

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

Injury No.: 07-114438

Employee: Frederick H. Monteil
Employer: Arctic Slope Regional Corporation aka ASRC Management Services
Insurer: Insurance Company of the State of Pennsylvania
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge. The award and decision of Administrative Law Judge Robert B. Miner, issued January 11, 2010, is attached and incorporated by this reference. We supplement the award to address an issue raised while the matter was pending before us.

Third-Party Verdict and Settlement

Subsequent to the award on hearing issued by the administrative law judge and the Application for Review filed with the Commission by the employer/insurer, the parties filed with the Commission a Joint Stipulation for the Submission of Additional Evidence pursuant to 8 CSR 20-3.030(2). By this motion the parties requested the Commission receive into evidence stipulations regarding a jury verdict and third-party settlement entered into subsequent to the hearing and award issued by the administrative law judge. By order dated July 1, 2010, the Commission admitted the joint submission of evidence into the record as requested.

In workers' compensation cases, third party practice and subrogation are covered by § 287.150 RSMo. Pertaining to the instant case § 287.150.1 RSMo and § 287.150.3 RSMo are the relevant provisions and provide as follows:

1. Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and employee or his dependents using the provisions of subsections 2 and 3 of this section.

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3. Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee. Notwithstanding the foregoing provision, the balance of the recovery may be divided between the employer and the employee or his dependents as they may otherwise agree. Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:

(1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or

(2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.

When a recovery is made against a third party, the distribution of the proceeds of that recovery is governed by the above provisions and by a formula set forth in *Ruediger vs. Kallmeyer Bros. Service*, 501 S.W.2d 56 (Mo. banc 1973). The rule is set forth as follows:

1. The expenses of the third party litigation are first deducted from the third party recovery.
2. The balance is apportioned in the same ratio that the amount paid by the employer at the time of the third party recovery bears to the total amount recovered from the third party.
3. The amount due each is paid.
4. The amount paid the employee is treated as an advance payment on account of any future installments of compensation.
5. The employee is entitled to future compensation benefits in the event that the amount paid to the employee as an advance is exhausted.

In the instant case, as stipulated by the parties, a third party settlement was effected on April 23, 2010, after a jury verdict. The proceeds of the third party recovery were distributed pursuant to the provisions of § 287.150 RSMo and the *Ruediger* formula as outlined above. Without citation to authority, employee invites us to apply the

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provisions § 287.150 RSMo, as if the amounts awarded herein had been paid at the time of the third party recovery. We decline to do so.

As stipulated by the parties, the amount distributed and paid the employee was \$324,625.23. This amount is treated as an advance payment on account of any future installments of compensation and operates as a credit in behalf of the employer until the amount paid the employee is exhausted.

The total compensation awarded to employee from employer/insurer is \$36,376.45. As stated above, the amount paid and distributed to the employee from the third party recovery is \$324,625.23. The amount of compensation awarded the employee does not exhaust the amount paid to the employee due to the third party recovery. Therefore, there is no amount of compensation payable the employee from the employer/insurer.

The Commission 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 3rd day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Frederick H. Monteil

Injury No.: 07-114438

Employer: Arctic Slope Regional Corporation, a/k/a ASRC Management Services

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

Insurer: Insurance Company of the State of Pennsylvania

Hearing Date: November 10, 2009

Checked by: RBM

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: November 1, 2007.
5. State location where accident occurred or occupational disease was contracted: Missouri Highway 92 in Platte County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was driving his truck and fifth-wheel on his way home to Colorado from a job-site in Illinois when he was involved in a motor vehicle accident.

- 12. Did accident or occupational disease cause death? No.
- 13. Part(s) of body injured by accident or occupational disease: Neck, head, and right upper extremity.
- 14. Nature and extent of any permanent disability: 20% of the body as a whole (400 week level.)
- 15. Compensation paid to-date for temporary disability: \$37,878.72, representing 51 weeks at \$742.72 per week.
- 16. Value necessary medical aid paid to date by employer/insurer? \$94,114.79.
- 17. Value necessary medical aid not furnished by employer/insurer? \$5,253.25.
- 18. Employee's average weekly wages: Sufficient to result in maximum compensation rates.
- 19. Weekly compensation rate: \$742.72 for temporary total disability and \$389.04 for permanent partial disability.
- 20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$5,253.25

No weeks of temporary total disability (or temporary partial disability)

80 weeks of permanent partial disability from Employer (.20 x 400): \$31,123.20

No weeks of disfigurement from Employer

TOTAL FROM EMPLOYER: \$36,376.45

- 22. Second Injury Fund liability: Not determined (remains open.)
- 23. Future requirements awarded: None.

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Frederick H. Monteil

Injury No.: 07-114438

Employer: Arctic Slope Regional Corporation, a/k/a ASRC Management Services

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

Insurer: Insurance Company of the State of Pennsylvania

Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on November 10, 2009 in St. Joseph, Missouri on Employee's claim against Employer/Insurer. Employee, Frederick H. Monteil ("Claimant") appeared by his attorney, Leah Brown Burkhead. Employer, Arctic Slope Regional Corporation, a/k/a ASRC Management Services ("Employer") and Insurer, Insurance Company of the State of Pennsylvania ("Insurer") appeared by their attorney, Thomas V. Clinkenbeard. No one appeared on behalf of the Second Injury Fund. The Second Injury Fund is a party to this case, but was not represented at the hearing since the parties agreed to leave the Second Injury Fund claim open. Claimant's attorney requested an attorney's fee of 25%, and renewed her request for cost pursuant to Section 287.203, RSMo that she made in connection with the temporary hearing held in this case on June 12, 2008.

