

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

Injury No.: 03-146637

Employee: Timothy C. Rader
Employer: Werner Enterprises, Inc.
Insurer: St. Paul Travelers Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

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 heard the parties' arguments, reviewed the evidence, read the briefs, 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 February 26, 2010, as supplemented herein.

Introduction

The administrative law judge heard this matter to consider the following issues: (1) whether the Missouri Division of Workers' Compensation has jurisdiction in this matter; (2) whether an employee/employer relationship existed on the day of injury or whether the owner/operator exception of section 287.020.1 RSMo, applies to these facts; (3) the appropriate average weekly wage and applicable rates of temporary total disability, permanent partial disability, and permanent total disability; (4) medical causation of the May 29, 2003, injury; (5) the nature and extent of both temporary and permanent disability, if any, stemming from the May 29, 2003, injury; (6) whether an award of future medical benefits is appropriate; and (7) the liability, if any, of the Second Injury Fund.

The administrative law judge made the following findings: (1) the Missouri Division of Workers' Compensation has jurisdiction in this matter; (2) Timothy Rader (hereinafter claimant) was an employee of Werner Enterprises, Inc. (hereinafter Werner) and not an owner/operator under section 287.020.1 RSMo; (3) the appropriate average weekly wage is \$1,312.32, which amounts to temporary total and permanent total disability rates in the amount of \$649.32 per week and a permanent partial disability rate of \$340.12 per week; (4) claimant is permanently and totally disabled as a result of the May 29, 2003, injury; (5) Werner is credited with \$6,545.90 for overpaid temporary total disability payments; (6) claimant is entitled to future medical care from Werner; and (7) there is no Second Injury Fund liability.

Werner filed an Application for Review arguing the administrative law judge erred as a matter of law in failing to make certain findings. Werner included 18 separate numbered

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paragraphs setting forth various findings which Werner argues the administrative law judge should have made. In its Application for Review, Werner further argued the award of the administrative law judge is against the overwhelming weight of the evidence for various reasons. Werner included an additional 23 separate numbered paragraphs setting forth those reasons.

The following issues are currently before the Commission: (1) whether the Missouri Division of Workers' Compensation has jurisdiction in this matter; (2) whether an employee/employer relationship existed between claimant and Werner or whether the owner/operator exception of section 287.120.1 applies; (3) the appropriate average weekly wage and rates for temporary total, permanent total, and permanent partial disability; (4) medical causation; (5) the nature and extent of claimant's disability, if any; (6) whether claimant is entitled to future medical benefits from Werner; and (7) the liability of the Second Injury Fund, if any.

For the following reasons, the Commission affirms the award of the administrative law judge, as supplemented herein.

Discussion

Was Claimant An Owner/Operator Under Section 287.020.1 RSMo?

Werner argues the administrative law judge erred in finding claimant was an employee for purposes of section 287.020.1 RSMo¹, which provides, in pertinent 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, including executive officers of corporations. ... The word "employee" shall not include an individual who is the owner and operator of a motor vehicle which is leased or contracted with a driver to a for-hire common or contract motor vehicle carrier operating within a commercial zone as defined in section 390.020 or 390.041 RSMo, or operating under a certificate issued by the transportation division of the department of economic development or by the interstate commerce commission.

The foregoing language excludes from the definition of "employee" any individual who is (1) the owner and operator of a motor vehicle which is (2) leased or contracted with a driver (3) to a for-hire common or contract motor vehicle carrier operating within a commercial zone. *Booth v. Trailiner Corp.*, 21 S.W.3d 869, 874 (Mo. App. 2000).

The most recent Missouri case to consider the owner/operator exclusion is *Nunn v. C.C. Mid West*, 151 S.W.3d 388 (Mo. App. 2004). The employee in *Nunn*, an over-the-road truck driver, leased a tractor from a sister company of the employer. *Id.* at 391. The purpose of signing the lease was so that the employee could go to work for the

¹ Because claimant's injury occurred on May 29, 2003, we apply the law as it existed prior to the 2005 amendments to the Missouri Workers' Compensation Law; all references are to the Revised Statutes of Missouri (2000), unless otherwise indicated.

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employer under a purported independent contractor program wherein the employee would provide his own equipment. *Id.* The employee was subsequently injured while driving for the employer; the employer denied the ensuing workers' compensation claim on the basis of the owner/operator exclusion of section 287.120.1. *Id.* at 394. The parties disputed whether the employee was the "owner" of the motor vehicle. *Id.* at 395. The court turned to the dictionary to define "owner":

The dictionary defines "own" as, among other things, "to have or hold as property or appurtenance: have a rightful title to, whether legal or natural: possess"; "owner" as "one that owns: one that has the legal or rightful title whether the possessor or not"; and "ownership" as, among other things, "the state, relation, or fact of being an owner." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1612 (1993). "Own" is also defined as "to have power over: control." MERRIAM-WEBSTER ONLINE DICTIONARY. And Black's Law Dictionary defines "own" as "to rightfully have or possess as property; to have legal title to"; "owner" as "one who has the right to possess, use, and convey something; a person in whom one or more interests are vested"; and "ownership" as "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." BLACK'S LAW DICTIONARY 1137-38 (8th ed. 2004).

Id. at 396-97.

The court then looked to the language of the lease itself to determine whether an ownership interest in the tractor ever vested in the employee. *Id.* at 397. The court noted that, under the lease, no title would vest in the employee during the term of the lease unless the employee exercised a right-to-purchase option. *Id.* The court determined that title never passed to the employee under the lease. *Id.* The court concluded that employee could not be considered an owner of the motor vehicle because title to the motor vehicle never vested in the employee. *Id.* The court held that section 287.120.1 was therefore inapplicable to the facts of the case. *Id.*

Here, as in *Nunn*, the key dispute with regard to section 287.120.1 is whether claimant was the owner of the tractor. Claimant worked for Werner as an employee driver for approximately 6 to 8 years. On February 5, 2003, claimant executed a number of documents in order to begin his participation in Werner's "Owner-Operator Program." Among other things, claimant signed a Contractor Operating Agreement with Werner, an Equipment Finance Agreement with American Express Business Finance Corporation, and a Down Payment Agreement with Werner. In exchange for filling out the required documents and remitting a \$1000 down payment to Werner, claimant received a tractor with Werner's logo on the sides.

The determinative issue in the *Nunn* case was whether legal title to the tractor ever passed to the employee. *Nunn*, 151 S.W.3d at 397. Here, it appears that there was an attempted conveyance of a Nebraska title for the tractor to claimant, although we find the evidence inconclusive as to whether this was accomplished. An application for title

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and certificate of title were included in the record, but, as claimant's counsel points out, the certificate of title appears to be incomplete: claimant's signature is conspicuously absent, and the lines intended for the date of sale and odometer reading are blank. Neither party called any witness who was involved in the transaction who could explain what occurred or what the effect of the apparently incomplete Nebraska certificate might be. Neither party has apprised us of relevant Nebraska authority to aid our analysis. Werner deposed its senior workers' compensation counsel; this witness identified the exhibit containing the application for and certificate of title and summarily described them as passing "ownership" to claimant. The witness did not elaborate on the exhibits, nor did he explain the incomplete nature of the certificate of title. Remarkably, given the decisive nature of the title issue in the *Nunn* case, neither party asked the witness whether title to the tractor passed to claimant.

Because we find the application for and certificate of title inconclusive as to whether title passed to claimant, we look at the other aspects of ownership under the *Nunn* definition, and examine "the bundle of rights" that claimant enjoyed by virtue of signing the equipment finance agreement. *Nunn*, 151 S.W.3d at 397. We first examine the right of use and possession. The finance agreement stated as follows:

FINANCIAL INFORMATION DISCLOSURE ADDENDUM

...

Debtor further represents that Debtor will utilize said vehicle for the sole purpose of performing any and all duties necessary to fulfill the terms of his/her Contractor Agreement with Company Sponsor. Any use of the vehicle for personal or other business purposes will be deemed and [sic] event of default by Secured Party.

Under the foregoing provision, if claimant used the tractor for any purpose other than his employment with Werner, claimant would default under the agreement, with the result that claimant would lose the tractor or be liable for the accelerated balance. Claimant's use of the tractor was thus restricted to one very specific purpose—his employment with Werner—while all other purposes were excluded. Likewise, as demonstrated by the following language, if claimant's employment with Werner ended for any reason, so did the finance agreement:

A termination of Independent Contractor's employment with Company Sponsor for any reason whatsoever shall be deemed a material adverse change in Independent Contractor's business and an additional event of default under its AGREEMENT with Secured Party.

The only way for claimant to continue to enjoy his right to use and possess the tractor was to continue working for Werner. If his relationship with Werner ended, he either forfeited the tractor or became liable for the accelerated balance. This limitation was demonstrated by the facts of this case: it appears that when claimant was injured and unable to work, the tractor was repossessed.

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Given the foregoing limitations, we find that claimant had only a very limited and conditional right of use and possession. We next examine the right of conveyance. Here, the finance agreement specifically prohibited conveyance of the tractor, which it identifies as “the collateral”:

TERMS AND CONDITIONS

...

12. Assignment: Inspection: YOU HAVE NO RIGHT TO SELL, TRANSFER, ASSIGN, LEASE, OR ENCUMBER THE COLLATERAL OR THIS AGREEMENT.

(emphasis in original).

Given the foregoing language, claimant had essentially no right to convey the tractor. We note that on cross-examination, claimant was asked whether he owned the tractor and leased it to Werner. Claimant answered that he did, but because the question calls for legal conclusions, we find claimant’s answer unpersuasive. We also note the contradictory nature of Werner’s position—Werner would have us find that claimant leased the tractor to Werner as an owner, while ignoring the language of the finance agreement that *specifically prohibited* claimant leasing or conveying the tractor in any way. We find that claimant had no right of conveyance.

Given the foregoing, it appears to this Commission that claimant was an “owner” of the tractor only insofar as he worked for Werner and used the tractor for the sole purpose of that work. Claimant could not use the tractor for any other personal or business purpose, could not convey it, and the finance agreement was inextricably tied to, and dependent on, claimant’s ongoing relationship with Werner. Claimant cannot realistically be said to have been the owner of the tractor. There are simply too many of the fundamental aspects of ownership missing from claimant’s “bundle of rights.”

We agree with the administrative law judge and conclude that claimant was not the owner of the tractor and that section 287.020.1 does not apply to these facts.

Was Claimant An Employee Or An Independent Contractor?

The administrative law judge’s award contains no analysis of whether claimant was an employee or an independent contractor, which is of course a separate question from whether claimant was an owner/operator under section 287.020.1.

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.

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DiMaggio v. Johnston Audio/D&M Sound, 19 S.W.3d 185, 188 (Mo. App. 2000) (internal citations and quotations omitted).

The *Nunn* court also faced the issue of whether the employee was an independent contractor, and enumerated eight factors to consider:

The pivotal question is whether the employer had the right to control the means and manner of the service, instead of just controlling the ultimate results of the service. Missouri generally uses the right to control test to determine whether a claimant is an employee or an independent contractor. The court considers eight factors: (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 employer, and (8) the employment contract. Each of these factors is relevant to the determination, but no one factor is dispositive.

Nunn v. C.C. Mid West, 151 S.W.3d 388, 400 (Mo. App. 2004) (internal citations and quotations omitted).

On its face, the Contractor Operating Agreement purports to allow considerable freedom to claimant to work for Werner when and how he chooses. But the extent of Werner's actual exercise of control over claimant was considerable. Claimant had a "supervisor" with Werner, as evidenced by the supervisor's signature on the "Certificate of Driver Compliance" that claimant was required to fill out on March 31, 2003. Claimant credibly testified that, even after signing the paperwork that purportedly changed him to an independent contractor in February 2003, he worked only for Werner, and that all of the hauls he made were "at the direction" of Werner. Claimant also credibly testified that he believed he was not allowed to haul any items other than those directed to him from Werner. Claimant had a good reason for this belief, as the terms of the finance agreement discussed in the foregoing section make clear that claimant would lose the tractor if he drove for anyone else. Claimant testified that his work for Werner was a full-time job, and we find his testimony credible.

The duration of the relationship also supports a finding that claimant was an employee, and not an independent contractor. Claimant worked for Werner as a regular employee for approximately 6 to 8 years before he signed the paperwork that purportedly changed him to an independent contractor. Even after claimant signed those papers, he continued working exclusively for Werner until he was injured. Werner's right to discharge claimant was somewhat limited by the Contractor Operating Agreement, which imposed a 30-day notice requirement in the event either party wished to terminate the agreement. But the Contractor Operating Agreement did not otherwise limit the right of Werner to discharge claimant.

Other factors are indicative of an employer/employee relationship. Claimant was obviously engaged in the regular business of Werner. Although claimant purportedly

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furnished the tractor used in his employment with Werner, our analysis in the foregoing section reveals that claimant did not actually own the equipment in any meaningful sense. The truck came to claimant with Werner's logo on the sides. Further, Werner provided other items that were used in the course of claimant's work for Werner, such as base plates, permits, toll cards, fuel cards, and I.D. cards. These items had to be returned to Werner when the employment relationship ended. What evidence there is of the method of payment tends to show that the most significant change that occurred as a result of claimant signing the paperwork in February 2003 is that he received a higher rate per loaded mile and was responsible for his own expenses.

Werner argues that because claimant executed the Contractor Operating Agreement of his own free will, he cannot now argue that he was an employee. It is axiomatic, however, that the contract between the parties is merely a factor and is not controlling in the determination whether an employer/employee relationship existed. Missouri courts have faced this argument before:

Company contends the classification of claimant as an employee is erroneous; because "there was a signed, written agreement for [claimant] to perform as an independent contractor," and claimant "held the 'right to control' virtually all the details of his work activities." We disagree. A contract designating claimant as an independent contractor "is not conclusive when there is evidence" the employer had the right to control the manner in which the work was performed.

Hinton v. Bohling Van & Storage Co., 796 S.W.2d 87, 89 (Mo. App. 1990) (citation omitted).

We acknowledge the evidence that claimant did not read the paperwork that he signed in February 2003, and we agree with Werner that claimant cannot now hold up his failure to read what he signed as evidence that he remained an employee. "But while the contractual designation of the work status of a person is not to be brushed aside or ignored, it is not conclusive when there is evidence to overcome such designation." *Nunn v. C.C. Mid West*, 151 S.W.3d 388, 402 (Mo. App. 2004). This is because "[i]t is the actual conduct of the parties, not the language of the written contract, which establishes the work status of a particular worker." *Miller v. Hirschbach Motor Lines, Inc.*, 714 S.W.2d 652, 657 (Mo. App. 1986).

Werner asks us to find that claimant essentially owned his own business after signing the Contractor Operating Agreement paperwork, and that claimant was free to drive for whomever he chose, but to so find we would have to ignore the very terms of the arrangement and the parties' actual practice. We conclude that Werner exercised the right to control the means and manner of the performance of claimant's work activities. Accordingly, we conclude that claimant was an employee and not an independent contractor.

Because we otherwise agree with the analysis, findings, and conclusions of the administrative law judge, we affirm the remainder of the award without supplementation.

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Conclusion

We supplement the award of the administrative law judge with our findings on the issue whether claimant was an owner/operator under section 287.120.1 RSMo, and the issue whether claimant was an independent contractor. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued February 26, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 29th day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Timothy C. Rader Injury No.: 03-146637
Dependents: N/A Before the
Employer: Werner Enterprises, Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: St. Paul Travelers Insurance Company Jefferson City, Missouri
Hearing Date: December 2, 2009 and December 17, 2009 Checked by: CTL:ms

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: May 29, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Claimant injured his back and body as a whole when he was struck by a keg while in the course and scope of his employment.
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: back and body as a whole
14. Nature and extent of any permanent disability: Permanent and total
15. Compensation paid to-date for temporary disability: \$135,760.58
16. Value necessary medical aid paid to date by employer/insurer? \$198,998.13

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$1,312.32
- 19. Weekly compensation rate: \$649.32/\$340.12
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

TTD credit	(\$6,545.90)
Future medical expenses	*
Permanent and total disability benefits from Employer beginning May 23, 2007, for Claimant's lifetime	**

(all use of an asterisk denotes uncertain contingent benefits)

22. Second Injury Fund liability: None

TOTAL: * **

23. Future requirements awarded: None

Said payments to begin 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:

Stephen Thurmer

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Timothy C. Rader	Injury No.:	03-146637
Dependents:	N/A	Before the	
Employer:	Werner Enterprises, Inc.	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	St. Paul Travelers Insurance Company	Checked by:	CTL: ms

PREFACE

A hearing in the above mentioned matter was held on December 2, 2009. The Claimant, Timothy C. Rader, was represented by attorney Stephen Thurmer. The Employer, Werner Enterprises, Inc., and Insurer, St. Paul Travelers, were represented by attorney Robert Evans. The Second Injury Fund was represented by the Assistant Attorney General Carol Barnard. The record was reopened in the above mentioned matter on December 17, 2009 for the submission of additional exhibits.

STIPULATIONS

The parties stipulated to the following:

1. That the Employer/Insurer has paid \$198,998.13 in medical benefits.

ISSUES

1. Whether the Missouri Division of Workers' Compensation has jurisdiction in this matter;
2. Whether an Employer/Employee relationship existed on the day of the injury and Claimant was an Employee or, in the alternative, was Claimant an owner/operator that should be excluded from coverage;
3. The average weekly wage and the applicable rates of temporary total disability, permanent partial disability, and permanent total disability;
4. Medical causation of the May 29, 2003 injury;
5. The nature and extent of temporary disability and permanent disability;
6. Whether Claimant is entitled to an award for future medical benefits;
7. Liability of the Second Injury Fund, if any.

EXHIBITS

The Claimant offered the following exhibits into evidence:

- Exhibit A: City of St. Louis-EMS.
- Exhibit B: St. Louis University Hospital.
- Exhibit C: ETMC of Texas.
- Exhibit D: East Texas Medical Center of Tyler, Texas.
- Exhibit E: Records of Stephen Esses, M.D.
- Exhibit F: Twelve Oaks Medical Center.
- Exhibit G: HealthSouth
- Exhibit H: Southwestern Neuro Rehab Institute
- Exhibit I: Tyler Neurosurgical Associates
- Exhibit J: Pain Management Records
- Exhibit K: Dr. Aaron Lloyd
- Exhibit L: Dr. Aaron Lloyd (September 11, 2009)
- Exhibit M: First report of Alleged Occupational Injury of Illness with Werner Letter
- Exhibit N: Certified Nebraska Workers' Compensation Records
- Exhibit O: June 21, 2005 Answer
- Exhibit P: June 8, 2006 Answer
- Exhibit Q: June 6, 2008 Answer
- Exhibit R: Photo
- Exhibit S: Photo
- Exhibit T: Deposition of David Volarich, D.O. with Exhibits (August 28, 2009)
- Exhibit U: Deposition of James England, Jr., C.R.C. with Exhibits (November 10, 2009)
- Exhibit V: Traveler's Letter (October 26, 2006)
- Exhibit W: Deposition of David Volarich, D.O. with Exhibits (November 24, 2009)
- Exhibit X: Certified Medical Records of Stephen Esses, M.D.
- Exhibit Y: Wright v. Werner Stipulation for Compromise Settlement
- Exhibit Z: Photo of Truck/Trailer
- Exhibit AA: Secretary of State Annual Registration Report Werner Enterprises, Inc., 2003
- Exhibit BB: Secretary of State Annual Registration Report Werner Enterprises, Inc., 2009

The Employer/Insurer offered the following exhibits into evidence:

- Exhibit 1. Amended Answer to Claim filed by Werner, September 1, 2009.
- Exhibit 2. Video Disc of Employee, September 13, 14, and 16, 2005.
- Exhibit 3. Werner Group Exhibits on Owner/Operator Agreement, #1 to #22, 75 pages.
- Exhibit 4. Drivers Log of Timothy Rader, February 6, 2003 to October 24, 2003, 14 pages.
- Exhibit 5. 2003 Federal income Tax Return of Timothy Rader, 12 pages.
- Exhibit 6. U.S. Army Medical Report, March 31, 1983, December 13, 1983, April 28, 1986, September 15, 1986, and September 25, 1986, 11 pages.
- Exhibit 7. V.A. letter report, January 14, 1987, 11 pages.
- Exhibit 8. V.A. records, February 23, 1981 to September 24, 1986.

Exhibit 9. V.A. records, 2002 – 2009.

Exhibit 10. HealthSouth Functional Capacity Evaluation (FCE),

FINDINGS OF FACT

1. Claimant, Timothy C. Rader, testified at the time of the hearing that he was forty nine years of age, married, and he lives in Mabank, Texas. His wife is his only dependent. Claimant completed eleven grades of education and later received a GED.
2. He served in the United States Army from 1977 – 1986 at which time he was honorably discharged. Claimant testified that while in the army he had back problems as well as knee problems. Claimant testified that after he left service up until the time of the primary injury in the above mentioned matter, his back as well as his knee problems never caused him to lose any work. Nor did Claimant receive any treatments for his knees or back from the time he was discharged up to the date of the primary injury of May 29, 2003.
3. After Claimant left the army he worked as a truck driver full time. Claimant began working as a truck driver for a subsidiary of Werner Enterprises, Inc. in the early 1990's. Claimant testified that on February 4, 2003 his job status, paper wise, changed to owner/operator with Werner. The paperwork changing his status was signed in the state of Colorado. The Claimant testified that the equipment as well as the used tractor he was to purchase were supplied and provided by Werner, and the truck had Werner signs on it. All the loads and the routes he was to go were directed by Werner and he was not allowed to use the truck for any purpose other than Werner business. He further testified that he never did receive a title to the tractor.
4. Claimant on May 29, 2003, at the direction of the Employer, Werner, drove to St. Louis to the Anheuser Busch headquarters where he was to drop off kegs. In so doing a keg fell off the truck and hit Claimant in the head knocking him to the ground. An employee of Anheuser Busch called an ambulance for the Claimant who was taken to St. Louis University Hospital. The Claimant at the hospital complained of numbness in his left leg, lower back pain, and pain to the buttocks. Claimant was released and was to follow up with further medical care. Briefly after discharge, Claimant returned to his truck and slept for a period of time and then drove to his home in Mabank, Texas which is a 900 mile drive. Claimant testified that on the ride home there was a great deal of pain in his back.
5. On June 3, 2003, the Claimant went to East Texas Medical Center Emergency Room where an MRI was taken which showed a large central herniation at the L4, L5 area with collapse of the thecal sac and a bulging disc at L5-S1. Due to the results of the MRI the Claimant then went to E.T.M.C. in Tyler, Texas.
6. Claimant was referred to Dr. Hackbarth, a pain specialist. Claimant told of his back and right leg pain and the weakness that he felt and the doctor administered an epidural

steroid injection at L4, L5 at the right transforaminal space. On June 19, 2003, Claimant had further injections bilaterally at the facets from L3 through S1. Claimant as a result of his injury of May 29, 2003, has undergone five surgical procedures on his back. On July 3, 2003, Dr. Hackbarth performed a medial branch neurotomy at the L2 to L5 levels. On November 24, 2003, a discectomy at the L4 to S1 levels were performed by Dr. Esses. On May 19, 2004, Dr. Esses performed a hemilaminotomy, decompression, and a discectomy at the L4, L5 level. On January 21, 2005, Dr. Esses performed a laminectomy decompression and fusion at the L4 to S1 levels. On February 1, 2006, a spinal cord stimulator with dual leads was inserted by a Dr. Lloyd for Claimant's back and leg pain. On February 9, 2006, the spinal cord stimulator was removed.

7. Claimant as a result of the injuries to his back has not worked since May 29, 2003.
8. With regard to Claimant's back and knee problems that he had while in the United States Army, he does receive disability compensation from the Department of Veterans Affairs.
9. Werner is registered with the Missouri Secretary of State to conduct business in the State of Missouri, and at the time of the Claimants injury.

JURISDICTION

The Employer/Insurer make the argument that the State of Nebraska has jurisdiction over this Workers' Compensation case. The parties stipulate the Claimant suffered an injury on May 29, 2003, within the City of St. Louis, Missouri. Under Missouri law Missouri has jurisdiction of this Workers' Compensation case. See Section 287.110 RSMo.2000, paragraph 2, which states: This Chapter shall apply to all injuries received and occupational diseases contracted within this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of the state under contract of employment made in the state unless a contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of the state where the Employee's employment was principally localized in this state.

