

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

Injury No.: 97-429684

Employee: Joseph Muller
Statutory Employer: St. Louis Housing Authority
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 27, 1997
Place and County of Accident: St. Louis City

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, and we have considered the whole record. Further, we have heard the oral arguments of the parties.

Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the January 13, 2003, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We modify the award and decision of the administrative law judge solely on the issue of St. Louis Housing Authority's (SLHA) liability for past medical expenses.

Procedural History

The administrative law judge conducted the original hearing in this matter on September 10, 2002 and October 8, 2002. On January 13, 2003, the administrative law judge issued an award of compensation against SLHA as a statutory employer. On January 28, 2003, SLHA filed an Application for Review with the Commission. By order of remand dated February 25, 2004, the Commission remanded this matter for additional evidence regarding past medical expenses. The administrative law judge conducted the first remand hearing on May 24, 2004, and the transcript was forwarded to the Commission.

On October 19, 2004, the Commission issued a Partial Final Award affirming the January 13, 2003, award of the administrative law judge as to all issues except past medical expenses, which issue was left open for future resolution. On October 19, 2004, the Commission remanded this matter again for additional evidence regarding past medical expenses. SLHA appealed the Partial Final Award to the Missouri Court of Appeals.

Meanwhile, on January 18, 2005, the administrative law judge conducted the second remand hearing and forwarded a transcript of the hearing to the Commission. On January 24, 2005, SLHA filed with the Commission a Motion for Full Commission Review, a Motion for Reconsideration and a Motion to Strike. On February 14, 2005, the Commission issued an Order concluding it had no jurisdiction to consider the motions or the issue of past medical expenses because the matter was on appeal to the Missouri Court of Appeals.

On November 1, 2005, the Missouri Court of Appeals concluded that Commission's October 19, 2004, award was not a final award for purposes of appeal and dismissed the appeal. On November 14, 2005, SLHA filed a Motion

for Modification asking the Commission to review the case anew applying the amended standard of review found in § 287.800 RSMo (Cum. Supp. 2005).

The Court of Appeals issued its mandate on November 23, 2005. We now issue our final award resolving all disputes in this matter.

Pending Motions

Motion for Reconsideration

On October 19, 2004, the Commission stated it was issuing its final determination on all issues except past medical expenses. We reaffirm our determination herein. We will not revisit issues the Commission has finally determined particularly where, as here, no new evidence has been presented on those issues. SLHA's Motion for Reconsideration is denied.

Motion to Strike

SLHA's Motion to Strike asserts defenses and objections raised by employer during the two remand hearings. We will address these defenses and objections in the discussion below.

Motion for Full Commission Review

All three members of the Commission have considered the within matter. SLHA's Motion for Full Commission Review is denied as moot.

Motion for Modification

We decline SLHA's invitation to re-consider the merits of this matter under the amended standard of review set forth in § 287.800 RSMo. SLHA's Motion for Modification is denied.

Discussion

The administrative law judge awarded past medical expenses in the amount of \$187,562.00. The administrative law judge stated that because the award was in the nature of a temporary award, the parties may seek further relief to identify which past medical expenses are compensable. The administrative law judge erred by this statement. The administrative law judge did not enter a temporary award. Claimant had the burden at trial to prove his entitlement to an award for past medical expenses. The award of future medical treatment does not alter Claimant's obligation to prove past medical expenses.

Claimant's burden regarding past medical expenses is clear: Where an employee identifies medical bills and testifies that the bills relate to and are a product of his injury, and the bills relate to the services provided as demonstrated by the medical records, there is a sufficient factual basis to award past medical benefits. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989). The employer can then challenge the reasonableness or fairness of the bills, or their relationship to the injury. *Id.* at 112.

Expense Summary

Claimant argues that SLHA waived objection to all medical expenses listed in Claimant's Exhibit R by not objecting to the exhibit. Claimant's Exhibit R contains the deposition of Dr. Margherita and attachments to the deposition. One of the attachments is Deposition Exhibit C (hereinafter referred to as "Exhibit R-C"), which purports to be a summary of Claimant's medical expenses. Exhibit R-C is four pages long. Midway through page three is the identifier "Total" next to which is the figure \$110,027.02. The last entry on page four is "Total with additional bills" next to which \$187,562.00 is listed.

SLHA alleges that Exhibit R-C is not the same document as the expense summary shown to Dr. Margherita during his deposition. We have reviewed Dr. Margherita's deposition. He identified the expense summary he was referencing by the total expense amount of "110,171," which matches no total appearing on Exhibit R-C. We find

that the expense summary Dr. Margherita reviewed is not the same document as Exhibit R-C included in Exhibit R.

It was improper for Claimant to substitute Exhibit R-C for the expense summary presented to Dr. Margherita at his deposition. SLHA's determination not to object to the Exhibit R was based upon the assurance of Claimant's counsel that Exhibit R contained the deposition and the original attachments to the deposition. We will consider all objections to Exhibit R-C because SLHA's decision not to object at trial was elicited by the erroneous exhibit identification of Claimant's counsel.

May 24, 2004, Remand Hearing

We remanded the matter to the Division of Workers' Compensation (Division) to hold a hearing regarding the bills and treatment related to the February 11, 2002, surgery so we could accurately determine which, if any, expenses from that surgery were properly allowable. Claimant offered the medical bill of Barnes-Jewish Hospital under the cover of an affidavit of the custodian of bills of Barnes-Jewish Hospital. The custodian did not appear to testify regarding the bill. SLHA's counsel objected to the bill on the basis that it is hearsay not subject to the business record exception of § 490.692 RSMo. We agree. Section 492.692 requires the admission of business records offered in accord with that section. However, no party shall be permitted to offer business records pursuant to § 492.692 unless all other parties to the action have been served with copies of the records and the affidavit at least seven days prior to the day upon which trial of the cause commences. The custodian executed the affidavit just five days before the remand hearing. SLHA's objection to Exhibit U is sustained.

Claimant also offered Exhibit V containing medical records from Barnes-Jewish Hospital pertaining to services provided in February 2002. SLHA objected on the grounds that the records exceed the scope of the Commission's remand order. To the extent Exhibit V may assist the Commission in ensuring that medical expenses have not been awarded twice, Exhibit V does not exceed the scope of the remand order. Exhibit V is admitted solely for the purpose of determining whether expenses identified on Exhibit R-C were duplicative.

As to evidentiary objections not discussed herein, we adopt the provisional evidentiary rulings made by the administrative law judge during the hearing of May 24, 2004, as the rulings of the Commission.

Challenged Medical Expenses

Claimant identified the medical expenses summarized on the Exhibit R-C and the medical bills attached thereto. Claimant testified that the expenses were related to his neck injury of August 27, 1997. We have compared the expenses listed on Exhibit R-C with the medical bills and medical records admitted into the record. Claimant has shown the expenses listed on Exhibit R-C should be awarded, except as modified in the following discussion.

SLHA raises objection to the following expenses alleging they are not supported by the record:

Neurosurgical Associates

Exhibit R-C contains itemized charges for office visits on July 2, 1998, (\$50.00) and July 21, 1998, (\$72.00) for which there are no supporting medical records. We can find no medical record to substantiate this service. These expenses total \$122.00.

Unity Medical Group South

Exhibit R-C contains itemized charges for X-rays on February 19, 1998, (\$189.00) and April 30, 1998, (\$113.00) for which there are no supporting medical records. We can find no medical record to substantiate this service. These expenses total \$302.00.

Washington University School of Medicine

Exhibit R-C contains itemized charges on February 11, 2002, of \$664.00 and \$1,300.00. The medical bill for these charges confirm that they are included in the \$4,211.00 itemized amount listed on Exhibit R-C.

Exhibit R-C contains itemized charges for a CT scan on December 8, 2000, (\$214.00) and an MRI on

December 13, 2000 (\$447.00). SLHA alleges that these expenses were for services related to Claimant's cancer treatment. Other than a reference in the referral of Dr. Riew, we can find no medical record to substantiate these services.

These unsupported and duplicate expenses total \$2,625.00.

St. Luke's Hospital

Exhibit R-C contains itemized charges for an X-ray on December 11, 1997, (\$189.00) and surgery on October 17, 1997 (\$8,146.91). These charges also appear in the itemized expenses for Unity Medical Group South. A comparison of the Unity Medical and St. Luke's bills confirm that the listed expenses are duplicative. These unsupported duplicate expenses total \$8,335.91.

Comprehensive Anesthesia Care

Exhibit R-C contains itemized charges on October 17, 1997, for anesthesia services by Comprehensive Anesthesia Care (\$986.00). SLHA alleges that there is no medical record to substantiate these services. We disagree. The operative report of Dr. Marchowsky is in the record confirming Claimant received anesthesia services on that date. The expense is properly proven.

Washington University School of Medicine Additional

Exhibit R-C contains itemized charges on February 11, 2002, for anesthesia services by Dr. Kras (\$2,170.00). SLHA alleges that there is no medical record to substantiate these services. We disagree. The operative report of Dr. Riew is in the record confirming Claimant received anesthesia services on that date. The expense for Dr. Kras' services is properly proven.

Exhibit R-C contains itemized charges for February 7, 2002, EKG (\$32.00). We can find no medical record to substantiate this service. This unsupported expense totals \$32.00.

Barnes Jewish Hospital Additional

During Claimant's testimony, Claimant's counsel asked Claimant to testify regarding a bill in the approximate amount of \$70,000.00 from Barnes-Jewish Hospital relative to his February 11, 2002, surgery. SLHA objected on the grounds that Claimant produced no medical bills from Barnes-Jewish Hospital. Claimant's counsel confirmed that Claimant did not have the bills from Barnes-Jewish Hospital relating to his surgery and hospital stay beginning February 11, 2002. The administrative law judge sustained SLHA's objection and Claimant was not allowed to testify regarding the Barnes-Jewish Hospital bill. Claimant did not offer any bills of Barnes-Jewish Hospital at the hearing of this cause for services provided in February 2002.

Because there has been no proper identification of the Barnes-Jewish Hospital bill, Claimant has failed to meet his burden of proof regarding the Barnes-Jewish Hospital medical expenses. At the conclusion of the May 24, 2004, remand hearing, these expenses remained unsupported.

Prescription Costs/SmithKline

SLHA raised vague objections to expenses for prescription costs and a bill for SmithKline claiming they are also claimed as out of pocket expenses. SLHA does not direct us to the evidence that supports its allegation. SLHA's challenge to these expenses fails.

Barnes-Jewish Hospital

At the third evidentiary hearing on January 18, 2005, Claimant finally produced medical records and bills from Barnes-Jewish Hospital related to Claimant's surgery and hospital stay from February 11, 2002 through February 21, 2002. Dr. Margherita testified that the need for this surgery flowed from the failure of a previous surgery necessitated by the work injury. Dr. Margherita testified that the bills represent standard, usual, and are customary charges for the treatment and the treatment was reasonable and necessary to treat Claimant's condition of failed fusion. The bill reflects hospital expenses of \$75,358.03, a Medicare payment of \$12,862.32, a Medicare write-off in the amount of \$61,683.71, and a balance due from Claimant of \$812.00. The administrative law judge awarded \$74,727.00 as requested by Claimant at the initial hearing of this cause. SLHA has not shown that Claimant will never be held responsible for the amounts written off by Barnes-Jewish Hospital.

We affirm the administrative law judge's award of past medical expenses for Claimant's February 2002 surgery and recovery at Barnes-Jewish Hospital.

The total of the unsupported and duplicate medical expenses is \$ 11,416.91. ^[1] The medical expense award of the administrative law judge is modified to eliminate these unproven medical expenses.

Conclusion

We modify the award of the administrative law judge on the issue of SLHA's liability for past medical expenses.

SLHA is liable to Claimant for past medical expenses in the amount of \$176,145.09. ^[2]

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued January 13, 2003, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 19th day of September 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

DISSENTING OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I disagree with the award and decision of the majority of the Commission, which affirms the administrative law judge's finding that St. Louis Housing Authority was Claimant's statutory employer. I agree with the opinion of my predecessor on the Commission, Commissioner Bill I. Foster, and adopt his dissenting opinion dated October 19, 2004.

Alice A. Bartlett, Member

AWARD

Employee: Joseph Muller

Injury No.: 97-429684

Dependents: N/A

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Second Injury Fund Relations of Missouri
Jefferson City, Missouri

Employer: St. Louis Housing Authority

Additional Party:

Insurer: Self-Insured

Hearing Date: September 10 and October 8, 2002

Checked by: JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 27, 1997
5. State location where accident occurred or occupational disease was contracted: City of St. Louis
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 (imputed to statutory employer)
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
10. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was lifting dirt laden wheelbarrow upward into container.
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: cervical spine
14. Nature and extent of any permanent disability: PTD (referable to cervical spine) against statutory employer
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Joseph Muller

Injury No.:

97-429684

17. Value necessary medical aid not furnished by employer/insurer? \$187,562.00

- 18. Employee's average weekly wages: \$778.97
- 19. Weekly compensation rate: \$519.26/\$278.42
- 20. Method wages computation: Section 287.250.1(1) RSMo (1994).

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses	\$187,562.00
Out-of-pocket prescription drug expense	2,110.25
188.57 weeks of temporary total disability for the period September 12, 1997 through May 2, 2001	97,926.28
permanent and total disability from (statutory) employer beginning May 3, 2001* and continuing for the remainder of Claimant's life	indeterminate
* 74.71 weeks PTD past due (through last date of trial)	38,793.91

22. Second Injury Fund liability: None

TOTAL: INDETERMINATE

23. Future requirements awarded: Yes

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 \$56,926.00, plus expenses, in favor of the following attorney for necessary legal services rendered to the claimant:

Michael J. McDonnell

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph Muller

Injury No.: 97-429684

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: St. Louis Housing Authority

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri
Jefferson City, Missouri

Insurer: Self-Insured

Checked by: JED

This case involves a disputed neck injury to Claimant with the reported accident date August 27, 1999. Employer, Evan Thibault Garden Design, Inc., (hereafter "Thibault") is uninsured and St. Louis Housing Authority, (hereafter "SLHA") alleged statutory Employer, is self-insured, denies liability. Separately, Thibault was dismissed upon assignment to trial pursuant to its discharge from any liability herein by a federal bankruptcy court. The Second Injury Fund ("SIF") remains a party to this Claim. All parties are represented by counsel.

Issues for Trial

1. Notice.
2. Accident.
3. Whether injury arose out of and in the course of "employment."
4. Medical causation.
5. Unpaid medical expenses.
6. Future medical expenses.
7. Nature and extent of permanent disability.
8. Liability of the SIF (under both Section 287.220.1 and 287.220.7).
9. Rate of Compensation.

FINDINGS OF FACT

Dispositive Facts

1. Claimant was an employee of Thibault performing landscape duties on SLHA property pursuant to a contract between Thibault and SLHA. Claimant earned \$778.97 per week. Claimant reported his neck symptoms to Evan Thibault repeatedly during the thirty days succeeding the reported accident.
2. Despite the name of Thibault as a "design" company, neither the trial testimony nor the contract (Exhibit G) suggest any design work was performed; Claimant's duties were not personal services but fungible labor.
3. Claimant described landscape routines he performed with hand tools consistent with refurbishing plant beds and replacement of bushes (no trees). SLHA has seventeen housing complexes each designed by SLHA to include green space.
4. Claimant was lifting a wheelbarrow upward into a container at one of the sites when he injured his low back; recovery involved several surgeries and Claimant never returned to work. Claimant attempted light duty between the reported accident date and September 12, 1997.
5. The contract provided for the refurbishing plant beds and replacement of bushes at each of seventeen SLHA apartment house locations throughout the City of St. Louis.
6. SLHA owned and controlled the premises at each real property location.
7. Claimant underwent three cervical spine surgeries:

October 17, 1997	fusion at C6-C7	Dr. Marchosky
January 13, 1999	fusion at C5-C6	Dr. Riew
February 11, 2002	fusion with hardware	Dr. Riew

8. After the second cervical fusion, Claimant underwent interim radical neck dissection surgery for removal of a cancerous tumor. Diagnosis and surgery beginning December 14, 2000 and continuing until his return visit to Dr. Riew on November 6, 2001. Claimant's symptoms before and after this cancer episode were unchanged

neurologically, if not worse. The third surgery was recommended on November 13, 2001.

9. Claimant had no pre-accident neck treatment.

10. Claimant incurred \$187,562.00 in work related medical expenses (Exhibit R, *Deposition Exhibit C*).

11. Claimant was off work as a result of the three work related surgeries for the period September 12, 1997 until he reached maximum medical improvement on May 2, 2001 per Dr. Margherita.

12. Claimant is unable to use his upper extremities for work and has disabling pain for which injections are currently prescribed for relief. Claimant is unemployable in the open labor market.

13. The third surgery is overwhelming evidence of the necessity of future medical treatment.

14. Claimant proved \$2,110.25 in out-of-pocket expenses for prescription drugs and laboratory tests (Exhibit T).

RULINGS OF LAW

Existence of a Statutory Employer

Missouri workers' compensation law contains several sections intended to prevent "employers" from avoiding responsibility for work related injuries. Certain areas of the labor market are either particularly dangerous or are notable for contracting certain work on a recurrent basis. In the latter situation, the employer avoids counting such workers as its own relative to the statutory minimum which subjects it to liability under the Act. Initially, and as applicable here, the Act defines "employer" as one with five or more employees or involved in the construction industry:

Any of the above defined employers must have five or more employees to be deemed an employer for purposes of this chapter ... 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. (Emphasis Added.)

Section 287.030.1(3) RSMo (1994).

Common sense suggests that the heavy materials and equipment, working heights, dangerous tools and hazards of construction debris warrant this mandate for inclusion of construction work under the Act regardless of the size of the contractor. Consistent with this liability mandate is the further expansion of liability on any owner of business who have work performed on their premises:

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. (Emphasis Added.)

Section 287.040.1 RSMo (1994).

However, the legislature excepted business premises owners from this broad mandate if the work comprises those characteristics which inhere in the above mentioned [construction] industry. In doing so the legislature tracks, nearly verbatim, the operative words associated with the construction industry mandate in Section

287.030.1(3). That caveat is nearly repeated here:

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 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. (Emphasis Added.)

Section 287.040.3 RSMo (1994).

Here, Claimant seeks to characterize his duties giving rise to his injury as in the usual course of SLHA's business of operating multiple large housing complexes each designed with green space and utilizing basic landscape work. SLHA essentially seeks to avoid liability as a premises owner having work performed in the usual course of its business by characterizing Claimant's work as pursuant to a one-time, limited contract which included some landscape elements new to the established green spaces.

While Claimant appears perhaps to merely seek a statutory employer in SLHA in the face of an uninsured, and now dismissed, employer, a thorough analysis which is consistent with precepts underlying workers' compensation law demonstrates the viability of Claimant's theory. Thibault's discharge in bankruptcy is not relevant to the statutory inquiry. Rather, Thibault's uninsured status is the basis of SLHA's statutory liability herein. In a case involving statutory employment, the Supreme Court stated that "until directed by the legislature to embark on a different course, courts must continue to give the Act a liberal reading, deciding close cases in favor of workers' compensation coverage." Bass v. National Super Markets, Inc., 911 S.W.2d 617, 621 (Mo.banc 1995).

Character of Claimant's Work

in the Course of SLHA's "Usual Business"

It is undisputed in the record that Claimant performed handwork at SLHA sites including mulching, redefining plant bed edges, replacing bushes (no trees), and debris removal from existing green space and digging some new plant beds. Claimant supervised other workers as he worked. Nothing in the record suggests any "design" work or similar personal services were contemplated in the parties' contract or performed by Claimant. Similarly, it is not reasonable to suggest landscape design or landscape architecture is the "usual business" of the apartment housing industry.

While common sense suggests these duties are routine and quite usual for maintenance of any commercial green space, SLHA's evidence repeatedly emphasizes the record of neglect by SLHA of its landscape. The statute directs analysis not to industry standards but that which is usual for "his business" which is "carried on there." Here, SLHA ably established grossly neglected (albeit unexplained) green space maintenance, inconsistent management and inadequate funding, although some contract allusions and agent testimony suggest Thibault was to restore last year's plantings and that full-time employees existed to maintain green space.

The language of Section 287.040.1 fairly states that where there is no qualifying employer (with five employees), premises owners shall be deemed statutory employers where the work is performed pursuant to contract and on the owner's premises and is an operation of the usual business. This broad mandate manifests the legislative intent to have these injuries covered under the Act. The liability, however, is shifted back to the contractor where the work is in the *nature of* construction activity. This caveat uses the operative language of Section 287.030.1(3) without expressly using the word "construction." Still, the operative language is inescapable and not found elsewhere in the statute.

Focusing on the directive to analyze the "usual course of business carried on there" and "his business" presents a point of interpretation which, if taken subjectively, provides a loophole to avoid the legislative purpose. Taken objectively, the reference to the "usual business carried on there" is in contrast to other activity that might be "carried on there." The reference is reasonably understood to contrast the activity of the visiting contractor from the "usual business carried on there." Perhaps an owner made personal use of the property. Each is in contrast to the usual business carried on there which is traceable to business permits and perhaps, myriad commercial ordinances.

To interpret the reference subjectively presents two major dilemmas which defy traditional analytic process or require unreasonable investigation by workers, and, in both cases, defeat the legislative purpose of statutory employment.

First, focusing on the particular owner's conduct of business where, as here, the alleged statutory employer basically seeks to prove, in essence, "we never do that here" and thus avoid liability under the guise of independent contractor. This language cannot be interpreted to permit a business that does not maintain its property to avoid compensation. It cannot be reasonably posited that a business that inexplicably elects to neglect its property or defer maintenance should also be allowed to avoid inclusion under the statutory employment law. It is more reasonable to establish the general business practice as the major premise and then compare the visiting contractor's activity as the minor premise before drawing a conclusion. Indeed, the green space of SLHA was apparently in violation of City ordinances. Ordinances do not suspend application due to the sophistication, diligence or preference of a given owner of business premises.

Second, subjective interpretation the limitation which presents an injured employee with the impossible task of predicting whether his next assignment by his perhaps uninsured employer will be with a statutory employer. General business practice does not permit an employee of a visiting contractor to investigate the usual business of the premises owner. Hence, the necessity and breadth of the statutory employment Section.

These problems demonstrate that a subjective inquiry on what the record of activity of the individual owner is as opposed to general business practice is inconsistent with the accepted public policy of placing the cost of injuries on industry and, as here, otherwise provided by the legislature. Leaving untreated and uncompensated those injuries caused by dangerous or recurrent activity does not serve the State. Again, Section 287.800 makes permanent the admonition by the legislature to interpret these rules to provide benefits to the greatest number of workers.

The Supreme Court set forth four factors to be examined when analyzing whether the activity of the visiting contractor is not the "usual business" of an owner. Bass, supra. The activity must be routinely performed, on a regular or frequent schedule, the activity contemplated in the agreement to be repeated over a relatively short period of time, and that absent the contract performance, the business owner would be required to hire permanent employees.

Here, it is easily shown by undisputed evidence that Claimant duties were routine (and fungible) and not in the nature of design work or requiring experienced judgment. As discussed above, general business practice would suggest landscape maintenance is performed on a regular basis in general business practice; inclusion of green space in SLHA's housing complexes bespeaks this fact. SLHA's contracting officer stated that SLHA had full-time employees to perform property maintenance outside the buildings (Exhibit G, pp. 19, 43, 45). This is also consistent with the fact that SLHA has seventeen different complexes each designed with green space. Further, this is compatible with the general idea of providing suitable housing to tenants. Landscape maintenance its very nature is never completed but is an ongoing endeavor. It cannot be characterized as a short term project. Finally, the maintenance of green spaces for SLHA requires permanent employees because of the huge scale seventeen commercial properties represents (Exhibit G).

Construction Activity Exclusion Not Applicable

SLHA cannot avoid designation as a statutory employer under Section 287.040.3 which unambiguously repeats the operative language from Section 287.030.1(3) to exclude construction-like work from the statutory employment rule. Again, the heavy materials and equipment, working heights, dangerous tools and hazards of construction debris define this dangerous work. Nothing in the record suggests Claimant performed any such work. Further, nothing in the record suggests Claimant performed his shoveling and planting on "improvements."

However, SLHA relies on a recently reported statutory employment decision which creates ambiguity in this area of law. The court in Howell v. Lone Star Industries, Inc., 44 S.W.3d 874 (Mo.App. 2001), citing Huff v. Union Electric Co., 598 S.W.2d 503 (Mo.App. 1980), reversed the circuit court, holding an employee's widow had a right of common law negligence action against the alleged statutory employer where the employee engaged in heavy equipment operation and road work, among other things, at the time of his death.

While the court held Section 287.040.3 applicable, it nevertheless, permitted the widow to “seek relief beyond the Act.” Id. at 879. The court relied on Huff to find the owners of premises may be liable for common law negligence by [injured] employees of the independent contractor. Id. at 878. The court, however, did not address the mandate in Section 287.030.1(3), added to the Act in 1990 by Senate Bill 751. This section, together with general Sections 287.060 and 287.280, form the complete basis for coverage of claims. The decision does not explain why Lone Star is not protected by the exclusivity of workers compensation.

In addition, the decision does not address whether Howell Trucking was uninsured. Uninsured employers are not uncommon at the Division and can simply leave an injured employee left to civil suit (with the attendant risk of recovery on the judgment). However, in the worst case scenario of a work related death, the legislature provides for a special workers compensation recovery. Assuming, *arguendo*, Howell Trucking was uninsured for workers compensation, the widow in Howell seems to be eligible for the remedy provided Section 287.220.5 RSMo (1980, 2000) mandating coverage by the Second Injury Fund in death cases where the “employer” is uninsured. See Tatum v. St. Louis Metro Delivery, Inc., 887 S.W.2d 679 (Mo.App. 1994). Again, this section would indirectly protect Lone Star from civil liability by limiting decedent’s widow to a workers’ compensation remedy.

Finally, in response to Lone Star’s scrutiny of the decedent’s fatal activity versus other activity under the contract, the court analyzes the word “improvements” and expands its meaning consistent with economic valuations. Howell at 879. It is this interpretation that SLHA exploits in trying to establish that Claimant’s mulching and planting activity falls within the construction exclusion. Under this tact, any activity by a visiting contractor could be characterized as enhancing the value of the business and, hence, an “improvement.”

The use of the word “improvement” in the Act is fairly limited to construction activity. Section 287.030.1(3) expressly contemplates the construction industry and thus the building of structures associated with the dangers attendant erection demolition, alteration and repair. This is consistent with the traditional definition of “improvements.” Section 287.040.3 nearly tracks this language verbatim.

Black’s Law Dictionary definitions consistently define improvements generally as “buildings” but including any “*permanent* structure” or other development. Secondary definitions are listed which contemplate enhanced market value, etc. Landscape by its biologic nature has limited life and limited durability. It is inexact to describe the shoveling of mulch and digging small holes by hand for minor plantings as similar to the heavy materials and equipment, etc., associated with erection demolition and repair of permanent structures. Landscape *designs* may be permanent but Claimant’s duties pertained to routine, fungible maintenance of a transitory nature.

Expanded definitions of improvements from reported decisions are difficult to apply to statutory employment cases because a definition exceeding the risks contemplated by the express construction activity caveat(s) tends to allow any expenditure by a premises owner to be the vehicle of liability avoidance. The voluntariness of the expenditure itself is evidence of the likelihood of the business or premises being enhanced in value. The statute’s stated protection is for construction (and similarly at-risk) workers not the consideration of property values. Expanded definitions of “improvements” should not be the basis for redefining the unambiguous word of “erection, demolition alteration and repair.” Expansion of the construction caveat in this manner swallows much of the rule establishing statutory employers. In other words, the analysis in workers’ compensation is not an economic analysis but one of safety. The courts have observed the willingness of employers to avoid responsibility under the Act. Burgess v. Nacom Cable Co., 923 S.W.2d 450, 454 (footnote 2)(Mo.App. E.D. 1996). Barton v. U.P.S., 842 S.W.2d 951 (Mo.App. E.D. 1992).

The workers compensation law supplants any common law rights of the individual. Hill v. John Chezik Imports, 797 S.W.2d 528 (Mo.App. 1990). The Act must be liberally construed under Section 287.800 RSMO (1994, 2000), and in view of Sections 287.030.1(3) and 287.040.3. Bass, supra. Given the exclusive jurisdiction of the Division of Workers’ Compensation together with the statutory safeguards for construction activity, it is difficult to discern useful guidelines from Howell. Accordingly, Howell is distinguished and not followed here.

Accordingly, SLHA is found to be a statutory employer under Section 287.040.1 RSMo (1994). SLHA is liable for benefits herein. Section 287.060 RSMo (1994).

Rate of Compensation

and Nature and Extent of Temporary Total Disability

It is undisputed that Claimant earned \$778.97 per week on the reported accident date. Application of Section 287.250.1 RSMo (1994) results in TTD/PPD rates of \$519.26/\$278.42.

It is also undisputed in the record that Claimant never returned to work after September 12, 1997. Claimant attained maximum medical improvement on May 2, 2001. During the interim Claimant developed and continues to treat a neck cancer condition. Nothing in the record suggests Claimant's cervical disc pathology symptomatology dissipated during the cancer surgery episode. Thus, Claimant was temporarily and totally disabled for 188.57 weeks at the stated rates.

Medical Expenses

Claimant has the burden to demonstrate that the bills he submits are related to the alleged injury and that they are reasonable and necessary. Claimant must identify the medical care received and testify that the bills received were for those visits. This testimony must accompany the bills and the medical records for such care. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105, 111 (Mo. banc 1989). Here, Claimant introduced Exhibit R which included an exhibit of medical expenses in the amount of \$187,562.00.

Although Claimant did not testify as to a specific total for the bills, the Exhibits were regular on their face. Claimant had difficulty identifying whether the treating doctors were for his cancer or his neck injury. SLHA is not responsible for expenses relative to the cancer treatment. Since the Award herein is in the nature of a temporary award, and since future medical expenses are awarded, the parties may apply for relief hereafter. See Section 287.200 RSMo (1994).

Claimant's proffer of \$2,110.25 in out-of-pocket medical expenses was credible and also unrebutted. Nothing in the statute supports reimbursement of parking expenses.

Permanent Disability and Future Medical Expense

Claimant's thrice operated cervical spine is the self-evident basis for permanent total disability. The unrebutted evidence demonstrates Claimant is unable to use his upper extremities. He endures constant disabling pain which continues to be treated. Both medical and vocational professionals' opinions that Claimant was unemployable as a result of the reported injury were unrebutted.

As stated above, the third surgery is overwhelming evidence of the necessity of future medical treatment. Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathis v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996).

Liability of the SIF

The liability of the SIF is set out in Section 287.220 RSMo (1994). Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995). A previous disability need only be a "hindrance or obstacle to employment or obtaining employment." Id. § 287.220.1. However, the SIF is only liable for permanent total benefits when a "prior injury combines with a later, on-the-job inquiry so as to produce permanent and total disability that would not have resulted in the absence of the prior disability or condition." Wuebbling v. West County Drywall, 898 S.W.2d 615, 616-617 (Mo.App. 1995).

However, an employer is liable for permanent total disability compensation under Section 287.200 RSMo (1994) if there is evidence in the record that the primary injury alone caused the employee to be permanently and

totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo.App. 1996); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo.App. 1994); Roby v. Tarleton Corp., 728 S.W.2d 586, 589 (Mo.App. 1987). The employee is not entitled to permanent total disability compensation from both the Second Injury Fund and the employer. Vaught v. Vaught, Inc., 938 S.W. 2d 931, 939 (Mo.App. 1997); Roller v. Treasurer of State of Mo., 935 S.W.2d 739 (Mo. App. 1996). Therefore, if the disability caused solely by the primary injury is permanent total disability, then it is irrelevant if any injury or condition pre-existed the primary injury, and the Second Injury Fund is not liable for any benefits.

These facts, together with the vocational profile, which includes age, are sufficient to predicate permanent total disability. The liability of the SIF depends on a synergistic effect between these facts a pre-existing conditions. Here, Claimant worked heavy labor without physical disability or other hindrance up until the subject accident despite a 11985 low back surgery. The cancer is a subsequent deterioration and independent of the reported injury. Claimant's PTD is caused by the last injury alone.

Conclusion

Accordingly, on the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained permanent total disability as the result of the reported injury. Section 287.200 RSMo (1994). The SIF is not liable for either uninsured medical expenses or additional permanent disability. Section 287.220 RSMo (1994).

With regard to attorney fees, the twenty-five percent contingency is allowed with the observation that this case was, without question, clearly work related and clearly permanent total disability. No amount of legal services can change these nearly undisputed facts. See Cervantes v. Ryan, 799 S.W.2d 111, 115 (Mo.App. 1990). The parties' lengthy statement of disputed issues was somewhat idle. The challenge here was general case management over four years and analysis of the single (threshold) legal issue of statutory employment. Thus, with the characterization that the overwhelming evidence was that of a work related PTD accident, the fee is capped at one hundred weeks (\$51,926.00), plus expenses.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Reneé T. Slusher
Director
Division of Workers' Compensation

[1] 122.00 + 302.00 + 2,625.00 + 8,335.91 + 32.00 = 11,416.91

[2] 187,562.00 – 11,436.91 = 176,145.09