The Court previously entered its Temporary or Partial Award in this case on June 12, 2008 and found that Employee sustained a compensable accident and awarded medical and temporary disability benefits, and denied Employee's attorneys' request for costs. The Court takes judicial notice of the Temporary or Partial Award in this case entered on June 12, 2008.

STIPULATIONS

At the time of the final hearing, the parties stipulated to the following:

1. On or about November 1, 2007, Frederick H. Monteil ("Claimant") was an employee of Arctic Slope Regional Corporation, a/k/a ASRC Management Services ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.

2. On or about November 1, 2007, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law, and was duly insured by Insurance Company of the State of Pennsylvania ("Insurer").
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.
5. The amount of \$37,878.72 had been paid in compensation at the rate of \$742.72 per week, representing 51 weeks.
6. Medical aid had been paid in the amount of \$94,114.79.
7. The average weekly wage was sufficient to result in maximum compensation rates, and the rate of compensation for temporary total disability is \$742.72 per week, and the rate of compensation for permanent partial disability is \$389.04 per week.
8. In the event this case is found compensable, Claimant shall be entitled to an award of 20% of the body as a whole (400 week level) in permanent partial disability benefits, which amounts to \$31,123.20 (.20 x 400 x \$389.04).
9. The past medical expenses in the amount of \$5,253.25 sought by Claimant are fair, reasonable, usual, and customary, and causally related to the November 1, 2007 accident. It was also agreed that these medical expenses represent treatment received by Claimant that was reasonably required to cure and relieve him from the effects of his injury, and in the event this case is found compensable, Claimant shall be entitled to an award for past unpaid medical expenses of \$5,253.25.

DISPUTED ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about November 1, 2007, Claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment for Employer.
2. Nature and extent of permanent partial disability.
3. Whether Claimant is entitled to past medical benefits of \$5,253.25 if Claimant's claim is found compensable.
4. Whether cost should be assessed against Employer/Insurer pursuant to Section 287.203, RSMo 2006.

Claimant and Employer/Insurer offered Joint Exhibit 1 which was admitted in evidence at the final hearing. Joint Exhibit 1 is a Transcript of the temporary hearing held in this case on June 12, 2008, and includes the testimony of Claimant, Exhibit 1—Map of Kansas City, Missouri area, Exhibit 2—Missouri Uniform Accident Report, Exhibit 3—Medical records, Exhibit 4—Copy of check dated November 20, 2007, Exhibit 5, Claimant's Attorney Fee Statement, and Employer/Insurer's Exhibit A—a letter dated December 12, 2008 from Jennifer Held.

Claimant also offered medical billing records marked as Exhibit A, which was admitted in evidence at the final hearing without objection.

The Court notes that a prehearing telephone conference was held in this case on November 9, 2009 with attorneys Leah Burkhead and Thomas Clinkenbeard during which the attorneys advised that Claimant had a cervical fusion following the November 1, 2007 accident and was working.

Findings of Fact

Summary of the Evidence

Claimant testified at the June 12, 2008 hearing that he was 57 years old. Employer was engaged in the business of installation of replacement generators all over the country. Claimant worked in several states and drove to job sites all over the country. Each job typically lasted about 10 days. He was the B Team Leader. He oversaw the projects and coordinated work with the FAA and subcontractors.

Claimant started work for Employer in October 2007. Before that, he had worked for about a year doing the same job with the same boss, the same crew, and for the same pay. Employer's name changed in October 2007.

Claimant stated that he had worked for Employer at a job site in Centralia, Illinois for about two weeks in October 2007. That job ended in the late afternoon on October 31, 2007. Claimant drove his personally-owned Ford F-350 truck that had a fifth wheel. He pulled a 28 foot fifth wheel that was attached to the gooseneck of his truck. He owned the fifth wheel. He drove the truck and fifth wheel to various job sites while employed by his prior Employer and his current Employer. His fifth wheel and truck were parked at the Mount Vernon, Illinois RV Park when he worked in Centralia, Illinois in October 2007. He paid the parking fees and was reimbursed by Employer at the rate of 60% of the allowed hotel lodging rate based on the hotel price in the area. He stayed in RV parks for a variety of reasons including convenience, safety, and sanitation. He carried his office in his trailer that included computers, file cabinets, and catalogs. He

said he treated his trailer like his office and his home. The trailer had two computers, including a laptop owned by Employer and a desktop which he owned personally. It also had a printer owned by Employer and a file cabinet which he owned. The file cabinet contained files relating to his jobs, including records of expenses and photographs. His trailer allowed him to work at night on occasion. He usually held a crew meeting at the trailer during a job.

Claimant stated that Employer did not direct him where to park his RV. Factors that he used when he selected RV sites included safety, proximity to job sites, and convenience. He said his RV was easy to break into and could be entered with a screwdriver. He stated he avoided places with mobile homes, large truck stops, and large highways. He said RV parks usually have set hours and limits on the number of people who come and go.

Claimant stated he was paid by the hour on the job site. He worked at night in his RV at different times. He was also paid for meals according to a GSA schedule. The flat rate was at least \$39.00 per day, but the rate might be higher in larger cities. He had to turn in receipts for RV park rentals and meals.

Claimant stated that after he finished his job in Centralia, Illinois, he wanted to go home for a break. His home is in Longmont, Colorado. He had three crew persons working for him at the time. Two lived in Oklahoma City and drove Employer-owned vehicles. The third drove his forty foot RV Coach that he owned.

Claimant said that he got his trailer set up to pull out on October 31, 2007. He left Illinois on Thursday November 1, 2007 around 5:00 a.m. He said Employer paid him for an eight-hour day so long as he traveled at least 350 miles within a day. He did not get paid for eight hours if he did not drive at least 350 miles in a day. He was only paid for eight hours even if he drove more than 350 miles. He was also paid mileage reimbursement.

Claimant stated that when he left Illinois on November 1, 2007, he was on route to the Travel Lodge Motel Park in Platte City, Missouri. He recalled staying there on at least one prior occasion, and he may have stayed there another time. He said the Travel Lodge was a safe and secure place that was off the interstate and was quiet. He had calculated that the mileage was 362 miles from Centralia, Illinois to the Travel Lodge Motel Park in Platte City. He had also checked and knew the RV Park in Platte City was open.

Claimant stated that Employer did not tell him where to park his RV. He submitted the receipt to the Employer and was paid. He was paid on the same per diem

basis, whether he was traveling to a job-site from home, from a job-site to home, and from one job-site to another.

Claimant testified that when he left Illinois on November 1, 2007, he had his route planned to Platte City. He said he planned to travel to Interstate 70, to Interstate 35, to Highway 169, and on to Highway 92 to Platte City. Claimant said that he had taken Interstate 70 from his home in Colorado to Moline, Illinois, and had taken Highway 435 to Platte City, Missouri on that trip.

Claimant testified that his 93 year old father lived in a nursing home about one and one-half blocks off of Highway 169 in Smithville, Missouri. Claimant said he planned to see his father while he was in Platte City, and that was another reason that he was stopping in Platte City. Claimant said that while he was driving across Missouri, he called his father on the cell phone. He and his father had problems communicating because of poor reception. He was going to tell his father that he would be arriving in Platte City.

Claimant stated that while he was on his way to the RV Park in Platte City, he stopped and saw his father at his father's nursing home in Smithville. He told his father that he was going to drop his trailer off and then come back to see him. Claimant said that he was familiar with the area and had grown up in that area. He said Highway 92 was a scenic road and he enjoyed driving on that road. He said that when he left Illinois, he did not plan to see his father on the way to the RV Park. He decided to stop in on the way to the park because of the cell phone call. Claimant stated that he did not change the route he was planning to take to the RV Park when he stopped to see his father in Smithville.

Claimant testified that after he saw his father on November 1, 2007, he got back in his truck and drove to Highway 92. He went west on Highway 92 on route to the RV park in Platte City. He had driven about six miles when he was involved in a motor vehicle accident. He said that at the time of the automobile accident, he was on the route that he had intended to take when he left Illinois in the morning. He said that the route he was on was the same that he taken before, and was the same that his Employer had paid him for on a previous trip. His last stop before seeing his father was in Columbia, Missouri.

Claimant stated he was planning to take the RV to Platte City, park it, hook it up, and then go back and take his father out to dinner. Some other family members were going to join them for dinner. He said he did not plan to see any family the next day before he left for Colorado. He stated his mileage reimbursement stops when he parks his RV for the night. He said that Employer knew that he would stop to see his father, and his Employer had no issues with that. He said he was on the clock until he parked the

truck. He said he would not have been on Highway 92 but for working for the Employer. He said Employer did not direct his routes when he traveled.

Claimant stated that the motor vehicle accident occurred at about 11:30 a.m. He had driven between 354 and 356 miles that day at the time of the accident. The mileage to the RV Park from where he started was 362 miles. He was traveling west on Highway 92 going down a hill before the accident occurred. He saw a flat bed truck pulling a bail buster, used for erosion, parked along his lane of traffic. The driver of the flat bed was on a cell phone. Claimant drove to the left and then the driver of the flat bed pulled out in the west-bound lane in front of Claimant. The flat bed turned left right in front of Claimant and Claimant went into the left lane to avoid the collision. Claimant pulled his truck against a guard rail.

Claimant said that he had driven for ten minutes, and had traveled eight to nine miles, after leaving the nursing home where he had seen his father when the accident occurred. He said that the trailer that he was pulling weighed about 11,000 pounds and the weight affected his ability to stop.

Claimant said that he injured his neck in the accident. He stayed at his sister's that night. His vehicle was not drivable. He began having headaches the afternoon of the accident. Claimant said he saw Dr. Pettine after the November 1, 2007 accident. Dr. Pettine had performed a two level fusion at C5-C7 on Claimant in 2003. Claimant said he had no problems after that fusion. He said he was not taking any medications before the November 1, 2007 injury. Dr. Pettine performed an x-ray after the November 1, 2007 accident that showed that the fusion between C6 and C7 was broken and a screw was backed out. Dr. Pettine did an epidural. Claimant stated that Dr. Pettine had recommended surgery to repair the fusion at C6-C7 to reinsert the screw. He also recommended an artificial disk at C3-C4. He last saw Dr. Pettine in December 2007.

Claimant stated that he had been off work since November 1, 2007 at Dr. Pettine's instructions. Claimant said that he believed that he could not work.

Claimant stated that he had received only one check from the workers' compensation insurer. The check was mailed to him, and was to pay benefits from November 5, 2007 through November 25, 2007. He was not told whether he was paid under Missouri or Oklahoma law. He said he had no claim pending in any other state. Claimant said that his symptoms were excruciating neck pain, neck spasm, severe headaches, numbness and loss of sensation in his arms. He said his hands felt like they were asleep, and he had trouble sleeping. He said before the accident he had been an active outdoor person and had fished, hunted, mowed, and performed household chores. He said that he could not lift more than 10 pounds after the accident. He requested

permission for Dr. Pettine to treat him. He said Dr. Pettine is a leading orthopedic surgeon who had performed prior knee surgery and prior shoulder surgery on him.

Claimant stated that he had flown in for the hearing and had spent \$260.00 for the airfare. He stayed with his family.