Therefore, the statute clearly gives this court jurisdiction of this matter.

WAS THE CLAIMANT AN EMPLOYEE OF WERNER OR WAS HE AN OWNER/OPERATOR?

The court, in the judicial notice of its file, notices that for years the Employer/Insurer indicated that the Claimant was an Employee of the Employer at the time of his injury of May 29, 2003. The Employer/Insurer did not indicate that it felt that the Claimant was an owner/operator at the time of his injury on May 29, 2003, until its filing of an Amended Answer on September 1, 2009.

Claimant began working as a truck driver for Werner Enterprises, Inc., in the 1990s. On February 4, 2003, Claimant's job status changed as he signed paperwork operating as an owner/operator with Werner. Although Claimant testified he executed paperwork in Colorado and signed certain documents, Werner was of the opinion that he was still an employee. Although he was going to purchase the tractor provided by Werner, all the evidence has failed to show that Claimant ever became the owner of the tractor. The Claimant's truck had the Werner signs on the side. The Claimant was directed where to deliver the equipment and the routes were directed by Werner, as well as the Claimant was only able to use the truck for Werner purposes and no other purpose.

All the evidence is clear that the Claimant was an Employee of Werner on the date of his injury of May 29, 2003. We further reason that Claimant never became the owner/operator of the truck. The Employer/Insurer fully admitted that Claimant was an Employee of Employer in various signings with the court in this case.

AVERAGE WEEKLY WAGE

Claimant filed income tax for the year of 2003, Form 1040 shows he had a gross amount of payment from Werner in the amount of \$37,908 for 15 weeks of work from February 6, 2003, to the date of injury of May 29, 2003. Thus, Claimant's gross receipts of \$37,908 minus \$1,164 cost of goods, \$9,971 of other expenses, and \$7,188.25 which amounts to 15 weeks pro rata depreciation. Thus, Claimant had net earnings of \$19,684.75 for 15 weeks, which amounts to \$1,312.32 per week which amounts to TTD and PTD in the amount of \$649.32 per week and a permanent partial disability rate of \$340.12.

IS CLAIMANT PERMANENTLY AND TOTALLY DISABLED?

Dr. Volarich saw the Claimant on behalf of the Claimant's attorney and his testimony essentially was that the problems the Claimant had as a result of having been in the United States Army with his low back and knees were not such that it affected the Claimant's ability to work from the time he got out of the service in 1986 up to the time he went to work for the Employer in the 1990s.

Dr. Volarich testified very credibly that the Claimant's injury of May 29, 2003, caused a cervical strain that resolved, a thoracic strain that resolved, lumbar syndrome that included disc herniations at L4-5 and L5-S1, which required multiple separate surgical repairs including an initial L4-L5 decompression followed by an L4-L5 and L5-S1 posterior laminectomy discectomy at both levels and fusion. Claimant continues to have right L4-L5 protrusion and a central L5-S1 protrusion. Dr. Volarich was also of the opinion that Claimant would need future medical care.

Mr. England, a rehabilitation counselor, testified very credibly that Claimant would not be able to successfully compete for employment or sustain any work due to his injuries received as a

result of the May 29, 2003 incident, and also as a result of the restrictions placed upon the Claimant by Dr. Volarich.

RULINGS OF LAW

1. The Missouri Workers' Compensation Act applies to the injury that Claimant incurred on May 29, 2003 in the City of St. Louis, State of Missouri.
2. Claimant, on the date of his injury of May 29, 2003, was an Employee of Werner.
3. Claimant is permanently and totally disabled as a direct result of the work related injury of May 29, 2003.
4. Werner/Employer has previously paid the Claimant \$135,760.58 in temporary total disability payments and Claimant's temporary total disability as of the date of his MMI amounts to \$129,204.68 therefore the Werner/Employer is credited with \$6,545.90.
5. Claimant is awarded permanent total disability from the Employer in the amount of \$649.32 per week beginning May 23, 2007.
6. The Claimant is entitled to future medical care by the Employer/Insurer.
7. I do not find any Second Injury Fund liability.

Date: _____

Made by: _____

Cornelius T. Lane
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Division of Workers' Compensation