

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

Injury No.: 03-028988

Employee: Paul Probst
Employer: Bill Wise
Insurer: Travelers Casualty and Surety Company

Date of Accident: December 31, 2002

Place and County of Accident: Columbia, Boone 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 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 20, 2006.

The sole allegation of error, as stated by employer, Billy G. Wise, d/b/a Wise Construction Company, is that, "the Administrative Law Judge found that claimant was covered under the Traveler's insurance policy issued to employer, but failed to award employer attorney fees and costs expended in defending this action after Traveler's wrongfully refused to defend on employee's behalf."

We have thoroughly reviewed employer's Application for Review and Brief. Employer's arguments and allegations fail to direct us to statutory authority for the awarding of attorney's fees and costs to employer from insurer. We have reviewed the record and the Missouri Workers' Compensation Law for any such authority.

At trial, this issue was stated as, "Employer's claim for reimbursement of legal fees and expenses for reimbursement from Insurer." Our review of the Missouri Workers' Compensation Law revealed no statute authorizing us to order reimbursement of attorney's fees and costs.

Section 287.560 RSMo endows the Commission with authority to assess the costs of a proceeding, but only against a party who brought, prosecuted, or defended a proceeding "without reasonable grounds." That section reads, in 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.

In *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. 2003), the Supreme Court held that attorney's fees are properly considered costs under § 287.560. "The commission should only exercise its discretion to order the cost of proceedings under section 287.560 where the issue is clear and the offense egregious." *Landman*, 107 S.W.3d at 250. Employer did not allege error with regards to the administrative law judge's failure to make a finding that insurer defended this claim without reasonable grounds. Employer did not argue the issue of unreasonable grounds in its Brief. Any claim under § 287.560 is deemed abandoned.

We conclude that employer failed to preserve a legal basis for an award of attorney's fees and costs. We deny employer's Motion to Submit Additional Evidence as moot.

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

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

The award and decision of Administrative Law Judge Robert J. Dierkes, issued January 20, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of September 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Paul Probst

Injury No. 03-028988

Dependents: N/A

Employer: Bill Wise

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

Additional Party: N/A

Insurer: Travelers Casualty and Surety Company

Hearing Date: October 27, 2005

Checked by: RJD/tmh

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: December 31, 2002.
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone County, Missouri.
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.

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.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was carrying a box up concrete stairs, stumbled and struck his right knee on the concrete.
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: Right knee.
14. Nature and extent of any permanent disability: 7.5% permanent partial disability of right knee.
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? \$7,894.14.
18. Employee's average weekly wages: \$525.00.
19. Weekly compensation rate: \$350.00/\$340.12.
20. Method wages computation: 287.250.1(4)

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|--|---------------------------|
| Medical expenses: | \$ 7,894.14 |
| 12 weeks of permanent partial disability benefits: | <u>\$ 4,081.44</u> |

TOTAL: \$11,975.58

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dennis Murphy

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paul Probst

Injury No: 03-028988

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Bill Wise

Additional Party: N/A

Insurer: Travelers Casualty and Surety Company

Checked by: RJD/tmh

ISSUES DECIDED

An evidentiary hearing was held in this case on October 27, 2005, in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on November 28, 2005. The hearing was held to determine the following issues:

1. Whether Travelers Casualty and Surety Company insured alleged Employer, Bill Wise, d/b/a Wise Construction Company, at the time of the alleged work-related accident;
2. Whether Claimant, Paul Probst, sustained an accident arising out of and in the course of his employment with Bill Wise, d/b/a Wise Construction Company, on December 31, 2002;
3. Whether the notice requirement of Section 287.420, RSMo, is a bar to Claimant's Claim for Compensation herein;
4. Whether alleged Employer and its alleged Insurer (Travelers Casualty and Surety Company) shall be ordered to pay medical bills allegedly related to an alleged work-related accident of December 31, 2005;
5. Whether alleged Employer (Bill Wise, d/b/a Wise Bill Wise, d/b/a Wise Construction Company Construction Company) and its alleged Insurer (Travelers Casualty and Surety Company) shall be ordered to pay temporary total disability ("TTD") benefits to Claimant, and, if so, for what period(s) of time;
6. Claimant's average weekly wage and resultant compensation rates;
7. The nature and extent of Claimant's permanent partial disability, if any; and
8. Employer's claim for reimbursement from alleged Insurer for legal fees and expenses.

