

AWARD DENYING COSTS
(Pursuant to the Mandate of the Missouri Court of Appeals, Southern District)

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

On January 7, 2008, the Missouri Court of Appeals, Southern District, issued an opinion that reversed a portion of the July 26, 2007, Final Award of the Labor and Industrial Relations Commission (Commission) in the above-referenced case. *Nolan v. Degussa Admixtures, Inc.*, 246 S.W.3d 1 (Mo. App. S.D. 2008). In particular, the Court reversed and remanded that part of the Commission's award denying costs to employee under §287.560 RSMo.

By Mandate issued March 19, 2008, the Court remanded this matter to the Commission for further proceedings consistent with its January 7, 2008, opinion. In all other respects, the Court affirmed the Commission's award.

Pursuant to the Court's opinion and Mandate, we issued an Order dated April 10, 2008. In that Order, we gave notice to each of the parties of their opportunity to submit briefs regarding the issue of costs under §287.560. On May 16, 2008, we gave notice to the parties of their right to participate in oral arguments. On June 18, 2008, attorneys on behalf of employer/insurer and the dependents of employee participated in such oral arguments before the Commission.

Furthermore, the parties have submitted various motions to the Commission. We hereby deny all such motions.

We have considered the briefs and oral arguments of the parties and hereby issue this award concerning solely the issue of costs under §287.560. In relevant part, that statute indicates as follows: "[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."

In the case at hand, employer/insurer had received test results showing 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. Section 287.120.6(2) RSMo provides for 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.

We conclude that these circumstances gave employer/insurer a reasonable argument or grounds for withholding benefits and denying liability to employee. Therefore, we hereby reverse that part of the January 8, 2007, decision of the administrative law judge that awarded costs under §287.560.

Given at Jefferson City, State of Missouri, this 1st day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. I have read the parties' briefs and listened to their oral arguments. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge concerning costs under §287.560 RSMo was correct and should be affirmed.

Section 287.560 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 §287.120.6(1) RSMo 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 argues that employer/insurer had reasonable grounds to completely deny employee and his dependents any and all relief under §287.120.6(2) RSMo.

To use §287.120.6(2) 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, at best, employer/insurer may have had some grounds under §287.120.6(1) for withholding 15% of the benefits to which employee and his dependents were rightfully due. It had no reasonable grounds, however, 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.

Accordingly, I must respectfully dissent.

John J. Hickey, Member