dr. Roeder released claimant on November 9, 2010. Dr. Bennoch found claimant at maximum medical improvement on March 9, 2011. Dr. Harris released claimant on May 27, 2011.

that they would allow claimant to work or not work as he needed. These are not conditions that one would expect of a reasonable employer in the open labor market.

Based on all of the evidence, I find the claimant is permanently and totally disabled as a result of his injuries of June 15, 2010. He is entitled to permanent and total disability from the time he left NAMI. Because the evidence was not more specific than this occurred sometime in September 2012, I order permanent total weekly benefits to begin October 1, 2012, and continue into the future according to law.

11. A Medical Fee Dispute filed by Cox Health Systems a/k/a L.E. Cox Medical Center to be ruled upon.

Cox Health Systems filed an Application For Direct Payment for the amount of \$51,595.61. Section 287.140.13(6) does not require an express promise to pay, but it specifies the serves “have been authorized in advance by the employer or insurer.” The statute does not define the term “authorized.” In *Curry v. Ozarks Electrical Corp.*, 39 S.W.3d 494 (Mo.banc.2001) the Supreme Court looked to the plain and ordinary meaning of the word from the dictionary. Quoting Webster’s Third New International Dictionary they stated “‘Authorize’ means ‘to endorse, empower, justify, or permit by or as if by some recognized or proper authority (as custom, evidence, personal right, or regulated power).’”*Id.*

The evidence supports that Mr. Gertz promised to pay the claimant and his girlfriend for medical expenses, but there is no evidence his actions rose to a level ever expressly or impliedly endorsed, empowered, justified, or permitted payment by Klean Rite under the common meaning of the word “authorize” with the Cox Health Systems a/k/a L.E. Cox Medical Center as he never actually spoke to anyone from the health care provider directly. The facts in this case can be distinguished from the case above in that the president of the employer asked the health care provider to send his bills to the employer to he would know what treatment the employee had received.

Therefore, I deny Cox Health Systems a/k/a L.E. Cox Medical Center's Application For Direct Payment.

12. Disfigurement to be assessed.

At the hearing I viewed claimant's scars, and based on my observations, I award 7 weeks of disfigurement to the right elbow and 5 weeks of disfigurement to the left wrist for a total of 12 weeks disfigurement.

13. Motion for Reverse Judgment filed by Alleged Statutory Employer and Employer's Insurer to be ruled upon.

Pursuant to Section 287.040.3 RSMo as set forth above, Superclean's Motion for Reverse Judgment is granted. Klean Rite is liable to Superclean for all amounts paid to the claimant as a result of this award. No attorney fees or expenses are awarded to Superclean as there is insufficient evidence to do so.

Attorney for the claimant, Mike Mergen, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: _____

Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation