

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

Injury No.: 07-097323

Employee: David Parsons

Employer: Steelman Transportation, Inc. (Alleged)

Insurer: Missouri Employers Mutual Insurance Company (Alleged)

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 whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 1, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued October 1, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 23rd day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: David Parsons

Injury No. 07-097323

Dependents: N/A

Employer: Steelman Transportation, Inc. (alleged)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: September 4, 2009

Checked by: VRM/db

FINDINGS OF FACT AND RULINGS OF LAW

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: 7/2/2007.
5. State location where accident occurred or occupational disease was contracted: Portland, Oregon.
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? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease was contracted: Claimant was lifting side panels off a trailer when he sustained a hernia.
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: Abdomen – hernia.

14. Nature and extent of any permanent disability: None awarded.
15. Compensation paid to date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None Awarded.
18. Employee's average weekly wages: \$2,522.05.
19. Weekly compensation rate: \$742.72 TTD/\$389.04 PPD.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A.

TOTAL: NONE.

23. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

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Injury No. 07-097323

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INTRODUCTION

David Parsons (Claimant) requested a hearing after Steelman Transportation, Inc. (alleged Employer) denied liability for medical treatment, temporary total disability, and permanent disability. The parties appeared for a final hearing in Springfield, Greene County, Missouri, before the undersigned Administrative Law Judge on September 4, 2009. Randy Alberhasky represented Claimant. Shari Lockhart appeared on behalf of the alleged Employer. The parties agree to the following facts:

STIPULATIONS

Stelman Transportation is an employer within the meaning of the Missouri Workers' Compensation Law and was fully insured on July 2, 2007, by Missouri Employers Mutual Insurance Company. On July 2, 2007, Claimant sustained an injury by accident, resulting in a hernia, while working in Portland, Oregon. Physicians for both parties have rated the hernia as resulting in a five percent Permanent Partial Disability to the body as a whole. No medical benefits, Temporary Total Disability, or Permanent Partial Disability have been paid. Jurisdiction, venue, statute of limitations, and notice are not disputed. Claimant's average

weekly wage was \$2,522.05, yielding a Temporary Total Disability rate of \$742.72 and Permanent Partial Disability rate of \$389.04.

ISSUES

1. Evidentiary Issue: Do the Owner-Operator Contract and Lease-Purchase Contract between Claimant and Steelman Transportation, Inc., constitute "statements" requiring disclosure, as prescribed by § 287.215 RSMo Cum Supp. 2006?
2. Was Claimant an employee of Steelman Transportation?
3. Did the Accident occur within the course and scope of employment?
4. Is Claimant entitled to Temporary Total Disability, and if so, how much?
5. Is Claimant entitled to Permanent Partial Disability?
6. Is Claimant entitled to reimbursement of \$14,527.70 in medical expenses?

EXHIBITS

The following exhibits were admitted on behalf of Claimant:

Medical Records

- A. Cox Medical Center (75 pages)
- C. Ferrell Duncan Clinic (13 pages)
- D. St. John's Health Center (13 pages)
- E. St. John's Clinic, Smith Glynn Callaway (12 pages)

Medical Bills

- F. Cox Medical Center
- G. Emergency Physicians of Springfield
- H. Ferrell Duncan Clinic
- I. St. John's Hospital
- J. St. John's Physicians and Clinics

Medical Report

- K. Dr. David Paff

Documents

- L. Claim
- M. Answer of Alleged Employer and Insurer
- N. Letter dated February 19, 2008,
- O1. Position Requirements
- O2. Contractor Settlement Deductions
- O3. TripPak

- O4. Driver Qualifications
- O5. Fleet Managers Expectations of Driver Contractors

These exhibits were admitted on behalf of alleged Employer and Insurer:

- 1. Medical Record: Springfield Neurological and Spine Institute (Dr. Lennard)
- 2. Explanation of Benefits – AIG Domestic Claims, Inc.
- 3. Independent Contractor Operating Agreement
- 4. Lease with purchase option contract summary
- 5. Cover letter dated November 13, 2007 regarding Operating Agreement.
- 6. Blank Copy of Independent Contractor Operating Agreement
- 7. Blank Copy of Lease with purchase option contract summary
- 11 Owner/Operator Handbook

