

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

Injury No.: 10-069477

Employee: Teresa C. Parks

Employer: Independent Living Center of Southeast Missouri

Insurer: Missouri Employers Mutual Insurance Company

This 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, read the briefs, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Was Teresa Parks an "employee" under the Missouri Workers' Compensation Law?*

Section 287.020.1 RSMo provides, in relevant part, as follows:

The word "employee" as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election ...

The Missouri courts have articulated the following test for determining whether a paid worker is an "employee" under the foregoing definition:

A claimant establishes an employer/employee relationship if the claimant worked in the service of the alleged employer and the employer controlled these services. The pivotal question in determining the existence of an employer-employee relationship is whether the employer had the right to control the means and manner of the service, as distinguished from controlling the ultimate results of the service. While a claimant's employment status must be determined on the facts of each case, several factors must be examined to determine if a right to control existed. These factors include: (1) the extent of control, (2) the actual exercise of control, (3) the duration of the employment, (4) the right to discharge, (5) the method of payment, (6) the degree to which the alleged employer furnished equipment, (7) the extent to which the work is the regular business of the alleged employer, and (8) the employment contract. Each factor is relevant to the issue, but no one factor is dispositive.

*DiMaggio v. Johnston Audio/D&M Sound*, 19 S.W.3d 185, 189 (Mo. App. 2000)(citations omitted).

Teresa Parks alleges she was an employee of the Independent Living Center (ILC) when she provided personal care attendant services to Gregory Donnellan. ILC is a non-profit organization in the business of helping elderly and disabled individuals stay in their own

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residences instead of going to nursing homes. ILC is a vendor contracted with the Missouri Department of Health and Senior Services to arrange for workers to provide services under the Consumer Directed Services (CDS) program. It was under the CDS program that Ms. Parks provided her services to Mr. Donnellan. In order to determine whether ILC exercised sufficient control over Ms. Parks to render her an “employee” under the law, we will separately analyze each of the 8 factors enumerated above.

*1. The extent of control.*

Ms. Parks testified that when she began providing services to Mr. Donnellan, ILC told her how many days and hours she could work and what services she could and could not perform for Mr. Donnellan, but she also agreed on cross-examination that ultimately the amount of hours she worked and the scope of the services she performed were dictated by Medicaid under the CDS program. Employer’s witness, Lisa Holmes, the director of CDS programs for ILC, testified that ILC has no input whatsoever in determining the services that Ms. Parks provided for Mr. Donnellan. We find that Medicaid dictated the number of hours Ms. Parks worked and the services she was permitted to perform for Mr. Donnellan under the CDS program, and that ILC merely communicated these terms to Ms. Parks at the outset of the work relationship.

Mr. Donnellan, rather than ILC, instructed Ms. Parks as to when he needed services performed, and thus dictated her day-to-day work schedule. If Ms. Parks needed a day off from work, she first asked Mr. Donnellan if this was okay, then notified ILC so that ILC could find a replacement. Ms. Parks testified that if ILC could not find a replacement, it was her understanding that she was required to show up for work, but she did not identify any source for this understanding, and also indicated that every time she needed a day off, she was able to take a day off. Ms. Holmes testified that Ms. Parks was not required to contact ILC if she needed a day off. Ms. Holmes’s testimony strikes us as more certain and persuasive as to this factual issue. We find that ILC did not have any control over Ms. Parks’s day-to-day work schedule or whether she took a day off.

Ms. Holmes testified that Mr. Donnellan, rather than ILC, would have provided any training that Ms. Parks needed and that ILC does not provide any training to personal care attendants like Ms. Parks. We note that Ms. Parks did not offer any testimony relative to the issue of training or whether there were particular guidelines or procedures she was required to follow. We find that ILC did not provide Ms. Parks with any training.

In light of the above considerations, this factor suggests there was not an employment relationship between Ms. Parks and ILC.

*2. The actual exercise of control.*

Ms. Parks performed her services for Mr. Donnellan without any supervision from a representative of ILC. Ms. Parks did not submit any reports to ILC apart from her timesheets, although Ms. Parks believed she was supposed to contact ILC if Mr. Donnellan went to the hospital. Ms. Parks initially testified that all of her “directions” came from ILC, but agreed on cross-examination that when it came to daily activities, Mr. Donnellan directed her as to what he needed done, and that the only constraint on her activities was whether they fell within the scope of services dictated by Medicaid through the CDS program. A representative from ILC was expected to periodically visit Mr. Donnellan’s

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residence to check up on him, but there is no evidence that this individual had any implied or express authority to direct Ms. Parks in the performance of her services. We find that Mr. Donnellan directed Ms. Parks in all of her activities, and that Ms. Parks did not receive any instructions or supervision from ILC beyond the initial explanation as to the scope of services covered under Medicaid's CDS program. This factor suggests that there was no employment relationship between Ms. Parks and ILC.