On cross examination, Claimant stated that he was hired in Oklahoma by Employer. He said that he was not principally employed in the state of Missouri. He did not know if Employer had any offices in Missouri. Claimant stated that Interstate 70 was the most direct route from Illinois to his home. He acknowledged that Interstate 70 went through Kansas City, Missouri. He said he traveled interstates on a regular basis. He said there are RV parks along interstates including I-70. He said he was not required to take the route that traveled along Highway 92 near Platte City, MO. He said he could choose his own destination and could have driven on I-29 to the RV Park in Platte City.

Claimant estimated it was 370 miles from Centralia, Illinois to Kansas City, Missouri and 370 miles from Centralia, Illinois to Platte City, Missouri. He said he had driven 350 miles by the time he got to his father's nursing home. He had intended to travel along Highway 92 that day, and had decided to see his father while on route.

Claimant stated that he had a brother and sister in the area. One lived in Smithville and one lived in Platte City. He said he planned to see all of his family the evening of the accident. He acknowledged that the selection of the RV Park was very convenient to see his family. He said his family was a reason for him to stop where he did. He planned to go back and see his father after parking his RV. He planned to travel back to I-70 the next morning when he left for Colorado. He said that I-435 near Kansas City did not require him to be on either Highway 169 or Highway 92. He said that Highway 92 was a hilly two-lane highway.

Claimant said he did not discuss with Employer that he was going to see his family. He said he was not sure of the number of miles north of I-70 that the Travel Lodge RV Park was. He did not disagree that it might have been about 30 miles. He said that Highway 92 went right to the trailer park. He said he did not conduct any business for Employer the evening of the accident.

Claimant said he was not going to meet with his crew at Platte City. He said he had conducted personal business out of his trailer in the past and that relatives had visited in his trailer. A family reunion had not been held there and nothing was planned there that day. He said the reason he was there that day was to see his family. There were other routes available to return home.

Claimant stated that Employer did not require him to stop in Kansas City. He said it was his normal pattern when going across the Midwest to stop at Platte City to see his family. He had planned to take 435 southwest to I-70 the next day on his return home. He said he had not told his Employer in advance that he planned to stop in Platte City.

On redirect, Claimant stated that he was not principally employed in any state. He said that he had his office in his RV and his preferred place of business was his RV. He said travel was an important part of his employment. He chose the route when he left Illinois. He said he was not familiar with other RV parks in the area. On re-cross, Claimant stated that he could do his job without stopping in Platte City. He said he planned the trip through Platte City because his family was there.

I find that Claimant's testimony was credible.

Exhibit 1 is a Google map of the Kansas City, Platte City area showing I 70, Highway 435 and Highway 92. It contains a red circle in Smithville designating "Father's house," a blue circle designating "Accident," and a purple circle designating "Travel Lodge." Exhibit 4 is a copy of check dated November 20, 2007 in the amount of \$1,731.00 payable to Claimant that notes "temporary total 110507- 112507."

Exhibit 3 includes a letter dated February 12, 2008 from Dr. Kenneth Pettine pertaining to Claimant. This letter notes that Claimant had been treated for severe ongoing neck pain, headache, and intrascapular pain with radiating arm pain, motor weakness and sensory changes due to a motor vehicle accident that occurred during work on November 1, 2007. The letter further noted that prior to the motor vehicle accident, Claimant had a surgical fusion at C5-6, C6-7 that was done in July 2003. The letter noted that x-rays obtained on November 8, 2007 showed a solid fusion at C5-6 with a pseudoarthrosis at C6-7. The letter stated that the doctor did not know whether this occurred as a result of the accident or was old. An MRI documented abnormalities at C3-4 as well as the pseudoarthrosis at C6-7. The letter noted that Claimant had undergone two epidural steroid injections without much benefit. The letter further noted that based on Claimant's neurologic deficits, Dr. Pettine believed it was medically reasonable and necessary to proceed with a surgical approach to Claimant's problem. The letter stated that Dr. Pettine believed a Prestige cervical disc at C3-4 would be in Claimant's best interest due to the fact that he had a previous fusion from C5 to C7, in order to avoid a rapid degeneration of the C4-5 disc. The letter stated that he would also redo Claimant's fusion at C6-7 at the same time. The letter also noted that due to Claimant's status, he was incapable of substantial gainful employment since the motor vehicle accident. The letter concluded that Dr. Pettine believed Claimant's treatment and future surgery were directly related to the motor vehicle accident noted earlier in the letter.

Dr. Pettine's November 8, 2007 note stated that Claimant was as miserable as he had ever seen him. Based on the extensive nature of his symptoms and his radicular findings, Dr. Pettine thought it would be very reasonable to get a MRI scan on back, neck collar, pain medications, muscle relaxers, and physical therapy. The note said Dr. Pettine was not at all optimistic about Claimant's future. An additional November 8, 2007 note of Dr. Pettine noted that Claimant had 80% loss of cervical motion; marked muscle spasm; pain to palpation to the paraspinal suboccipital area; muscle spasms; motor weakness and sensory changes, positive Spurling's and compression test; minimal evidence of intrinsic shoulder or elbow pathology; no evidence of acute skin change, distal swelling, or vascular changes.

Exhibit 3 also included Dr. Pettine's November 15, 2007 note that stated that Claimant was unable to work because of the amount of pain he was in. The plan was noted to be to proceed with continued use of immobilization and possible cervical epidural steroid injection. Dr. Pettine said he thought it would be reasonable to keep Claimant off work. The note further stated that Dr. Pettine would not consider any surgery until Claimant had had at least three months of symptoms.

Exhibit 3 also included a March 23, 2006 note of Dr. Pettine. It noted that Claimant was status post two-level anterior cervical fusion C5-C7 that was done in July 2003. He had a month of severe neck pain, intrascapular pain and some radiating left arm pain. They discussed a short course of Decadron pain medications and muscle relaxers. Exhibit 3 also included additional records pertaining to Claimant's prior medical treatment, including his anterior cervical fusion done on July 30, 2003. The records also included Dr. Kenneth Pettine's Procedure Note dated July 30, 2003. The pre-procedure diagnosis was severe disc herniation, lateral recess foraminal stenosis at C5-6 and C6-7 with severe arm pain. The procedure was complete discectomy at C5-6, C6-7 with complete foraminotomy, partial corpectomy at each level at C5-6 and C6-7, harvesting of left autogenous iliac grafting, and anterior cervical fusion at C5-6 and C6-7. Exhibit 3 also included a neck disability index dated March 23, 2006. It noted that Claimant could do most of his usual work, but no more, and could lift heavy weights, but it gave him extra pain.

Exhibit 2 is the Missouri Uniform Accident Report for Claimant's November 1, 2007 accident. The accident report noted that the officer's investigation revealed that Vehicle 1 (the vehicle not operated by Claimant) pulled into the west-bound lane of Highway 92 in front of Claimant's vehicle, and the vehicles side-swiped each other in the roadway. A witness statement in the report stated that Vehicle 1 pulled right out in front of Claimant's vehicle, and there was no where for Claimant's vehicle to go. He observed Claimant's vehicle swerve onto the oncoming lane to avoid collision.

Claimant's attorney submitted a three page Attorney Fee Statement, Exhibit 5, in the total amount of \$7,330.63. The Statement included \$6,824.00 in attorney's fees and \$506.63 in costs for the period November 26, 2007 through June 20, 2008.

Employer's Exhibit A, a letter dated December 12, 2008, was admitted without objection. Employer's Exhibit A was from Jennifer Held, claim representative, AIG Services referring to Claimant and Employer and date of injury of November 1, 2007. Exhibit A stated: "AIG Claims Services is the workers' compensations carrier and I am the claim adjuster handling the current claim for the above stated claimant. This letter is to you inform you that indemnity payments that were issued to the claimant were issued out of the office that handles the Oklahoma claims and was issued according to the Oklahoma workers compensation laws."

Claimant's Exhibit A contains an itemization of Claimant's medical bills for treatment at Longmont United Hospital and Dr. Pettine of Rocky Mountain Associates from November 8, 2007 through July 31, 2008 in the amount of \$4,897.85, and Claimant's out-of-pocket medical expenses in the amount of \$355.40.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the medical evidence, and the stipulations of the parties, I make the following Rulings of Law:

1. Did Claimant sustain an injury by accident that arose out of and in the course of employment?

Section 287.800, RSMo¹ provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

¹ All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Generally, workers' compensation benefits are available for an employee's personal injury or death by accident arising out of and in the course of employment. Sections 287.120.1, 287.020.3(1), RSMo; *Smith v. Donco Constr.*, 182 S.W.3d 693, 699 (Mo.App. 2006). Section 287.020.3(1), RSMo provides in part:

In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment." Section 287.020.10, RSMo provides: "In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Section 287.120.1, RSMo provides in part: "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person."

The accident must both "arise out of" and be "in the course of" employment. *Simmons v. Bob Mears Wholesale Florist*, 167 S.W.3d 222, 225 (Mo.App. 2005). "Arising out of" and "in the course of" employment are two separate tests, both of which must be met. *Id.* Claimant has the burden of proving both elements. An injury "arises out of" the employment if it is a natural and reasonable incident thereof and is the rational consequence of some hazard connected with the employment. *Id.* An injury arises "in the course of" the employment when it occurs within the period of employment, at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of his employment. *Id.* There is no "all embracing definition" of the phrase "arising out of and in the course of the employment," and each case must be decided on its own facts and circumstances and not by reference to some formula. *Foster v. Aines Farm Dairy Co.*,

263 S.W.2d 421, 423 (Mo. 1953). A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003); *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. 1996). "To meet the test of . . . 'arising out of' the employment, the injury must be a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the duties or conditions under which the employee is required to perform and the resulting injury." *Smith*, 182 S.W.3d at 699. The purpose of the workers' compensation act is "to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment." *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 901 (Mo. banc 2007).

In general, an employee does not suffer injury arising out of and in the course of his employment if he is hurt while journeying to or returning from his place of work. *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534, 535 (Mo. 1996); *Reece v. Neal Chev. & Universal Underwriters Ins. Co.*, 912 S.W.2d 599, 602 (Mo.App. 1995); *McClain v. Welsh Co.*, 748 S.W.2d 720, 724-25 (Mo.App. 1988). It is not sufficient that the employment may simply have furnished an occasion for an injury from some unconnected source. *Kelley v. Sohio Chemical Co.*, 392 S.W.2d 255, 257 (Mo.banc 1965). In general, an employee does not suffer injury arising out of and in the course of his employment if he is hurt while journeying to or returning from his place of work because it is an inevitable condition of employment that every worker present himself at the assigned location to perform the task for which he was hired and depart therefrom when the day's work is over. The employer usually controls neither the place of residence chosen by the employee nor his mode of transport, and the employer therefore plays no part in the relative extent of the risk incurred by the employee in traveling to and from work. *Garrett v. Industrial Commission*, 600 S.W.2d 516, 519 (Mo.App. 1980).

The Missouri Court of Appeals further discusses this general principle in the *McClain* case, 748 S.W.2d at 725:

Going to or returning from employment is a personal act, akin to dressing, grooming and presenting oneself for work In other words, a trip to or from one's place of work is merely an inevitable circumstance with which every employee is confronted and which ordinarily bears no immediate relation to the actual services to be performed. 'If a worker is to do the task for which he is employed, he must of course present himself at his place of work at the appointed hour; and when his day's work is over, he is no longer subject to his employer's direction and control but is free to return to his home to do anything else that may happen to suit his own personal convenience. .

. .' Suffice it to say that the following exceptions have been recognized by our courts: (1) the 'journey' exception authorizes compensation when an injury suffered by the employee occurs while the employee is traveling for the employer.... (2) the 'conveyance exception' where the employer furnishes the employee with a vehicle or the employee uses his own vehicle and the employer pays expenses on it when used for business purposes.... However, the use of the vehicle to go to or return home after the work day serves no employment-related function so that no award of compensation is authorized.... (3) the 'special task' exception whereby the employee performs a special task, service or errand in connection with his employment. In such cases compensation is awarded.... (4) the exception which authorizes compensation where the duties of the employee entail travel away from the employer's business to obtain parts or supplies for employer.

The Court in *Smith v. District II A and B*, 59 S.W.3d 558 (Mo.App. 2001), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225, states at 565-66:

An exception to this general rule involves an employee whose work entails travel away from the employer's premises. *Miller v. Sleight & Hellmuth Ink Co.*, 436 S.W.2d 625, 628 (Mo.1969). In the case of a traveling employee, the employee is considered to be in the course of his employment continuously during the trip except when a distinct departure on a personal errand is shown. *Id.*; *Baldrige v. Inter-River Drainage Dist.*, 645 S.W.2d 139, 140 (Mo.App. S.D.1982); 2 Arthur Larson, *Larson's Workers' Compensation Law* § 25.01 (2001). When an employee abandons his employment and engages in work or pleasure purely his own, his employer is not liable for any accidental injuries sustained by the employee while so engaged because the accident does not arise out of and in the course of the employee's employment. *Miller*, 436 S.W.2d at 628. When, however, the employee's deviation has ended and he has returned to the business of his employer, any accidental injuries then sustained by the employee arise out of and in the course of his employment. *Id.*

'The test of when a deviation begins or terminates is not so much a matter of the time consumed and the distance traveled, but rests primarily on whether the employer's or the employee's purpose is being served.' *Id.* Such determination is a question of fact for the Commission. *Id.* In the case of a traveling employee, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away

from home to perform the employer's purpose are usually compensable. *Id.*; Larson, *supra* § 25.01. In particular circumstances, however, a finding that a personal social motive was the occasion for an excursion that would otherwise be in the course of employment is quite possible. *Miller*, 436 S.W.2d at 628; Larson, *supra* § 25.03[1]. Such was the finding in the 1969 Missouri Supreme Court case, *Miller v. Sleight & Hellmuth Ink Co.*, 436 S.W.2d 625 (Mo.1969).

See also *Spradling v. International Shoe Co.*, 364 Mo. 938, 270 S.W.2d 28 (Mo. 1954), where the Missouri Supreme Court states at 270 S.W.2d 30:

We have said: 'It has been quite uniformly held that an injury arises 'out of the employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury; and that an injury to an employee arises 'in the course of' his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.' (Omitting citations.)

The *Spradling* Court continued at 270 S.W.2d 31-32:

The instant case is not analogous to that of an employee whose furtherance of his master's business begins when he arrives in the morning and ends when he quits in the afternoon. The work of a traveling salesman takes him away from headquarters or home. His lodging and his meals and his going to his territory and returning to headquarters or home are considered incident to and acts of service within his employment so long as he performs them in a normal and prudent manner and does not step aside from his employment for personal reasons. The employer recognizes these necessities and usually pays the expenses incurred, as was done in this case. (Omitting citations.)

The Court continued at 270 S.W. 2d 32:

Mr. Spradling was privileged to select his routes of travel and was not restricted to routes within his sales territory. He would remain in his territory for a greater distance by traveling highways 121 and 51 from Lincoln via Decatur to his home in Carbondale. He would have been in his employment in so doing, and respondents would have been hard pressed for a defense had he arranged to meet his wife for the stated

purpose at a point within his territory along such a route. His death was not the result [sic] of a peril added to his employment by the trip to Springfield. A trip home by Mr. Spradling from Lincoln via Springfield to Carbondale, necessitating travel outside of his territory for part of the distance, would constitute such a slight deviation in choice of routes as to not affect the applicability of the Workmen's Compensation Law. His meeting Mrs. Spradling in Springfield for the purposes established by the record and terminating his journey there should not change the result.

See also Gee v. Bell Pest Control, 795 S.W.2d 532, 536 (Mo.App. 1990), where the court states:

The Commission found that Mr. Gee was on a purely personal errand when he visited the Cumpton home and that he was still in the midst of his personal errand when the collision took place. . . . The Commission could, and did, conclude that Mr. Gee was on a personal errand to the Cumpton's, but erroneously decided when the errand came to an end. The errand ended when Mr. Gee began to drive the Bell Pest truck away from the Cumpton home. . . . A significant part of Mr. Gee's job was driving the Bell Pest truck to and from different job sites.

The *Gee* Court continued at 536:

Analogous to the case at bar is *Tate v. Southwestern Bell Telephone Co.*, *supra*. In *Tate*, the Southern District stated the general rule is that an injury arises in the course of a claimant's employment if the accident occurs within the period of employment at a place the employee may reasonably be, while he is in furtherance of the employer's business or performing activities incidental to employment. *Tate* at 328. Moreover, the court stated that because claimant's duties required him to drive a company vehicle, any deviation from the course of employment had terminated when he began driving the vehicle after finishing his personal errand.