The following exhibits were not admitted and were not withdrawn:

- 8. Copy of an Interstate Commerce Commission Certificate
- 9. Copy of an Order of the Missouri Division of Transportation
- 10. Copy of a letter of United States Department of Transportation

FINDINGS OF FACT

In early 2007, Claimant approached Steelman Transportation, Inc., about a job. He was accepted as a driver on May 5, 2007. Two months later, on July 2, 2007, Claimant was dispatched to deliver a load in Portland, Oregon. While in Portland, Claimant suffered a hernia as he was removing some side panels from the trailer he was hauling. There is no dispute that Steelman Transportation owned the trailer as opposed to the truck or tractor. Claimant gave notice of the injury to the dispatcher. Upon his return to Missouri, Claimant obtained medical treatment, including surgical repair of the hernia. He now seeks reimbursement of his medical bills, Temporary Total Disability, and Permanent Partial Disability. Both medical experts agree that Claimant sustained a five percent Permanent Partial Disability to the body as a whole at the time of the accident.

Employment Issue

Jim Towery, President of Steelman Transportation, Inc., testified that Steelman is an “interstate common carrier, flat bed and specialized hauler.” His company has been in operation

more than 11 years. Steelman's sales people call on shippers and manufacturers. Steelman bids to haul freight from one state to another. Sometimes it is a one-time spot bid, other times it results in a long-term contract with interstate shippers. Steelman has "48 state authority and can operate in all 48 states."¹ Steelman then contracts with drivers to perform those deliveries. Claimant was an over-the-road (OTR) truck driver.

Steelman carries workers' compensation insurance on its office workers and local delivery drivers. It does not carry workers' compensation on the 75 OTR truck drivers who make deliveries for Steelman throughout the United States because the company considers them to be independent contractors. Steelman Transportation requires all of its OTR drivers to carry a workers' compensation policy or an occupational accident policy. Claimant opted for an occupational accident insurance rather than workers' compensation.²

According to Towery, Steelman's company president, an OTR driver working with Steelman is precluded by federal law from driving for other trucking companies. Steelman has a bond to assure that the drivers with whom the company contracts limit their hours as required by federal regulations. As to assignments, Towery said all of its OTR truck drivers receive dispatches to and from the locations where the driver needs to be. But as an independent owner-operator, the driver may take any route he or she chooses to get from one city to another. OTR drivers receive a 1099 form with no taxes withheld. Claimant was not able to state whether he received a W-9, W-4, or 1099, but he agreed that employment taxes were not deducted from his weekly pay.

¹ Uncertified photo-copies of what purported to be an Interstate Commerce Commission Certificate, and an Order from the Missouri Division of Transportation allowing Steelman Transportation to engage in intrastate transportation, were excluded upon Claimant's objection that the documents had not been authenticated or certified. That objection was sustained. There also was no foundation identifying these documents as business records of Steelman Transportation. There was no objection made to Mr. Towery's earlier testimony, however, that his company was an interstate common carrier with authority to operate in 48 states.

² Evidence that Claimant obtained insurance was admitted solely for purpose of determining whether Claimant was an independent contractor or an employee since § 287.290 RSMo, states that no cost of workers' compensation insurance is to be assessed against or collected or paid by an employee.

Steelman requires all OTR drivers to pass a Department of Transportation physical, maintain a CDL license, pass a drug test, complete any maintenance and repairs on his or her truck, report miles and keep a log as required by federal law, follow all applicable laws including DOT, state, local, traffic, and hazard laws. Fuel is the drivers' responsibility. If fuel is charged to Steelman, the driver must reimburse the company.

If a driver wants lumpers to unload freight, the driver pays for the help. OTR drivers pay their own federal taxes, fuel taxes, highway heavy vehicle use taxes, state or local axle, weight, mileage, property and other taxes. Claimant, like all OTR drivers who contract with Steelman, are responsible for ferry, bridge, tunnel and road toll charges. They are responsible for any fines or penalties unless it was for a pre-sealed load with a penalty for the truck being overweight or oversized.

OTR drivers either own their own trucks or opt to sign a lease purchase agreement with Steelman Transportation or with some other company. If the truck is leased from Steelman, monthly payments for the truck are deducted from the weekly settlement check; such was the case with Claimant. Upon completion of all monthly installments, Claimant could purchase the truck. A number of drivers contracted with Steelman Transportation had completed such lease/own agreements and later left the company with their own vehicle.

Steelman and Claimant entered into a lease with a purchase option for a 2006 Kenworth, for which \$427.00 was deducted weekly from Claimant's settlement check. When all of the installments were completed, Claimant had the option to purchase the vehicle. Claimant selected the vehicle. Claimant was handed the keys and took possession of the vehicle. No other driver

working with Steelman was permitted to operate that vehicle. Conversely, Claimant drove no other vehicle.³

Stelman requires OTR drivers to maintain insurance on the truck, but the vehicle is then leased back to Steelman, with a driver. Steelman takes control of the vehicle to assure that it meets all DOT requirements and has up-to-date inspections. Steelman's president said that federal regulations require that Steelman Transportation have control of the vehicle at all times. Towery said to satisfy federal regulation [49 CFR 376.2], a statement of lease is carried in the permit book inside the truck to verify that the truck is leased to Steelman Transportation.

In addition to deductions on gross pay noted above, including the truck lease and various types of insurance, deductions also are made for the license and permit, and Qualcom charges. OTR drivers are responsible for a repair reserve, tire replacement revenue, excess mileage fees, and base plate. If an OTR driver does not have tie-down equipment for use on the Steelman flat-bed trailers, he or she also would have to purchase such equipment.

Claimant, as with all new OTR drivers contracted with Steelman, must attend an orientation at which the drivers review the Steelman owner/operator handbook and rules of the Federal Motor Carriers Safety Administration, DOT, and Steelman's "insurance company." Drivers also receive an explanation of the "pay package" and settlement deductions from their gross pay. Steelman's president spends about an hour explaining the contracts with each OTR driver. OTR drivers and James Towery sign the contract multiple times. Exhibit 3 is the independent contractor contract signed by David Parsons and James Towery. All OTR drivers working with Steelman are required to sign an independent contractor agreement.

³ Exhibits 3, 4, 6 and 7 are contracts, admitted over Claimant's objection. These represent the owner-operator agreement and the lease with purchase agreement for the 2006 Kenworth. Two of the contracts have been signed and two are blank or draft copies. Any marks or highlighting on the documents were present at the time the documents were entered into evidence and were not made by the Administrative Law Judge.

Medical Treatment and Bills

After Claimant returned to Springfield, Missouri, following the July 2nd injury, he showed his abdomen to the dispatcher. The dispatcher suggested that Claimant should see a physician. Claimant eventually treated with Dr. Yerra and Dr. Woods. Claimant was subsequently released to return to work, but he never returned to driving over the road.

While Claimant believed that bills were being run through “workers’ compensation,” he testified that he did not know the difference between “occupational insurance” and “workers’ compensation insurance.” He admitted that the medical providers submitted bills directly to an insurer. Claimant initially identified a number of the bills he incurred as related to his hernia treatment, but he later admitted that he had not actually read these documents.

CONCLUSIONS OF LAW

1. Are the Owner-Operator and Lease-Purchase contracts “statements” within the meaning of § 287.215 RSMo?

The dispositive issue is whether Claimant is an independent contractor or an employee of Steelman. Steelman offered copies of contracts that Claimant had signed at the time of orientation as well as draft or blank copies. At face value, these contracts identify Claimant as an independent contractor. Claimant objected to the admission of the contracts, contending that each contract is a “statement” that had not been provided to Claimant within the time limits prescribed in § 287.215 RSMo Cum. Supp. 2006. The Administrative Law Judge admitted these contracts provisionally, and allowed the parties to address the admissibility of the contracts in their briefs. The statutory provision at issue reads as follows:

287.215. Injured employee to be furnished copy of his statement, otherwise inadmissible as evidence –statement, what is not to be included. – No statement in writing made or given by an injured employee, whether taken and transcribed by a stenographer, signed or unsigned by the injured employee, or any statement which is mechanically or electronically recorded, or taken in writing by another person, or otherwise preserved, shall be admissible in evidence, used or

referred to in any manner at any hearing or action to recover benefits under this law unless a copy thereof is given or furnished the employee, or his dependents in case of death, or their attorney, within thirty days after written request for it by the injured employee, his dependents in case of death, or by their attorney. The request shall be directed to the employer or its insurer by certified mail. The term “**statement**” as used in this section shall not include a video-tape, motion picture, or visual reproduction of an image of an employee.

The primary rule of statutory construction is to determine legislative intent by considering the plain and ordinary meaning of the words in the statute. *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999); *Kinder v. Mo. Dep't of Corr.*, 43 S.W.3d 369, 372 (Mo. App. W.D. 2001). In construing an earlier version of this same statute, the Missouri Supreme Court noted that the law’s purpose was “designed to avoid surprises.” *Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 527 (Mo. banc 2001). That purpose, however, is not forwarded by holding that the contracts are a “statement” within the meaning of § 287.215 RSMo Cum Supp. 2006. Claimant was not “surprised” by the contracts. He signed them after a thorough explanation and received copies at the time of their execution.

Another rule of statutory construction requires that each word of a statute is to be given meaning. *Crack Team USA, Inc. v. Am. Arbitration Ass'n*, 128 S.W.3d 580, 581-82 (Mo. App. E.D. 2004). Claimant had not yet been injured at the time he executed the contracts with Steelman Transportation. But, § 287.215 RSMo, specifically refers to a “writing made or given by an *injured* employee.” Thus, the writing made prior to an injury is not a “statement” within the meaning of § 287.215 RSMo. To hold otherwise would be to treat the term “injured” as mere surplus – something precluded by the rules of statutory construction.

This view is consistent with the analysis by the Labor and Industrial Relations Commission in earlier cases. For instance, in *Ross L. Case v. David Sherman Corporation*, Injury No: 99-130581 (LIRC 2001), the Commission considered whether a Claimant’s

application for employment was a “statement” requiring disclosure under the predecessor version of § 287.215 RSMo. In that case, the Commission affirmed the Administrative Law Judge’s award, holding that an employment application prepared by the employee 15 years prior to the date of injury was not a “statement” requiring disclosure under the statute. *See also, James Hayes v. H.J. Enterprises, Inc.*, Injury No. 02-065518 (LIRC 2005) (discussing the difference between statements in a personnel file made to obtain employment and those made regarding an injury); and *Paula Miller v. Roger Mertens Distributor, Inc.*, Injury No. 01-160830 (LIRC 2005) (rejecting contentions that a time card was a “statement”). Thus, items that otherwise might have been considered “statements” using a dictionary interpretation, historically have not been considered statements requiring disclosure under § 287.215 RSMo, if executed or created prior to the work injury.

Finally, § 287.800 RSMo Cum Supp. 2006, now requires an Administrative Law Judge to “strictly” construe all provisions in the Workers’ Compensation Law. Applying strict construction, giving meaning to every word in the statute, and considering that the purpose of the statute is to avoid surprise, I conclude the contracts executed by Claimant before he became “injured,” as well as blank or draft copies of the same documents, are not “statements” as contemplated by § 287.215 RSMo Cum Supp. 2006. The contracts, initially admitted provisionally, are received into evidence for all purposes.

2. Was Claimant was an employee of Steelman Transportation?

Section 287.020.1 RSMo Cum Supp. 2005, states in applicable part as follows:

The word “**employee**” shall not include an individual who is the owner, as defined in subsection 43 of section 301.010, RSMo, and operator of a motor vehicle which is leased or contracted with a driver to a for-hire motor carrier operating within a commercial zone as defined in section 390.020 or 390.041, RSMo, or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or any of its subagencies.

This definition has five requirements: a) owner; b) operator; c) leased or contracted with a driver; d) to a for-hire motor carrier; e) operating within a commercial zone or under certificate by the Missouri or United States Department of Transportation or one of its subagencies.