STIPULATIONS

The parties stipulated to the following:

1. That the Missouri Division of Workers Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations; and
4. That both Employer and Employee were covered by the Missouri Workers Compensation Law at all relevant times.

EVIDENCE

The evidence consisted of the “live” testimony of Claimant, Paul Probst, as well as his deposition testimony; the testimony of Claimant’s wife, Karen Probst; the testimony of Russell Anderson; the testimony of Jay Wilson; the “live” testimony of (Employer) Billy Gene Wise, as well as his deposition testimony; the deposition testimony of Dr. Robert Sparks; the deposition testimony of Dr. Richard Rende; photocopies of payroll checks; affidavit of Janice Sturman and audit results; and a photocopy of an insurance policy.

FINDINGS OF FACT

Based upon the evidence adduced, I find the following facts:

1. In the year 2002 and early 2003, Billy Gene Wise was engaged in the construction business in Columbia, Missouri;
2. During that time, that construction business was not incorporated; Billy Gene Wise was engaged in the construction business as a sole proprietorship;
3. During that time, Billy Gene Wise did business under the names “Bill Wise Construction”, “Wise Construction Company” and “Wise Choice Construction”; these were not three separate business entities, but rather one business entity known by different names;
4. Other than the owner, Billy Gene Wise, the construction business had two employees, Paul Probst and Roger Strickland;
5. Billy Gene Wise paid Paul Probst \$15.00 per hour for his work;
6. Paul Probst generally worked thirty to forty hours per week for Billy Gene Wise;
7. Billy Gene Wise paid Paul Probst by check, and, occasionally, by cash;
8. The construction business was engaged in finishing of new residential construction;
9. On December 31, 2002, Billy Gene Wise was to help his sister move out of an apartment in Hallsville into an apartment in Columbia;
10. Late on December 30, 2002, Billy Gene Wise called Paul Probst and Roger Strickland and asked them if they would work on December 31, 2002, the work being moving Wise’s sister; both Probst and Strickland reported to work on December 31, 2002, at the location in Hallsville and helped to move Wise’s sister furnishings and belongings;
11. Billy Gene Wise paid Paul Probst and Roger Strickland their hourly wages for their work on December 31, 2002; Paul Probst was paid at his regular rate of \$15.00 per hour;
12. After the trucks were loaded on December 31, 2002, in Hallsville, Billy Gene Wise, Paul Probst, Roger Strickland and others proceeded to an apartment on Texas Avenue in Columbia where they began unloading the trucks and transporting Wise’s sister’s belongings into the apartment;
13. On December 31, 2002, while carrying a large box up the steps of the Texas Avenue Apartment, Paul Probst caught his toe on a step and fell forward, landing with his right knee on a concrete step, causing an abrasion of his knee;
14. On December 31, 2002, Billy Gene Wise became aware of an incident where Paul Probst fell or almost fell on the stairs, but Wise did not witness the incident;
15. On January 2, 2003, Paul Probst advised Billy Gene Wise that his right knee was swollen from the December 31, 2002, incident;
16. Prior to March 31, 2003, Paul Probst did not request medical treatment for his knee from Billy Gene Wise;
17. Paul Probst continued to work for Billy Gene Wise through March 31, 2003, but his job performance continued to suffer due to his right knee problem;
18. Billy Gene Wise advised Paul Probst that he would have to cut Probst’s pay if his production did not improve;
19. On March 31, 2003, Billy Gene Wise asked Paul Probst to “pick up his tools” because Probst “wasn’t working out”;
20. At various times between January 2, 2003, and March 31, 2003, Paul Probst would drain his knee with a hypodermic needle and a syringe he obtained from his wife, who is a nurse;
21. On April 2, 2003, Paul Probst went to a convenience clinic and was referred to a knee surgeon at the