Tate is consistent with similar, earlier cases dealing with salesmen, solicitors, and other workers whose duties involve driving where there is no fixed route or destination. This line of cases holds that an employee has returned to his respective course and scope of employment the moment the personal errand has been completed. *See Kinkead v. Management and Engineering Corporation*, 103 S.W.2d

545, 547 (Mo.App.1937), citing *Beem v. H.D. Lee Mercantile Co.*, 337 Mo. 114, 85 S.W.2d 441, 445 (1935); *Schulte v. Grand Union Tea & Coffee*, 43 S.W.2d 832, 835 (Mo.App.1931). Thus, claimant returned to his course and scope of employment the moment he left the Cumpton residence and resumed the logical route back to Independence, Missouri. Mr. Gee was clearly on the direct route back to Bell Pest and thus within the course and scope of his employment. There was not sufficient competent evidence in the record to warrant the finding that Mr. Gee was not in the course and scope of his employment as Mr. Gee was at a place where he may have reasonably been while he was reasonably fulfilling the duties of his employment. *See Page v. Green*, 686 S.W.2d 528, 532 (Mo.App.1985).

“Unless a statute clearly abrogates common law by express statement or by implication, the common law stands.” *Mika v. Central Bank of Kansas City*, 112 S.W.3d 82, 90 (Mo.App. 2003). I find that the common law cases discussed above relating to coverage for traveling employees was not abrogated by Section 287.020.10, RSMo. Section 287.020.10, RSMo neither expressly nor implicitly abrogated earlier case law interpretations of those cases. The cases cited in Section 287.020.10, RSMo do not deal with coverage for traveling employees and are distinguishable from the case at hand.

I find that this case is governed by the principles set forth in *Smith, Spradling and Gee*. Based on all the evidence and the application of the Missouri Workers' Compensation Law, I find that Claimant was acting in the course of his employment for Employer at the time of his accident on November 1, 2007. I find that at the time of the accident, Claimant was engaged in duties connected with his employment. Claimant was a traveling employee. His job duties took him across several different states at different times. He was paid to travel from jobs back to his home at the conclusion of his jobs. He traveled hundreds of miles from job to job and from job to home. He carried his office with him in his fifth wheel trailer. Under the terms of his employment, he was working while he traveled.

I find that Claimant did engage in a personal errand when he left Highway 92 and drove to Smithville to see his father. At that point, Claimant had abandoned his employment because he was engaged in a purely personal activity. The question is whether at the time of his accident he was still engaged in a deviation from his covered travel. I find that he was not. I find that at the time of the accident, Claimant's deviation to see his father from his originally planned route to the trailer park in Platte City on his way home to Colorado had ended. Claimant had returned to the route along Highway 92 toward Platte City when the accident occurred. Claimant was still towing his fifth wheel at the time of the accident. He had not yet stopped at the RV Park and unhooked his

trailer. He was not on his way back to meet his father or family after having arrived at the place where he planned to spend the night.

I find that Claimant's travel to Platte City was not purely personal. He was on his way home to Colorado from Illinois. I find that he was in the scope and course of his employment while traveling from Illinois to Colorado. He was being paid to travel. His work required him to travel long distances to and from job sites and his home. As in *Spradling*, Claimant's lodging and his returning home are necessities and are considered incident to and acts of service within his employment. Claimant was traveling to the place of his lodging for the evening at the time of the accident. As in *Gee*, Claimant's personal errand came to an end when he began to drive his truck and fifth wheel from his father's nursing home in Smithville to the RV Park in Platte City.

Employer argues that the only reason Claimant was going to Platte City was for Claimant's own personal comfort. Employer asserts that it derived no benefit from Claimant's use of the Platte City RV Park. Employer asserts that Claimant was not required to travel to Platte City by his work and that the travel to a location estimated to be 37 miles north of Interstate 70, which was the most direct route between Illinois and Claimant's home in Colorado, resulted in a deviation. But Employer's argument overlooks the fact that Claimant was on his way home and still had several hundred miles to travel before reaching his home in Colorado at the time of his accident.

As noted in *Smith*, in the case of a traveling employee such as Claimant, injuries arising out of the necessity of sleeping away from home to perform Employer's purpose are usually compensable. Claimant was on his way to park his RV at the trailer park where he would sleep at night before he continued his trip home to Colorado the next morning. Claimant had resumed his regular route at the time of the accident. Here, as in *Spradling*, Claimant was privileged to select his own routes of travel and was not restricted to routes. Claimant was required to travel to various job sites. He was covered under the workers' compensation law during the travel.

I find that the accident occurred within the period at a place Claimant may reasonably have been while in the furtherance of Employer's business or a performance of activities incidental to his employment. I find that the trip to Platte City was not purely personal. I find that the primary purpose of Claimant's trip was to travel home to Colorado, and not to visit his family in the Platte City area. I find that Claimant's trip along Highway 92 to Platte City constituted such a slight deviation in choice of routes as to not affect the applicability of the workers' compensation law. I find that on November 1, 2007, Claimant sustained an injury by accident arising out of and in the course of his employment for Employer.

2. Liability for permanent partial disability benefits.

The parties stipulated at the final hearing that in the event it is determined that Claimant sustained a compensable accident arising out of his employment for Employer, Claimant shall be entitled to an award of permanent partial disability benefits from Employer of 20% of the body as a whole (which is the 400 week level) at the permanent partial disability rate of \$389.04 per week. I have determined that Claimant sustained a compensable accident on November 1, 2007 arising out of his employment for Employer. I therefore award permanent partial disability benefits to Claimant in the amount of \$31,123.20 from Employer/Insurer.