*3. The duration of the employment.*

Ms. Parks testified that she provided services under the CDS program through ILC for her brother and for another individual in the past, but she did not provide any testimony or other evidence to establish the duration of these particular work relationships. It appears from Ms. Parks's timesheets set forth in Employer's Exhibit 3 (and we so find) that Ms. Parks worked for Mr. Donnellan for only about 4 months from May 3, 2010, through August 24, 2010. Because Ms. Parks failed to prove the duration of her previous periods of performing services under the CDS program through ILC, and only worked for Mr. Donnellan for about 4 months, we do not deem this factor to be indicative of an employment relationship between Ms. Parks and ILC.

*4. The right to discharge.*

Ms. Holmes testified that nobody at ILC had the right to discharge Ms. Parks from employment; Ms. Parks did not offer any contrary testimony. We find that ILC did not have the right to discharge Ms. Parks. This factor suggests there was no employment relationship between Ms. Parks and ILC.

*5. The method of payment.*

Ms. Parks received her paychecks by filling out timesheets provided by ILC, presenting them to Mr. Donnellan for a signature, and then submitting them to ILC. ILC paid Ms. Parks \$8.00 per hour on a biweekly basis for her services rendered to Mr. Donnellan. ILC withheld taxes from Ms. Parks's paychecks. ILC's executive director was responsible for determining the hourly rate of pay. This factor suggests there was an employment relationship between Ms. Parks and ILC.

*6. The degree to which the alleged employer furnished equipment.*

Ms. Parks did not use any equipment furnished by ILC with the exception of the timesheets provided to her for recording her hours. Instead, Ms. Parks used equipment and supplies provided by Mr. Donnellan to perform her services. Ms. Parks also used her own personal vehicle to drive Mr. Donnellan for errands, and did not receive any reimbursement for her mileage or gas expenses. This factor suggests there was no employment relationship between Ms. Parks and ILC.

*7. The extent to which the work is the regular business of the alleged employer.*

As noted above, ILC is a non-profit organization in the business of helping the elderly and disabled stay in their own residences instead of going to nursing homes. It was part of ILC's normal business to arrange for workers to provide services to elderly or disabled individuals under the CDS program, and the work Ms. Parks performed for Mr. Donnellan was thus within the regular business of ILC. This factor is indicative of an employment relationship between Ms. Parks and ILC.

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*8. The employment contract.*

Ms. Parks did not present a copy of any written contract between herself and ILC, or provide testimony specific to the issue whether there was any employment agreement between herself and any representative of ILC. Ms. Parks did provide testimony suggesting there was an agreement between herself and Mr. Donnellan that she would provide services to him through the CDS program, and that she approached ILC in order to effectuate that agreement, but we find insufficient evidence to support a finding that Ms. Parks had any employment agreement with ILC. This factor suggests there was no employment relationship between Ms. Parks and ILC.

Only 2 of the foregoing 8 factors suggest that ILC exercised, or retained the right to exercise, control over the manner and means whereby Teresa Parks performed her services. We find that the role of ILC in this work relationship was limited solely to processing Ms. Parks's initial request to participate in the CDS program, educating and training Mr. Donnellan regarding the scope of Medicaid-approved services, receiving and processing Ms. Parks's time sheets, and administering payroll to Ms. Parks. We are persuaded (and we so find) that ILC did not have the right to control the manner and means whereby Ms. Parks performed her services for Mr. Donnellan. We conclude, therefore, that Teresa Parks was not an "employee" for purposes of § 287.020.1.<sup>1</sup>

**Conclusion**

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Administrative Law Judge Gary L. Robbins, issued December 17, 2013, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 30<sup>th</sup> day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

<sup>1</sup> We note that the administrative law judge concluded that certain provisions under the Quality Homecare Act are preclusive of a finding that Teresa Parks was an employee. Having resolved of this matter by applying § 287.020.1 and the well-established case law interpreting the meaning of "employee" under that subsection, we deem it unnecessary to consider whether § 208.862 RSMo supersedes the Missouri Workers' Compensation Law.

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Teresa C. Parks Injury No. 10-069477  
Employer: Independent Living Center of Southeast Missouri  
Insurer: Missouri Employers Mutual Insurance Company  
Appearances: Mark A. Cordes, attorney for the employee.  
Patrick N. McHugh, attorney for the employer-insurer.  
Hearing Date: September 24, 2013 Checked by: GLR/rm

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease? August 24, 2010.
5. State location where accident occurred or occupational disease contracted: Butler County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? No.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? No.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee claims that she injured her right shoulder when she was loading a wheel chair into a van.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$0.
17. Value necessary medical aid not furnished by employer-insurer: \$11,268.19.
18. Employee's average weekly wage: Not determined.
19. Weekly compensation rate: Not determined.
20. Method wages computation: Not determined as issue was moot.
21. Amount of compensation payable: \$0.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: N/A.

No compensation is awarded in this case.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW**

On September 24, 2013, the employee, Teresa C. Parks, appeared in person and with her attorney, Mark A. Cordes for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Patrick N. McHugh. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. The employer had notice of the employee's accident.
2. The employee's claim was filed within the time allowed by law.
3. The employer-insurer paid \$0 in medical aid.
4. The employer-insurer paid \$0 in temporary disability benefits.
5. The employee had no claim for mileage.
6. The employee had no claim for future medical care.
7. The employee had no claim for permanent total disability.

### **ISSUES:**

1. Covered Employer.
2. Covered Employee.
3. Accident/Occupational Disease.
4. Average Weekly Wage and Rate.
5. Medical Causation.
6. Previously Incurred Medical Bills.
7. Temporary Total Disability.
8. Permanent Partial Disability.
9. Affirmative Defense Under Section 208.862.7 and 19 CSR 15-8.400.

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee Exhibits:

- A. Medical report of Dwight I. Woiteshek, M.D., dated September 13, 2010.
- B. Medical report of Dwight I. Woiteshek, M.D., dated June 23, 2011.
- C. Medical records from Kneibert Clinic.
- D. Medical records and bills from Lawrence A. Kriegshauser, M.D.
- E. Medical records and bills from Poplar Bluff Rehabilitation.

- F. Medical records from St. Anthony's Medical Center.
- G. Medical bill from Opensided MRI of St. Louis.
- H. Medical bill from St. Anthony's Medical Center.
- I. Letter from MSPRC dated September 23, 2011, regarding conditional payments made.

Employer-Insurer Exhibits:

- 1. Consumer Directed Service Program – employment documents.
- 2. Consumer Directed Service Program – Training Manual for Attendant Care.
- 3. Consumer Directed Service Program – personal care attendant timesheets.
- 4. Medical report of Richard C. Lehman, M.D.
- 5. Division of Workers' Compensation – Certified Copy of workers' compensation files for Injury Number 91-173816 and Injury Number 95-187592.
- 6. Consumer Directed Service Program – Participation Agreement July 1, 2010-June 30, 2011.
- 7. Consumer Directed Service Program – Participation Agreement July 1, 2009-June 30, 2010.
- 8. Deposition of Teresa Parks.
- 9. Summary of Earnings.

**RELEVANT LAW:**

- 1. Section 208.862.7 RSMo.
- 2. 19 CSR 15-8.400

**STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

**STATEMENT OF THE FINDINGS OF FACT:**

The employee and Lisa G. Holmes were the only two witnesses to personally testify at trial. All other evidence was presented in the form of written records or medical records. The Court only included information in the statement of the findings of fact relevant to the employer/employee relationship as the other information was not relevant to the principle issues in this case.

Section 208.862.7 states that "Personal care attendants shall not be considered employees of the state of Missouri or any vendor for any purpose".

19 CSR 15-8.400 states that "The attendant is an employee of the consumer only for the time period subsidized with CDS funds, but is never the employee of the vendor, DHSS, or the state of Missouri".

Ms. Holmes is employed by Independent Living Center of Southeast Missouri/ILCSEMO. ILCESMO is a company that provides home health care to individuals. Ms. Holmes is

responsible to administer the Medicaid Consumer Directed Service Program/CDS for ILCSEMO. ILCSEMO also provides home health services independent from the CDS program, but that is not relevant to this case.

The CDS program is a Medicaid program administered through the Missouri Department of Health and Senior Services. The purpose of the program is to allow physically disabled persons to remain in their home and live independently by providing Medicaid benefits for disabled persons to hire a personal care attendant to assist them with their needs. Ms. Holmes indicated that the physically disabled person is designated as the “consumer” and has the right to hire, fire, supervise and train personal care attendants. She reported that the majority of personal care attendants are family members, although the consumer has the ability to choose any other qualified person.

Ms. Holmes testified that ILCSEMO acts as a “vendor” under the CDS program. A vendor provides services including orientation and training of the consumer, assisting the consumer by performing a background check of the personal care attendant, and having the personal care attendant fill out an Application for Employment and necessary tax documents. As a vendor, ILCSEMO is also responsible for administering payroll for the consumer. Specifically, she explained ILCSEMO acts as a payroll agent for the consumer. The consumer’s Medicaid funds are sent directly to ILCSEMO and ILCSEMO makes the necessary tax and FICA deductions and issues checks to the personal care attendant. The checks are issued by ILCSEMO on behalf of the consumer, with the consumer’s name being designated on each paycheck. Ms. Holmes testified ILCSEMO does enter into a written agreement with the Missouri Department of Health and Senior Services on a yearly basis to provide services as a vendor under the CDS Program.

Ms. Holmes testified that ILCSEMO acted as a vendor for Mr. Donnellan under the CDS Program. She stated Medicaid approved Mr. Donnellan as an eligible consumer for personal care attendant services. She explained the scope of the services for which Mr. Donnellan was eligible to receive was determined by Medicaid. This included the specific type of services to be provided by the personal care attendants as well as the number of hours and days the personal care attendant could work. She stated ILCSEMO has absolutely no input or discretion as to the scope of services to be provided.

Ms. Holmes stated that Ms. Parks worked as a personal care attendant for Mr. Donnellan exclusively through the CDS Program from May 3, 2010 through August 24, 2010. ILCSEMO assisted Mr. Donnellan in the employment process to allow Ms. Parks to work as a personal care attendant for him. This involved having Ms. Parks fill out a separate employment application, tax forms, I-9 form, conducting a background check for Mr. Donnellan, and other necessary paperwork under the CDS Program. She stated that it is ILCSEMO’s responsibility to provide education and training to all consumers, including Mr. Donnellan. This training included making him aware of the scope of the personal care services that he was entitled to, how to understand and administer the timesheets, and ensure that he, as the consumer, was aware that it’s his responsibility to direct the personal care attendant as to when and what he needs done, within the scope of the approved services. She specifically stated that the training provided by ILCSEMO was provided to Mr. Donnellan as the consumer and not Ms. Parks as the personal care attendant.

Ms. Holmes emphasized that pursuant to the regulations of the CDS Program; Mr. Donnellan was Ms. Parks employer and was responsible for supervising her day-to-day activities. She stated that Ms. Parks was working as a personal care attendant for Mr. Donnellan under the CDS Program on the date of her injury.

On cross-examination, Ms. Holmes stated ILCSEMO does provide a case manager for each consumer. The case manager's responsibility is to talk to the consumer, train him, and periodically check on the consumer to ensure the proper personal care attendant services are being provided. If services are not being properly provided, it is the case manager's responsibility to report this to the state if a health or safety issue is involved. Regarding the training provided by the consumer, she explained that the case manager goes to the consumer's house and provides a booklet that contains a training manual and the necessary timesheets. The case manager also advises the consumer as to the services the personal care attendant is supposed to provide and that it is his responsibility to ensure that the personal care attendant provides "no more and no less" than is authorized by the program. She confirmed the state determines what work can and cannot be performed. She admitted that the consumer can allow the personal care attendant to be present during this training session.

Ms. Holmes was questioned with regard to the document in Exhibit 1 identified as "Medicaid Non-Public Entity OHCDS Organized Health Care Delivery System Home and Community Based Services – Request For Proposal." The employee's attorney referenced the caption, "Services to be sub-contracted by: Center For Independent Living." Ms. Holmes explained this agreement is required by the CDS Program to ensure the consumer is identified as the employer, the personal care attendant as the employee, and ILCSEMO as the vendor. She confirmed this document was signed by all parties on April 28, 2010.

Ms. Holmes testified that ILCSEMO does have workers' compensation coverage for its other employees. She explained it does not provide workers' compensation coverage for personal care attendants working under the CDS Program as the program mandates that the consumer be designated the employer and that the vendor is not considered an employer of the personal care attendant. She said they do explain to each consumer that "they are the boss" and if they hire more than four attendants, they will need to obtain workers' compensation insurance. She stated she is not aware of any consumer that does purchase workers' compensation insurance.

## **RULINGS OF LAW:**

### **Covered Employer and Covered Employee**

The evidence clearly establishes that the employee was working as a personal care attendant for Mr. Donnellan under the Medicaid CDS Program when this injury occurred. The employee admitted that Mr. Donnellan was a neighbor who had approached her about providing personal care attendant services for him under the CDS Program. The employee had provided personal care attendant services for two other individuals through the CDS Program prior to being approached by Mr. Donnellan. She was familiar with the program and how to qualify through ILCSEMO to work for a consumer. The employee filled out the necessary employment application and tax forms to

work for Mr. Donnellan and a background check was conducted by ILCSEMO. The employee worked exclusively for Mr. Donnellan as a personal care attendant under the CDS Program from May 3, 2010 through August 24, 2010 and was working in this capacity at the time of her accident.

Ms. Holmes credibly testified that ILCSEMO is qualified to act as a “vendor” under the Medicaid funded CDS Program. A “vendor” is defined by §208.865(10) as, “Any organization having a written agreement with the department to provide services including monitoring and oversight of the personal care attendant, orientation, and training of the consumer, and fiscal conduit services necessary for delivery of personal care assistant services to consumers.” ILCSEMO was acting in this capacity in Mr. Donnellan’s case. ILCSEMO had a written agreement with The Missouri Department of Health and Senior Services to provide services through the CDS Program at the time CDS Services were initially provided to Mr. Donnellan and as of the date of injury. ILCSEMO provided orientation and training to Mr. Donnellan, as a “consumer”, under this program. It also acted as a fiscal conduit for the delivery of personal care attendant services by the employee to Mr. Donnellan by administering payroll on his behalf. The employee testified she would only contact ILCSEMO on days she would not work for Mr. Donnellan and that a representative of ILCSEMO would occasionally check up on Mr. Donnellan and the services being provided. This communication between the employee and ILCSEMO and monitoring of the services provided is consistent with a vendors’ statutory obligation to monitor and oversee the personal care attendant providing services to a consumer. The employee produced no evidence suggesting ILCSEMO was acting in any capacity other than a vendor for Mr. Donnellan under the CDS Program.

Section 208.862 RSMo (2008) defines the consumer rights and employment relations aspects of consumers, vendors, and personal care attendants. This statute clearly defines the employment relationship under the CDS Program. Section 208.862.1 provides, “**Consumers shall retain the right to hire, fire, supervise, and train personal care attendants.**” Section 287.862(7) further dictates, “**Personal care attendants shall not be considered employees of the state of Missouri or any vendor for any purpose.**” This employment relationship is confirmed by the Code of State Regulations, 19 CSR 15-8.400(4)(A).4, which states, “**The attendant is an employee of the consumer only for the time period subsidized with CDS funds, but is never the employee of the vendor, DHSS, or the state of Missouri.**”

Since ILCSEMO was acting only as a vendor when this incident occurred, the employee cannot be considered an employee of ILCSEMO “**for any purpose,**” including the purpose of attempting to establish an employment relationship to obtain workers’ compensation benefits. The legislature enacted Section 208.862 and related statutes governing the CDS Program in 2008. It was fully aware of the provisions of the Missouri workers’ compensation law when this law was enacted. It cannot be presumed that the legislature, when enacting Section 208.862.7, gave no consideration to the existing workers’ compensation law. “It is a fundamental precept of statutory construction that Courts presume the legislature, when enacting new legislation, acts with knowledge of the subject matter, surrounding circumstances, existing law, and the purpose and object to be accomplished.” Safety Roofing Systems, Inc. v. Crawford, 86 S.W.3d 488, 492 (Mo.App. 2002) (citations omitted). Further, it cannot be presumed that the legislature enacts meaningless provisions. *Id.* The legislature was fully cognizant of the workers’ compensation law when it enacted legislation dictating that personal care attendants “**shall not be considered employees of ...any vendor**” under the CDS Program.

Employee's counsel discussed the "controllable services test" as authority that ILCSEMO was an employer in this case. The Court does not find that the "controllable services test", the "relative nature of the work" test nor the statutory employment standards are relevant to this case and rejected those principles given the finding of the Court that ILCSEMO was not an employer under Section 208.862 RSMo.

Therefore, based on the competent and substantial evidence, the Court finds that the employee failed to sustain her burden of proof that she was an employee of ILCSEMO when this accident occurred, or that she sustained an accident arising out and in the course of her employment for this entity.

**Accident, Average Weekly Wage, Medical Causation, Past Medical Bills, Temporary Total Disability and Permanent Partial Disability**

The Court determined that the employee was not entitled to any benefits due to the Court's rulings on Covered Employer and Covered Employee. Based on the Court's findings all of the above listed issues are moot. The Court made no findings as to these issues.

**ATTORNEY'S FEE:**

No attorney fees are awarded in this case.

**INTEREST:**

No interest will accrue in this case.

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*