1. Owner

Section § 301.010 (43) RSMo Cum Supp. 2006, defines “owner”, as:

any person, firm, corporation or association, who holds the legal title to a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law;

Testimony of both Claimant and the company president establishes that Claimant had lease payments deducted from his weekly draw for payments on the truck. Claimant selected the vehicle he was to drive and lease. No other driver could be assigned to that vehicle. Claimant, likewise, drove no other driver’s vehicle while hauling for Steelman Transportation. Claimant was not required to lease the truck from Steelman. He could have brought his own vehicle or leased one from another company, provided that the vehicle could pull the type of trailers used by Steelman Transportation. Claimant was responsible for all expenses connected with the operation of the vehicle. He received immediate possession of the vehicle he leased. Based on the forgoing definition, Claimant was an owner.

2 . Operator of a Motor Vehicle

Claimant drove the 2006 Kenworth truck hauling loads for Steelman Transportation. He was an operator of that motor vehicle.

3. Leased or Contracted with a Driver

After Claimant signed a lease/purchase agreement for the 2006 Kenworth, he signed an agreement leasing that vehicle back to Steelman, as outlined in the “Statement of Lease”

attached to the Independent Contractor Operating Agreement. Claimant thereafter exclusively drove the 2006 Kenworth while hauling freight for Steelman. This evidence establishes that Claimant leased his vehicle with himself as a driver to Steelman.

4. A For-Hire Motor Carrier

Stelman Transportation does not haul its own goods, but hauls the shipments of others from location to location within 48 states. Mr. Towrey, the company president, classified his business as an interstate common carrier with “authority” to operate within those 48 states. Indeed, Claimant’s hernia occurred while delivering goods out of state while under the lease with Steelman. Clearly, the evidence is sufficient to establish that Steelman was a for-hire motor carrier.

5. Operating Within a Commercial Zone or Under a Certificate

It is undisputed that Steelman Transportation has been in business 11 years and has been hauling products, not only within Missouri, but also on the public highways outside Missouri, in and between cities. Mr. Towery’s testimony that Steelman Transportation had “48 state authority and can operate in all 48 states,” is uncontroverted. There also was substantial evidence that Steelman Transportation complied with regulations of the U.S. Department of Transportation and Missouri rules. For example, the reason Steelman Transportation accepted responsibility for Claimant’s vehicle is to assure that the “vehicle is in compliance with all the DOT requirements....” He noted that there were “federal regulations that we’re required to have control of the vehicle at all times....” Absent any contrary evidence, I conclude that Mr. Towery’s testimony, and the record as a whole, is sufficient to establish that Steelman Transportation, Inc., was operated within a commercial zone or under a certificate issued by the Missouri Department of Transportation or by the United States Department of Transportation, or

one of its subagencies. Absent evidence contradicting the testimony of Mr. Towery, I conclude that the admission of the certificates themselves is unnecessary to establish this element.

Therefore, based on the above analysis, Claimant was an owner/operator and not an employee within the definition § 287.020.1 RSMo Cum Supp. 2006.

In reaching this conclusion, I am keenly aware of the amendments to the Missouri Workers' Compensation Act that occurred in 2005, particularly the enactment of § 287.043 RSMo Cum Supp. 2006, relating to the General Assembly's intent to "reject and abrogate" earlier case law interpretations of the term "owner." The statute reads as follows:

287.043. Abrogation of case law regarding definition of owner.—In applying the provisions of subsection 1 of section 287.020 and subsection 4 of section 287.040, [relating to contractors and subcontractors], it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "owner", as extended in the following cases: *Owner Operator Independent Drivers Ass', Inc. v. New Prime, Inc.*, 133 S.W.3d 162 (Mo. App. S.D., 2004); *Nunn v. C.C. Midwest*, 151 S.W.3d 388 (Mo. App. W.D., 2004).

Claimant argues that irrespective of the above statute, he still is an employee of Steelman because he was injured while working with the *trailer*, not while driving the truck. Claimant states that he had no ownership interest in the *trailer*, and thus cannot be an owner-operator of the trailer. I am not persuaded by such novel argument. I see no legislative intent to allow Claimant to vacillate between his status as an independent contractor and that of an employee. Claimant was injured while performing work incidental to his duties as an owner-operator. As such, he was not an employee, and not entitled to benefits from Steelman Transportation.

The determination that Claimant was not an employee of Steelman Transportation on the date of his injury is dispositive. Benefits are denied. I need not address the remaining issues.

Date: October 1, 2009

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation