

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

Injury No.: 01-076622

Employee: Paul Robey, deceased
Dependent: Aileen Robey, widow
Employers: Schott Farms, Inc. and
Alliance Savings Company/AMS Staff Leasing
Insurer: CNA
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Denied)
Date of Accident: June 22, 2001
Place and County of Accident: Jackson 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 July 2, 2007. The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued July 2, 2007, is attached and incorporated by this reference.

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.

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

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

Final Award

Employee: Paul Robey, Deceased

Injury No. 01-076622

Dependents: Aileen Robey, Widow

Employer: Schott Farms, Inc. and Alliance Savings Company / AMS Staff Leasing

Additional Party: Second Injury Fund

Insurer: CNA

Hearing Date: February 21, 2007
(Hearing completed March 30, 2007)

Checked by: JK/kh

SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes
- Was the injury or occupational disease compensable under Chapter 287? Yes
- Was there an accident or incident of occupational disease under the Law? Yes
- Date of accident or onset of occupational disease? June 22, 2001
- State location where accident occurred or occupational disease contracted: Jackson County, Missouri

Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes (See findings)

- Did employer receive proper notice? Yes
- Did accident or occupational disease arise out of and in the course of the employment? Yes
- Was claim for compensation filed within time required by law? Yes
- Was employer insured by above insurer? Yes
- Describe work employee was doing and how accident happened or occupational disease contracted: Employee was involved in a motor vehicle accident while driving a truck for Schott Farms, Inc. and Alliance Savings Company.
- Did accident or occupational disease cause death? Yes
- Parts of body injured by accident or occupational disease: Head and chest
- Nature and extent of any permanent disability: Employee died on September 21, 2001 as a result of the head injuries he suffered in the June 22, 2001 accident.
- Compensation paid to date for temporary total disability: None
- Value necessary medical aid paid to date by employer-insurer: None
- Value necessary medical aid not furnished by employer-insurer: \$63,137.89
- Employee's average weekly wage: \$493.32

- Weekly compensation rate: \$328.88 for temporary total disability benefits and death benefits
- Method wages computation: Section 287.240.1(5)
- Amount of compensation payable:

| | |
|-----------------------------|-----------------|
| Temporary total disability: | \$ 4,322.42 |
| Medical Expenses: | 63,137.89 |
| Funeral Expenses | <u>5,000.00</u> |
| Total | \$72,460.31 |

- Second Injury Fund liability: SIF claim denied
- Future requirements awarded: \$328.88 per week for death benefits payable to the employee's widow, Aileen Robey, and a possible remarriage payment, as specified in the findings of fact and rulings of law.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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 awarded hereunder in favor of the following attorney for necessary legal services rendered to the employee's dependent: Joseph P. Rice

FINDINGS OF FACT AND RULINGS OF LAW

Procedural History

Temporary or Partial Award

On January 24, 2006, the employee's widow, Aileen Robey, appeared in person and by her attorney, Mr. Joe Rice, for a temporary or partial award. Schott Farms, Inc. was represented at the hearing for the temporary award by its attorney, Mr. Jim Hux. Alliance Savings Company / AMS Staff Leasing and CNA were represented at the hearing by their attorney, Mr. Steve McManus. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Frank Rodman.

On February 16, 2006, Administrative Law Judge, Jack H. Knowlan, Jr. issued a Temporary or Partial Award in which the judge determined Schott Farms, Inc.'s status as a covered employer, Mr. Robey's status as an employee of Alliance Savings Company / AMS Staff Leasing, Mr. Robey's average weekly wage and rate of compensation, and the amount of temporary total disability payable to the Mr. Robey's widow. Given the complex nature of the medical issues, the parties had agreed that a temporary or partial award would be more efficient. The parties believed that after the

threshold issue of covered employment was resolved, the parties might be able to settle the remaining issues.

Order of Commission Setting Aside Temporary or Partial Award

On March 29, 2006, the Labor and Industrial Relations Commission issued an order setting aside the administrative law judge's temporary or partial award. Citing Section 285.510 RSMo. (2000), and *Shaw v Scott*, 49 S.W.3d 720, 728 (Mo. App. 2001), the Commission concluded that "once further medical progress is not expected, a final award can be made and the issuance of a temporary award is no longer appropriate". The Commission felt their decision was consistent with the goal of avoiding piecemeal litigation. The Commission returned the matter to the Division of Workers' Compensation for further proceedings and final disposition.

On May 30, 2006, a Joint Motion for Reconsideration of Order issued by the Labor and Industrial Relations Commission on March 29, 2006, was filed. After considering this request, the Commission denied the Motion for Reconsideration by order dated June 30, 2006.

Direct Payment Medical Fee Disputes

On January 30, 2007, a telephone conference call was held to discuss a motion to quash a subpoena related to a request for direct payment of medical. The attorneys participating in this phone conference included Mr. Joe Rice, the attorney representing the employee's widow; Mr. Jim Hux, the attorney for Schott Farms, Inc.; Mr. Steve McManus, the attorney representing Alliance Savings Company / AMS Staff Leasing and CNA; and Assistant Attorney General Frank Rodman, the attorney for the Second Injury Fund. In addition to the attorneys representing the primary parties to the claim, three additional attorneys representing health care providers that have filed requests for direct payment of medical bills participated in the telephone conference. Those attorneys included Mr. Dan Finch, attorney for Southeast Missouri Hospital and Scott R. Gibbs, M.D.; Mr. Bart Brand, attorney representing Anesthesia Associates of Cape Girardeau; and Mr. Alan Gallas, attorney for St. Luke's Hospital.

During this telephone conference call, the parties discussed and agreed that the rules of the Department of Labor and Industrial Relations pertaining to medical fee disputes had been amended effective February 28, 2007, and no longer provided that the Division of Workers' compensation loses jurisdiction to hear medical fee disputes after the underlying case is dismissed, settled or an award entered [8 CSR 50-2.030 (2) (D)]. The parties agreed that under the amended rules it is permissible for the direct pay medical fee disputes to be left open and resolved independently of the underlying workers' compensation claim. Under the circumstances of this case, the parties further agreed that if the primary case is resolved in favor of the employee, and that decision is affirmed, the direct pay medical disputes may be resolved by agreement.

Based on this discussion, the parties agreed that the parties to the underlying workers' compensation case would proceed with a final hearing on February 21, 2007, to resolve all the issues in dispute, but the direct pay medical fee disputes of St. Luke's Hospital and Southeast Missouri Hospital would remain open. The employee's attorney, Mr. Joe Rice, agreed to contact the other health care providers who have filed direct pay requests to determine whether they preferred to have Mr. Rice present their bills as part of his primary case or leave the direct pay requests open. By letter dated January 31, 2007, Mr. Steve McManus confirmed the agreement reached in the telephone conference call. A copy of that letter, together with all of the Requests for Direct Payment, have been marked and admitted by the administrative law judge as part of employee's exhibit U.

Subsequent to the January 30, 2007 conference call, two health care providers that had filed requests for direct payment advised Mr. Rice that they wanted Mr. Rice to pursue the payment of their claims as part of the underlying claim. Anesthesia Associates of Cape Girardeau filed a request for direct payment dated February 7, 2006, for \$1,135.00, and Mr. Rice has submitted that bill as employee's exhibit U-6. Midwest Pulmonary Consultants, PC filed a request for direct payment on February 11, 2002, for \$3,155.00. Midwest Pulmonary filed a second request for direct payment for the same services on August 26, 2002 for \$2,905.00. Mr. Rice has advised that these two requests are duplicates, and the correct amount is \$2,905.00. On March 2, 2007, Midwest Pulmonary withdrew its request for direct payment, and their bill was submitted by Mr. Rice as employee's exhibit U-5.

The direct pay medical fee disputes that are still pending and have not be resolved as part of the final hearing of the underlying case are as follows:

| <u>Health Care Provider</u> | <u>Date of Claim</u> | <u>Amount of Claim</u> | <u>Attorney</u> |
|---|---|--|--|
| <ul style="list-style-type: none"> • St. Luke's Hospital • Saint Joseph Medical Center | <ul style="list-style-type: none"> January 25, 2006 January 4, 2007 | <ul style="list-style-type: none"> \$235,677.67 68,259.50 | <ul style="list-style-type: none"> Alan B. Gallas Brent Lagergren |
| <ul style="list-style-type: none"> • Southeast Missouri Hospital | <ul style="list-style-type: none"> November 4, 2004 | <ul style="list-style-type: none"> 86,405.24 | <ul style="list-style-type: none"> Daniel Finch |
| <ul style="list-style-type: none"> • Scott R. Gibbs, MD • Dr. John M. Hiebert • Advance Nursing Center | <ul style="list-style-type: none"> March 7, 2003 November 28, 2001 November 11, 2001 | <ul style="list-style-type: none"> 4,071.00 3,857.00 176.00 | <ul style="list-style-type: none"> Daniel Finch No attorney No attorney |

Hearing for Final Award

On February 21, 2007, the employee's widow, Aileen Robey, appeared in person and by her attorney, Mr. Joe Rice for a hearing for a final award on her claims against Schott Farms, Inc., Alliance Savings Company / AMS Staff Leasing, and the Second Injury Fund. Schott Farms, Inc. was represented at the hearing by its attorney, Mr. Jim Hux. Alliance Savings Company / AMS Staff Leasing and CNA were represented at the hearing by their attorney, Mr. Steve McManus. The Second Injury Fund was represented at the hearing by Assistant Attorney General, Frank Rodman.

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 the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

- On or about June 22, 2001, Alliance Savings Company/AMS Staff Leasing was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by CNA.
- On or about June 22, 2001, Paul Robey was an employee of Schott Farms, Inc.
- On or about June 22, 2001, Paul Robey sustained an accident that arose out of and in the course of his employment.
- Schott Farms, Inc. and the alleged employer Alliance Savings Company/AMS Staff Leasing had notice of the employee's accident and resulting death.
- The employee's claim for compensation was filed within the time allowed by law.
- The employee's injury and subsequent death were medically and causally related to his accident.
- No temporary total disability benefits were paid by the employer-insurer.
- The employee's dependent and the Second Injury Fund agree that if the administrative law judge rules that Paul Robey was an employee of Alliance Savings Company/AMS Staff Leasing, the Second Injury

Fund will not be liable for the medical bills, and the claim against the Second Injury Fund should be dismissed.

- Both employers agree that the medical services and bills identified by the employee are reasonable and necessary for purposes of resolving the employee's claim against the employer-insurer, but the employer-insurer reserves the right to dispute whether any medical bills are reasonable, usual or customary for purposes of the medical fee disputes.

ISSUES

- Status of Schott Farms, Inc. as a covered employer under the Missouri Workers' Compensation Act
- Whether Paul Robey was an employee of Alliance Savings Company / AMS Staff Leasing on the date of his accident
- Average weekly wage and rate of compensation
- Temporary total disability
- Medical expenses
- Funeral expenses
- Identification of employee's dependents
- Distribution of Death Benefits
- Liability of the Second Injury Fund

EXHIBITS

The following exhibits were offered and admitted into evidence:

Joint Exhibits:

- Transcript of Hearing for Temporary or Partial Award held January 24, 2006

Employee's Exhibits:

- A. Marriage certificate
- B. Death certificate
- F. St. Joseph Emergency Physicians Records (6/22/01 – 6/27/01)
- G. St. Joseph Health Center Records
- J. St. Luke's Hospital Records (contained in 2 binders)
- P. Dr. Jeffrey Colyer & Dr. Gary Hall's Records
- S. Records of Advance Nursing
- U. Medical Bills (Separate Binder)
- V. Funeral Bill
- Z. Co-employment agreement between Alliance and Schott
- CC. Settlement sheet
- DD. First load billed to Schott Farms carried by employee
- EE. Last load billed to Schott Farms hauled by employee
- FF. Employee's signature on June 18, 2001 load
- GG. Com data

HH.Employee payroll records
II.Title to truck driven by Paul Robey
JJ.Co-employment booklet
KK.4/22/98 Co-employment Agreement
LL.Employment documents
NN.Report of Injury
OO.Answer filed by Schott
PP.Amended answer filed by Schott
QQ.Deposition of Dr. Robert E. Gardner
RR.March 10, 2005 report of Dr. Gardner
SS.Deposition of Dorothy Hart taken February 12, 2002
TT.Deposition of Roy Hombs of Alliance taken April 11, 2003
UU.Deposition of Roy Hombs taken September 12, 2003
VV.Deposition of Dorothy Hart dated March 1, 2002
WW.Employee's W-2 form from prior employer, Big Lake Transport, Inc.
XX.Employee's W-2 form from prior employer, Big Lake Transport, Inc.
YY.Deposition of Carl Schott
ZZ.Deposition of Tina Hombs taken September 12, 2002
AAA.Deposition of Dyarl Alexander taken September 12, 2002
BBB.Deposition of Carl Schott taken March 1, 2002
CCC.Deposition of Richard Blankenship taken January 23, 2006
DDD.Deposition of Carl Schott taken July 10, 2002
EEE.Deposition of Tina Hombs taken April 23, 2003
FFF.Deposition of Dorothy Hart taken February 12, 2002

Employer Schott's Exhibits:

- 4.Employee handbook
- 5.Safety booklet from Alliance
- 6.Documents related to truck driven by Paul Robey
- 7.Miscellaneous documents from Schott and Alliance related to employees hired in 2001
- 8.Fax from Alliance to Schott dated July 25, 2001
- 9.Fax from Alliance to Schott dated June 26, 2000
- 10.August 13, 2001 memo from Alliance to Schott
- 11.January 5, 2001 Staff Leasing agreement between Alliance and AMS Staff Leasing

Employer Alliance's Exhibits: None offered.

Second Injury Fund's Exhibits: None offered.

FINDINGS OF FACT

Based on the evidence admitted, I find as follows:

- On or about June 22, 2001, Schott Farms, Inc. (“Schott”) was a Missouri Corporation and operated a trucking business.
- On April 22, 1998, Schott entered into a “co-employment agreement” with Alliance Savings Company, Inc. (hereinafter referred to as “Alliance” or “ASCI”). This agreement designates Schott as “co-employer”, and provides that “ASCI and co-employer shall act as joint employer with respect to the employees of co-employer” (Employee’s exhibit Z).
- The services to be provided under the co-employment agreement by ASCI included payroll, taxes, workers’ compensation insurance, employee benefits plans and “employee matters” (Employee’s exhibit Z).
- Under “employee matters” the co-employment agreement provides “ASCI **may** exercise the right to control and direct certain management functions including but not limited to recruiting, hiring, training, evaluation, supervision, discipline, replacement, termination of employees and the implementation and continuation of safety programs so long as it is necessary as for ASCI to properly perform its obligation under this agreement” (Employee’s exhibit Z, emphasis added).
- Under paragraph 7 of the co-employment agreement, Schott, as co-employer, was required to pay certain fees and miscellaneous charges to ASCI. Under paragraph 7C, under the heading “Payroll procedures”, the agreement provides that “at the end of the payroll period, co-employer shall notify the designated representative of ASCI of the correct names of each employee who worked during the previous payroll, the correct number of hours worked by each employee and any other information required by ASCI to meet its obligation hereunder” (Employee’s exhibit Z).
- Paragraph 8 of the co-employment agreement provides, in part, as follows: “The parties agree that ASCI shall have no obligations under this agreement to co-employer or to employees and, additionally, ASCI has the right to terminate employees in the following circumstances: (A omitted) B. Proper W-4. Unless a properly completed W-4 is submitted” (Employee exhibit Z).
- On January 5, 2001, Alliance entered into a “Staff Leasing Agreement” with AMS Staff Leasing (“AMS”). Under the terms of this agreement, AMS agreed to provide “staff leasing services” to Alliance that included obtaining and providing workers’ compensation insurance. Schott was included on the attached list of employers covered by this agreement (Deposition exhibit 60 attached to employee’s exhibit TT).
- From April 22, 1998 through the date of the employee’s accident on June 22, 2001, Alliance did not exercise its right to hire, control or terminate employees of Schott and Alliance. Schott hired drivers as either direct employees or owner-operators. Schott did not notify Alliance of the newly hired employees until the drivers had driven the trucks and the paperwork was sent to Alliance to generate the first paychecks. W-4s and I-9s were typically not submitted to Alliance until after the employees had started driving and had filed the paperwork needed to receive their first paycheck.
- Alliance did not require the submission of W-4s and I-9s before employees started working until after Paul Robey’s accident (See August 13, 2001 document admitted as employer Schott’s exhibit 10).
- On June 15, 2001, the employee, Paul Robey, completed an application for employment with Schott. The employee passed his road test, satisfied all the conditions for employment and was hired as a truck driver on June 18, 2001. Mr. Robey was hired as a direct employee, rather than as an owner-operator.
- At the time the employee was hired, Alliance and Schott were operating under the co-employment agreement, and Alliance delegated the responsibility for hiring the co-employees to Schott.
- On June 22, 2001 the employee was driving a truck for Schott and Alliance when he was involved in a motor vehicle accident that resulted in fatal injuries to the employee’s head and chest. The employee remained in a coma, and significant medical expenses were incurred until the date of his death on September 21, 2001. The medical bills submitted by the employee in employee’s exhibit U total \$63,137.89.
- At the time of the employee’s accident on June 22, 2001, Schott had not submitted to Alliance a properly completed W-4 for Paul Robey.
- As stipulated by the parties, the employee was totally disabled from June 23, 2001 through September

21, 2001.

- The employee's pay for driving trucks was based on an agreed rate of 23¢ per mile. Prior to his accident the employee had driven 1,675 miles for a total of \$385.25. Drivers also received a per diem for expenses of \$38.00 per day. The per diem was not included in the drivers' gross pay for purposes of computing the amount of income tax and social security to be withheld from the employee's wages.
- Prior to his job with Schott and Alliance, the employee worked as a truck driver for Big Lake Transport, Inc. The employee's W-2 confirms that during the year 2000 the employee earned \$25,652.47 working as a truck driver, for an average weekly earnings of \$493.32 (Employee's exhibit XX).
- At the time of the employee's accident, Schott had more than 5 employees working as drivers, mechanics, clerical assistants or dispatchers. This does not include any owner-operators, who were also driving trucks for Schott.
- The employee, Paul Robey and Aileen Robey were married on April 12, 1984 and remained married and were living as husband and wife until the date of Paul Robey's death on September 21, 2001. No children were born of the employee's marriage to Aileen Robey, and the employee had no other dependents. Aileen Robey had not remarried at the time of the hearing on February 21, 2007.

APPLICABLE LAW

- Section 287.020.1 states "the word 'employee' as used in this chapter shall be construed to mean every person in the services 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".
- Effective August 28, 1993, Section 287.020 excludes from the definition of employee "an individual who is the owner and operator of a motor vehicle which is leased or contracted with a driver to for-hire common or contract motor vehicle carrier operating within a commercial zone....".
- Section 287.030.1(1) defines employer as "every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay".
- Section 287.030.1(3) states, "any of the above-defined employers must have 5 or more employees to be deemed an employer for purposes of this chapter..."
- Chapter 287.250.1(5) states "if the employee has been employed less than 2 calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage".
- Section 287.250.2 states as follows:

For purposes of this section, the term "gross wages" includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging are similar advance received from the employer, except if such benefits continue to be provided during the period of disability, then the value of such benefits shall not be considered in calculating the average weekly wage of the employee. The term "wages" as used in this section, includes the value of any gratuities received in the course of employment from persons other than the employer to the extent that such gratuities are reported for income tax purposes. "Wages" as used in this section does not include fringe benefits such as retirement, pension, health and welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee. Any wages paid to helpers or any money paid by

the employer to the employee to cover any special expenses incurred by the employee because of the nature of his employment shall not be included in wages.