University of Missouri;

22. On April 11, 2003, Paul Probst filed a claim for compensation with the Missouri Division of Workers' Compensation, alleging a date of injury of January 7, 2003;
23. On June 2, 2003, Dr. William C. Allen performed surgery on Paul Probst's right knee, the surgery consisting of an excision of a prepatellar bursa;
24. Claimant incurred medical bills in the amount of \$7,894.14 as a result of the medical treatment;
25. Dr. Robert Sparks testified that these medical bills were reasonable, and that these medical bills were incurred as a direct result of the alleged accident of December 31, 2002;
26. Dr. Robert Sparks found that Claimant sustained a permanent partial disability of 15% of the right knee;
27. Dr. Richard Rende found that Claimant sustained a permanent partial disability of 5% of the right knee;
28. On August 2, 2002, St. Paul Travelers Insurance Company (actually Travelers Commercial Casualty Company) issued a workers' compensation policy to Bill Wise DBA Bill Wise Construction for the dates of coverage from 7/10/02 to 7/10/03, for his business described as "carpentry-detached one or two family dwellings";
29. An audit was conducted by an Underwriting Department representative of the payroll records of Bill Wise Construction on August 21, 2003; the audit found that wages of \$4,626.00 were shown as paid to Paul Probst during the third quarter of 2002, but no wages were listed as paid to Paul Probst for the 4th quarter of 2002, or the first or second quarters of 2003.

DISCUSSION

Of course, one of the significant issues in this case is whether Paul Probst ("Claimant") sustained a work-related accident to his right knee on December 31, 2002. The Claim for Compensation listed the date of injury as January 7, 2003. In his deposition testimony, Claimant testified that this was the date of injury to the best of his recollection. In that testimony, Claimant clearly described the scenario of moving Wise's sister out of the Hallsville residence and into the Texas Avenue apartment in Columbia, and described how the accident occurred. Billy Gene Wise testified in his deposition testimony that he was absolutely certain that his sister's move occurred on December 31, 2002, as "she had to be out (of the Hallsville residence) by the first". Wise also testified that he knew the move occurred on New Year's Eve Day, as they were not scheduled to work construction that day.

Wise testified that he does not know whether Claimant fell on his right knee on December 31, 2002; however, he does not believe that Claimant's inflamed knee was caused on December 31, 2002. Wise testified that sometime in November or December 2002, Claimant (acting as an independent contractor) had cut down a tree for someone on a weekend and injured his leg. Wise testified at the hearing that this was "sometime after Thanksgiving" that this occurred. In his deposition, Wise described it thus: "We had done a tile job for a man on Texas – or on some avenue over there – and he had a dead tree. Paul said he could cut the tree down and get it out of there. He did it on a weekend. And the next Monday he said he couldn't work because when he cut the tree down, he had it ties, and it swung down and hit him in the leg. And he showed me the leg. The whole leg was swollen." Wise testified that Claimant missed "six days total" between the tree incident and December 31, 2002, "going to the doctor". However, the payroll records submitted into evidence by Wise, although admittedly incomplete, nevertheless show that Claimant was paid for 40 hours on 11/22/02, for 37.5 hours on 11/29/02, for 29.5 hours on 12/6/02, and \$350.00 cash on 12/13/02. It certainly does not appear that Claimant missed anywhere near six days of work during this time.

Russell Anderson testified that in February or March 2003, Claimant was doing some trim work in his master bath and that Claimant showed him his obviously swollen knee. Anderson could not recall if it was his left or right knee. Anderson testified that Claimant said he hurt the knee in a "logging accident".

Jay Wilson testified that he saw Claimant's swollen right knee. He couldn't remember when this occurred, nor could he remember if Claimant told him how it happened.

More credible on this issue is Claimant's testimony. Claimant testified that on January 1, 2003, he cut down the tree in question, and in the process injured his *left* leg, but not his *right knee*. Claimant's testimony was corroborated by his wife's testimony. Dr. Rende testified that Claimant's injury was consistent with the history described in Claimant's testimony.

An additional crucial issue in this case is that of insurance coverage. Wise contends that the policy in evidence issued by Travelers covers Claimant's alleged work-related injury. The policy clearly covers "Wise, Bill, DBA Bill Wise Construction" for the period 7/10/02 through 7/10/03, which includes Claimant's injury date of 12/31/02. Travelers asserts

essentially three defenses to coverage: (1) That Claimant worked for "Wise Choice Construction" and not "Bill Wise Construction"; (2) That Claimant was not working as a carpenter on 12/31/02, and Travelers insured a carpentry business, not a moving business; and (3) The policy did not cover Claimant as the audit did not show payroll for Claimant during the fourth quarter of 2002 and the first quarter of 2003.

I find that all of these defenses fall short. (1) It is abundantly clear from the evidence that Bill Wise had one, and only one, construction business; the policy covered Bill Wise's construction business. (2) Paul Probst and Roger Strickland (who, according to Wise, were Wise's only employees) were working for Bill Wise on 12/31/02 as paid employees at their usual rate of pay; the policy covered Bill Wise's employees. (3) Numerous payroll checks from Bill Wise to Claimant during the fourth quarter of 2002 and the first quarter of 2003 were in evidence; Wise testified that these checks were provided to the auditor; thus the audit conclusions were erroneous. Even if Wise hid this information from Travelers for any reason, this does not negate coverage but merely changes the amount of premium Travelers would be allowed to charge. The policy clearly covered Wise's employees, and Claimant was Wise's employee on 12/31/02 irrespective of the audit.

RULINGS OF LAW

I make the following rulings of law:

1. Claimant, Paul Probst, sustained an accident arising out of and in the course of his employment with Bill Wise, d/b/a Wise Construction Company, on December 31, 2002, said accident causing injury to Claimant's right knee;
2. The notice requirement of Section 287.420, RSMo, is not a bar to Claimant's Claim for Compensation herein, as Claimant orally informed Wise of his injury on January 2, 2003; because Employer was given oral notice, there is no prejudice to Employer for failure to give written notice;
3. Bill Wise ("Employer") was fully insured for Missouri Workers' Compensation purposes by Travelers Casualty and Surety Company at all relevant times, and Travelers Casualty and Surety Company ("Insurer") is primarily liable for payment of the benefits awarded to Claimant herein;
4. Because of the Employer's and Insurer's denial of benefits in this case, Claimant was required to obtain necessary medical treatment on his own; the cost of this medical treatment, \$7,894.14, was reasonable, and the medical treatment was reasonable and necessary to cure and relieve Claimant from the effects of the work-related injury of December 31, 2002;
5. There is no evidence to support Claimant's claim for temporary total disability benefits;
6. Claimant sustained a permanent partial disability of 7.5% of the right knee at the 160 week level, entitling Claimant to 12 weeks of benefits;
7. Claimant averaged 35 hours per week of work for the 13 weeks prior to December 31, 2002, and thus had an average weekly wage of \$525.00, and compensation rates of \$350.00/\$340.12;
8. Employer has not presented a viable claim against Insurer for costs and attorney's fees, as Employer presented no evidence of his costs and attorney's fees.

ORDER

Employer Billy Gene Wise and Insurer Travelers Casualty and Surety Company are ordered to pay Claimant the sum of \$7,894.14 for medical expenses and the additional sum of \$4,081.44 for permanent partial disability benefits.

Claimant's attorney, Dennis Murphy, is allowed 25 percent of all sums awarded hereunder as and for necessary attorney's fees. The amount of such attorney's fees shall constitute a lien thereon.

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

Date: _____

Made by: _____

ROBERT J. DIERKES
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation