

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
and Denying Employee's Motion to Dismiss
and Employer's Motion to Submit Additional Evidence)

Injury No.: 05-083237

Employee: Tim Nolan (Deceased)

Dependents: Lois Nolan, widow; Michelle Nolan and Michael Nolan, dependent children

Employer: DeGussa Admixtures Inc., a wholly owned subsidiary of DeGussa Corporation

Insurer: Ace American Insurance Company

Date of Accident: July 28, 2005

Place and County of Accident: Polk County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the entire record, and having heard the oral argument of the parties, the Commission issues this modification of the award and decision of administrative law judge Margaret Ellis Holden dated January 8, 2007 (Decision), pursuant to section 286.090 RSMo. The Decision is attached to and incorporated into this decision. 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.

INTRODUCTION

The Decision awarded employee temporary total disability benefits from the date of employee's injury on July 28, 2005, to the date of employee's death ^[1]. It awarded 15 weeks of disfigurement. It awarded past medical expenses totaling \$741,582.53. It awarded death benefits beginning November 10, 2005, divided between employee's widow (1/2) and his two children (1/4th each). It awarded costs of the proceedings to employee's dependents under § 287.560 RSMo. It reduced employee's compensation and death benefit by 15% pursuant to § 287.120.6(1) RSMo. It denied commutation. It did not award burial expenses.

Counsel for both employer/insurer and employee filed Applications for Review with the Commission. On January 16, 2007, counsel for employer filed a motion to submit additional evidence to the Commission. On January 30, 2007, counsel for employee filed a motion to dismiss employer's Application for Review.

MOTIONS

The Commission hereby denies both the motions described immediately above.

ADDITIONAL AND HIGHLIGHTED FACTS

Employee worked for employer as a dispenser technician and regularly traveled in employer's vehicles to its customers' locations. On July 28, 2005, while traveling from one customer's location to another, employee lost control of employer's vehicle for unknown reasons, skidded, and overturned. A co-worker testified that prior to the accident, employee was acting normally and did not seem impaired. Employee sustained injuries due to this accident, including severe facial scarring and paralysis. Employee died on November 10, 2005, as the result of medical complications directly related to this accident. Counsel for employee presented evidence that employee's family incurred \$5,941.61 in burial expenses.

When employee was initially admitted to the hospital, his treating doctor ordered a clinical drug screen to be performed by the hospital's laboratory. The hospital followed its internal procedures in processing employee's urine sample. The

sample was labeled with his assigned hospital identification number (the same number that appeared on his hospital bracelet and in all his paperwork). At each stage of the hospital's handling, from the time of the collection of the sample through testing, the sample and its identification number were checked against the hospital's internal records and orders.

Because the drug screen was positive for methamphetamines, the hospital followed its procedures and sent employee's sample for additional testing by Medtox Laboratories, a facility with a reputation for reliability. Medtox Laboratories certified that it followed its internal procedures "to ensure the chain of custody of samples, the testing of those samples and the validity of the test procedures employed by our laboratory."

The confirming test was more accurate than the screening test. Although not truly a quantitative test, it produced "big positives" for both methamphetamine and THC (marijuana) metabolite.

Dr. Allen J. Parmet, a certified medical review officer for thirteen years, indicated that employee had used methamphetamines not more than three days prior to the July 28, 2005, accident, and had used marijuana not more than a week prior to the accident. Employee's widow, too, confirmed that she had been aware for years of employee's use of marijuana. She was not aware that he used methamphetamines.

Dr. Parmet indicated that unlike the marijuana (which the body fairly quickly breaks down into chemicals that do not actively affect the brain or nervous system) in employee's system, the methamphetamines in his system were being metabolized by his body into amphetamines and that both these chemicals were actively affecting employee's brain and nervous system as of July 28, 2005, when the accident occurred and the sample was collected. During deposition, he answered the question of what systems of the body were affected by use of methamphetamines:

Well, since they affect the adrenal system, almost everything. It affects the adrenergic functions in the brain and everything the brain does. It affects heart and blood vessels, increasing the pulse, the pressure, constricting blood vessels.

It affects adrenalin at the level of the muscles, the gut. So everything in the body, because adrenalin is a normal hormone that is secreted and designed to have many, many effects, it affects your lungs, the breathing, constricts muscles in your bladder. Any muscle in the body, any blood vessel. It even makes the hairs stand on end.

(Tr. 5361.)

BURIAL EXPENSES UNDER SECTION 287.240(1) RSMO

Section 287.240 states as follows:

If the injury causes death, either with or without disability, the compensation therefore shall be as provided in this section:

- (1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding five thousand dollars.

It is not disputed that employee's work-related injury caused his death. Counsel for employee has presented evidence that employee's widow, Lois Nolan, paid at least \$5,941.61 in burial expenses in connection with employee's death. The statute mandates an award for such expenses, but not to exceed \$5,000.00. Accordingly, we hereby modify the Decision to award burial expenses to Lois Nolan.

COMMUTATION

Section 287.530.2 RSMo states that "commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure." We affirm that part of the Decision holding that the circumstances in the case before us are not clearly of the unusual type warranting such a departure.

DISFIGUREMENT

Section 287.190.4 RSMo states as follows:

If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation.

In *Akers v. Warson Garden Apts.*, 961 S.W.2d 50 (Mo. banc 1998) (overruled in part on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)), this state's supreme court affirmed the Commission's decision not to award disfigurement benefits to a deceased employee's dependents. In the Commission's decision that it affirmed, the Commission discussed the origins of Missouri's statute concerning disfigurement. The disfigurement benefits were clearly intended for permanently but partially injured employees whose visible injuries would impede their hopes for finding work. Even in the statutory language relevant to this decision, the only disfigurement considered is that located about the head, neck, hands, or arms. These are injuries that are in visible areas of the body, difficult to conceal and potentially damaging when looking for future work.

The *Akers* court upheld the Commission:

Section 287.190 provides for the compensation to be paid for and defines "permanent partial disability." Section 287.190.6 defines "permanent partial disability" as being permanent in nature and partial in degree. Employee died the day after the fire but his death does not affect Employer's liability to furnish compensation as provided in chapter 287. Section 287.230. However, there is no evidence that Employee's injuries were partial in degree and, therefore, that he was entitled to compensation for permanent partial disability. Accordingly, the Commission did not err by failing to award disfigurement benefits.

Similarly, in the case at hand, employee's death ended any possibility of future employment. His injuries were not partial in degree. Disfigurement benefits were not intended under such circumstances. Therefore, we reverse that part of the Decision awarding any disfigurement benefits to employee.

TEMPORARY TOTAL DISABILITY BENEFITS

The administrative law judge awarded 10 5/7th weeks of temporary total disability. While we affirm the award of such benefits, we do not believe the judge properly calculated the number of weeks involved and, accordingly, modify that part of the Decision. Employee was entitled to and we hereby award temporary total disability benefits from the date of his injury on July 28, 2005, to the date of his death on November 10, 2005.

COSTS UNDER SECTION 287.560

Section 287.560 RSMo states in relevant part: "[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

Section 287.120.6(2) RSMo causes complete forfeiture of all benefits and other compensation to an employee if the employee's use of drugs in violation of his employer's rule is the proximate cause of the relevant injury. In the case at hand, employer/insurer had received test results indicating that employee was arguably under the influence of methamphetamines and marijuana (in violation of its rules) at the time he lost control of the vehicle he was driving on July 28, 2005.

We are persuaded that these circumstances gave employer/insurer a reasonable basis for withholding benefits and denying liability to employee. Therefore, we hereby reverse that part of the Decision that awarded costs under section 287.560.

15% REDUCTION UNDER SECTION 287.120.6(1) RSMO

Employer has not met its burden of establishing that employee's use of drugs in violation of employer's rules was the proximate cause for his July 28, 2005, accident. The employee with whom he was working that day saw no sign that claimant was impaired. Neither the police nor any of the toxicology experts could say with any certainty what exactly was the cause of employee's July 28 accident. Thus, the forfeiture provisions of section 287.120.6(2) do not apply to the

case at hand.

We next consider section 287.120.6(1), which states as follows:

Where the employee fails to obey any rule or policy adopted by the employer relating to the use of alcohol or nonprescribed controlled drugs in the workplace, which rule or policy has been kept posted in a conspicuous place on the employer's premises, the compensation and death benefit provided for herein shall be reduced fifteen percent if the injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs; provided, that it is shown that the employee had actual knowledge of the rules or policy so adopted by the employer and, provided further that the employer had, prior to the injury, made a diligent effort to inform the employee of the requirement to obey any reasonable rule or policy adopted by the employer.

To satisfy the requirements of this statute, employer/insurer must have shown that (1) employer had a drug rule or policy, (2) that employee was aware of the rule or policy, (3) that employer posted its rule or policy in a conspicuous place on employer's premises, (4) that employee violated the rule or policy, (5) that employer had made a diligent effort to inform the employee that it required his adherence to its rule or policy, and (6) that employee's injury was in conjunction with his use of drugs.

We agree with the administrative law judge that employer had a rule of which employee was aware that prohibited being under the influence of alcohol or illegal/unprescribed drugs while in the workplace or on company property. Employer's witness testified that employer did post some version of its prohibiting rule conspicuously on posters on all the bulletin boards in all of its locations. Although Ms. Schuld had not actually seen the posters in the Houston office, she knew that such posters had been sent to that office once each year and that the human resources personnel in that office had been directed to put the posters on their bulletin boards. Employer also posted its rules on its website. Arguably, even if employer's good faith effort to post its policy at each of its locations was technically deficient, employee clearly had actual notice of employer's rule; there is no evidence that he was somehow prejudiced by that deficiency; and the statute's technical requirement should not be strictly enforced. See *Davis v. Roadway Express, Inc.*, 777 S.W.2d 668, 670 (Mo. App. S.D. 1989); and *Brockmeyer v. Stieferman Bros. Van & Storage*, 34 S.W.3d 236, 240 (Mo. App. 2000) (reversed on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)).

Consequently, we are persuaded that employer satisfied this third requirement, as well as the fifth requirement that it have made a diligent effort to inform employee that it required him to follow its rule or policy. Through various mailings, posters, and website postings, employer had notified employee and others about its rules and that it expected compliance. The written and signed acknowledgement that employer received from employee stated that he had received its policy, understood the policy, agreed to comply with the policy, and acknowledged that his violation of the policy could result in "consequential actions" including discharge.

Lastly, employer satisfied the fourth and sixth requirements. The relevant statute does not require a forensic chain of custody or collection and testing procedures that comply with Department of Transportation or Health and Human Services regulations. The results from employee's clinical drug test were admissible, despite any objection, because they were certified business records from the hospital and from Medtox Laboratories.

Although clinical standards are not as stringent as forensic standards, employer nonetheless established that the test results were tracked using methods typical of hospitals and laboratories. The hospital kept track of all orders and results using its patient account or bar code method (the same number or bar code that employee had on his affixed wristband). Medtox Laboratories used its own assigned tracking numbers. Employer established that the confirming laboratory has an excellent reputation. Even employee's widow confirmed that she was aware her husband at least occasionally used illegal drugs.

The drug testing records prove that it was more likely than not that employee had knowingly violated employer's drug prohibition shortly before his July 28, 2005, accident. Employee had used methamphetamines within approximately three days before the accident and marijuana within approximately the week before. As Dr. Parmet testified, methamphetamines and amphetamines were still actively in employee's system at the time of the accident. These chemicals were actively affecting employee's brain and nervous system. They were affecting nearly everything in his body. Clearly then, employee's injury occurred in conjunction with his drug use. (The requirement that the drug usage be the proximate cause of the injury is only associated with the complete forfeiture of benefits and compensation under section 287.120.6(2), not subsection (1)). Therefore, we agree with that part of the Decision holding that employee's compensation (temporary total disability benefits) and death benefits (both past and future) be reduced by 15%.

We hereby modify the administrative law judge's Decision, though, to the extent that she excluded past medical expenses from this 15% reduction. In *Kelso v. Empire Container Corporation*, Injury Number 95-087132 (Labor and Industrial Relations Commission, November 4, 1997), a previous Commission looked at this same issue. It found the present set of facts where an employee has violated an employer's rules analogous to the situation in *Martin v. Star Cooler Corporation*, 484 S.W.2d 32 (Mo. App. 1972), where the employer's violation of safety rules caused its 15% penalty under subsection 4 of section 287.120. We agree. We see no reason why the term "compensation" should be defined differently in subsection 6 versus its definition for purposes of subsection 4.

Lastly, because the language of section 287.240 (and specifically subsection (1)) clearly refers to the payment of burial expenses as a form of compensation, we must reduce the allowable burial expense of \$5,000.00, too, by 15%. Accordingly, the burial expense for Lois Nolan shall be \$4,250.00.

CONCLUSION

Based on the above, we award -- \$4,250.00 in burial expenses; temporary total disability benefits from July 28, 2005 to November 10, 2005 (less 15%); past and future death benefits (less 15%); and past medical expenses (less 15%). We deny commutation, disfigurement benefits, and costs of the proceedings.

The Decision of administrative law judge Margaret Ellis Holden dated January 8, 2007, as modified, is attached and incorporated by reference.

The benefits and compensation awarded hereunder to employee and his dependents shall be subject to a lien in the amount of 25% of all payments ordered, in favor of attorney, Robert Gaines, for necessary legal services rendered on behalf of employee and his dependents.

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

Given at Jefferson City, State of Missouri, this 26th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION CONCURRING IN PART AND DISSENTING IN PART

I join my fellow commissioners in awarding burial expenses; temporary total disability benefits from July 28, 2005 to November 10, 2005; past and future death benefits; and past medical expenses. I also join in their denial of commutation and disfigurement benefits. On the other hand, my consideration of the record leads me to believe that the administrative law judge was correct in assessing costs against employer/insurer and that it is improper to impose the 15% reduction of section 287.120.6(1) RSMo to the benefits and compensation described above.

Assessment of Costs

Section 287.560 RSMo states in relevant part: "[I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended *without reasonable ground*, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." [Emphasis added.]

Employer/insurer could not rely on section 287.120.6(1) to completely deny all medical expenses, benefits, and compensation to employee during the short period he lived after his accident and to his dependents, because invocation of that statute results only in a 15% reduction in compensation and benefits. Consequently, the Commission majority relies on employer/insurer's potential defense under section 287.120.6(2) RSMo as its *reasonable ground* for such a complete denial of relief.

To use this statute as a defense, though, employer/insurer would have to have had some evidence that employee's use of drugs was the proximate cause of his accident. It would have to prove that he was impaired due to drug use and that his impairment caused the accident. But employer had no such evidence. Neither its own experts and witnesses nor the police could ascertain what caused employee to lose control of the vehicle he was driving on July 28, 2005. Its own witness and employee, Richard Rennie, was working with employee shortly before employee's accident and testified that employee was acting normally and not impaired. Employer did not even order a post-accident drug test on employee, as its policies permitted.

Thus, employer/insurer had no reasonable grounds for withholding 100% of the compensation and benefits to which employee and his dependents were and are entitled. Accordingly, I believe the administrative law judge's award of costs to employee and his dependents was proper. I would modify that award of costs only to increase it by the additional expenses entailed by their need to further defend to the Commission this unsupported and unreasonable issue.

15% Reduction Under Section 287.120.6(1), RSMo

In order to reduce compensation and benefits by 15%, as allowed under section 287.120.6(1), employer/insurer had the burden of establishing each of the many requirements set forth in that statute. I am not persuaded that employer/insurer proved that employer conspicuously posted its drug policies or that it had made a diligent effort to inform employee that he was required to follow these policies (employer had not even been sufficiently interested that it made sure to obtain his signature acknowledging these policies). More importantly, though, employer/insurer did not prove that employee violated its policy prohibiting work while under the influence of drugs.

Employee's widow testified that employee might have used marijuana two or three times a year, but only marijuana (never methamphetamines), and always recreationally away from work. The expert testimony established that marijuana's active component does not stay active in a person's system for long. Consequently, the day after using marijuana, the user would no longer be under its "influence". Thus, the testimony of employee's widow only helped confirm that employee did not work under the influence of drugs.

The drug test results also do not establish that employee was under the influence of drugs on July 28, 2005. Even if admissible, these test results should have been given no weight. The question that must be asked (that the majority failed to ask) is how much reliance should be placed in the test results obtained from the hospital's clinical drug screen. The answer is none.

As indicated above, employer did not order the drug screen. It was ordered by his hospital just for the purpose of aiding in his medical diagnosis and treatment. Consequently, the hospital took virtually none of the steps normally taken to prevent sample mix-ups or contamination. We have no evidence that it sealed the urine sample it took from employee or that it had him sign or initial that sample. It did not split the specimen to provide a "control" sample against which its results could later be checked. It did not use sterile containers or refrigerate the sample. It did not document how the sample got from employee to the laboratory or how many stops it made along the way or how many people handled it. We have no evidence that the container it used was tamperproof. It did not have its personnel complete a chain-of-custody form.

We have no evidence about the steps taken by the hospital to calibrate its machinery or otherwise insure the accuracy of its equipment. To the contrary, the test results from the hospital and Medtox Laboratories differed. The hospital screen did not produce a positive result for marijuana, while Medtox Laboratories' did. Similarly, we have no evidence as to how the relevant sample was shipped from the hospital to Medtox. We have no evidence to show what steps that courier took to safeguard the sample and keep it from contamination or mix-up.

The times that appear in the laboratories' documentation for collection, processing, and verification are not logical. We have no evidence that a medical review officer was involved in the process to allow employee the chance to discuss any medications he was taking or circumstances he had encountered that might produce a false or misleading result. Lastly, the data package transmittal letter from Medtox Laboratories reveals that this confirming laboratory confused employee's results with those of a different patient (Laura Curtis) whose sample the laboratory had received fifteen days before

employee's sample.

I am not persuaded that anyone, including the Commission majority, would want their adherence to a drug policy based on the type of unreliable practices in evidence before us.

Consequently, employer/insurer failed to meet the burden of showing that employee had violated its policies and that application of section 287.120.6(1) was proper. Therefore, I would reverse that part of the administrative law judge's decision that reduces the compensation and benefits due to employee and his dependents by 15%.

Thus, I join with the decision of the Commission majority with respect to all matters except the assessment of costs and the 15% reduction.

John J. Hickey, Member

[1] 10 5/7th weeks, according to the administrative law judge.