3. Liability for past medical expenses.

I find that medical benefits in the amount of \$94,114.79 have been paid by Employer/Insurer. Claimant requests an award of an additional \$5,253.25 in past medical expenses for treatment rendered Claimant between the November 1, 2007 and July 31, 2008. Claimant offered Exhibit A documenting past medical bills that total \$5,253.25. Employer stipulated at the final hearing that these medical expenses were fair, reasonable, usual, and customary, and were caused by Claimant's accident, and that the treatment Claimant received regarding these expenses was reasonably required to cure and relieve Claimant from the effects of the accidental injury. Employer also stipulated at the final hearing that in the event it is determined that Claimant sustained a compensable accident arising out of his employment for Employer, Claimant shall be entitled to an award of past medical benefits from Employer of \$5,253.25. I have determined that Claimant sustained a compensable accident on November 1, 2007 arising out of his employment for Employer. I therefore award past medical benefits to Claimant in the amount of \$5,253.25 from Employer/Insurer.

I previously awarded temporary total disability benefits and medical aid to Claimant in my Temporary or Partial Award entered on July 8, 2008. I find that temporary total disability benefits in the amount of \$37,878.72 have been paid. Claimant sought no further award for any additional temporary total disability benefits at the final hearing, and no award is made for any additional temporary total disability benefits. The Court notes that liability for future medical aid is not an issue in this case, and the Court makes no award to Claimant for future medical aid.

4. Cost of the Proceedings under Section 287.203, RSMo and Attorney's Fees

Claimant renewed her request for cost of the proceedings in the amount of \$6,824.00 in attorneys' fees and \$506.63 in expenses under Section 287.203, RSMo. Employer/Insurer has denied that Claimant was paid benefits under Missouri law, and has

asserted that cost of the proceedings should not be assessed against them under Section 287.203, RSMo.

Section 287.203, RSMo provides:

Whenever the employer has provided compensation under section 287.170, 287.180 or 287.200, and terminates such compensation, the employer shall notify the employee of such termination and shall advise the employee of the reason for such termination. If the employee disputes the termination of such benefits, the employee may request a hearing before the division and the division shall set the matter for hearing within sixty days of such request and the division shall hear the matter on the date of hearing and no continuances or delays may be granted except upon a showing of good cause or by consent of the parties. The division shall render a decision within thirty days of the date of hearing. If the division or the commission determines that any proceedings have been brought, prosecuted, or defended without reasonable grounds, the division may assess the whole cost of the proceedings upon the party who brought, prosecuted, or defended them.

Section 287.560 provides in part:

All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

The provision regarding the assessment of cost of the proceedings under section 287.203, RSMo 2006 is identical to the language contained in section 287.560, RSMo. Cases construing section 287.560, RSMo should therefore apply to section 287.203, RSMo 2006. Missouri courts have stated: "The commission should only exercise its discretion to order the cost of proceedings under section 287.560 where the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo.banc 2003), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224; *Monroe v. Wal-Mart Associates, Inc.*, 163 S.W.3d 501, 506 (Mo.App 2005).

Claimant testified at the temporary hearing that he was not told whether he was paid benefits under Oklahoma law or Missouri law. He was hired in Oklahoma. His

average weekly wage exceeded \$2,000.00. His temporary total disability rate under Missouri law is \$742.72 per week. Yet he was paid at the rate of \$577.00 per week. Insurer's Claims Representative's June 12, 2008 letter, Exhibit A, states that the indemnity payments that were issued to Claimant were issued according to the Oklahoma workers' compensation law. I find that the benefits Claimant received in the amount of \$1,731.00 from Insurer were not provided under section 287.170, 287.180 or 287.200, RSMo and section 287.203, RSMo is not applicable in this case. Cost of the proceedings should not be assessed against Employer/Insurer pursuant to section 287.203, RSMo.

I further find that even if Employer/Insurer had provided compensation to Claimant under Section 287.170, RSMo, cost of the proceedings should not be assessed against Employer/Insurer in this case pursuant to section 287.203, RSMo because I do not find that the issue is clear and the offense egregious. I find that Employer/Insurer did not defend this matter without reasonable grounds. I find that Employer/Insurer had a reasonable basis to dispute compensability in this case because of the questions of whether the 2005 amendments to The Workers' Compensation Law changed the meaning of "arising out of" and "in the course of the employment" in this type of case, and whether Claimant was engaged in a deviation at the time of the accident. I find that even though I have ruled against Employer/Insurer in this case, those issues were not clear. I find that Employer/Insurer had a reasonable defense to this claim and I find that Employer/Insurer's action in defending this claim was not egregious.

Claimant's request for cost of the proceedings under Section 287.203, RSMo is denied.

However, Claimant's attorney is entitled to a fair and reasonable fee in accordance with section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded in this final award for necessary legal services rendered to Claimant.

CONCLUSION

For all these reasons, and based on substantial and competent evidence, the stipulations of the parties, and the application of The Missouri Workers' Compensation Law, I find in favor of Claimant. I find that Claimant has met his burden of proof that he sustained an injury by accident arising out of and in the scope of his employment for Employer on November 1, 2007. I further find that Claimant's claims for past medical expenses in the amount of \$5,253.25, and for permanent partial disability benefits of 20% of the body as a whole (400 week level), which amounts to \$31,123.20 (.20 x 400 x \$389.04) should be allowed, and they are hereby awarded in accordance with the foregoing Findings of Fact and Rulings of Law. Cost of the proceedings is not assessed

against Employer/Insurer under Section 287.203, RSMo. Claimant's attorney, Leah Brown Burkhead, is awarded an attorney's fee of 25% of all amounts awarded in this final award for necessary legal services rendered to Claimant.

Claimant's claim against the Second Injury Fund has not been determined and remains open.

Made by: /s/ Robert B. Miner

Robert B. Miner

Administrative Law Judge

Division of Workers' Compensation

This award is dated and attested to this 11th day of January, 2010.

/s/ Naomi Pearson

Naomi Pearson

Division of Workers' Compensation