- In *Grimes v GAB Business Services, Inc.*, 988 S.W2d 636 (Mo 1999), the Eastern District Court of Appeals held that under Section 287.250.2, the employee's per diem expense allowance cannot be included as part of the employee's gross wage for purposes for calculating the average weekly wage unless the employee proves that the payments exceeded the actual expenses incurred, thus resulting in a real economic gain for the employee.

RULINGS OF LAW

Issue 1. Schott Farms, Inc. Status as a Covered Employer

The evidence unequivocally establishes that on or about the date of the employee's June 22, 2001 accident, Schott had more than 5 employees. This total does not include the owner-operators who were hauling loads for Schott.

Based on this evidence, I find that on the date of the employee's accident, Schott was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act.

Issue 2. Paul Robey's Status as an Employee of Alliance

Alliance acknowledges that under the terms of the co-employment agreement, it was an employer of the other drivers working for Schott. The terms of the co-employment agreement preclude any other conclusion. Alliance argues, however, that Paul Robey was not its employee on the date of his accident because Alliance had not received Mr. Robey's W-4.

Alliance's position is based on paragraph 8 of the co-employment agreement. This section indicates that Alliance has no obligation under the agreement to Schott or to an employee, and also has the right to terminate employees, unless a properly completed W-4 is submitted.

Based on the testimony of the witnesses and the other evidence, I find that Alliance was a co-employer of Paul Robey as of the date Paul Robey was hired on June 18, 2001.

Under paragraph 3 of their agreement, Schott and Alliance specifically stated that they "shall act as joint employers with respect to employees" of Schott. Although paragraph 6E indicated Alliance **may** exercise the right to hire their co-employees, the evidence confirms that Alliance never exercised this right, but relied on Schott to recruit and hire their employees.

There is nothing in the agreement to support a finding that the hiring was to be done in a two-step process. There is no evidence to indicate that the employees were initially to be hired by Schott, and then had to be approved and hired by Alliance. There was only one step required in the hiring process for both co-employers, and that step was completed for Paul Robey on June 18, 2001. On that date, Schott hired Paul Robey on behalf of both co-employers.

The “obligation” of Alliance referred to under paragraph 8 appears to be limited to the obligation to pay the employees. That is what W-4s are used for. No employer can pay an employee and know how much to withhold without a W-4. Alliance has cited no authority to support a finding that an individual cannot be an employee under the Workers’ Compensation Act without first filing a W-4.

This conclusion is also supported by the inclusion in paragraph 8 of the phrase “ASCI also has the right to terminate employees” if they have not submitted a W-4. The use of the word terminate implies that the person who has not submitted the W-4 is an employee.

The evidence supports a conclusion that Alliance and CNA did not become concerned about Schott’s practice of submitting W-4s after their employees started working until sometime after Paul Robey’s accident. This practice was not challenged until it became apparent that Mr. Robey’s medical bills would be very high due to his extended hospitalization.

It should also be noted that under workers’ compensation insurance policies employers are not required to report the daily hiring and firing of employees to the insurance company in order to obtain coverage for each employee. To the contrary, insurance companies cover all employees regardless of whether W-4s have been signed, and will periodically audit the employers to adjust the premiums.

Alliance and CNA’s belated attempt to deny benefits to the employee and his widow based on the fact that Schott had not submitted a W-4 was done for self serving reasons, and has no basis under the agreement or the law. While the failure of Schott to submit a W-4, may have given Alliance contractual authority to deny payment or to terminate Paul Robey, the contract did not make filing a W-4 a precondition to employee status. Paul Robey was hired by Schott as an employee of both Schott and Alliance on June 18, 2001, and the fact that his W-4 was not sent to Alliance prior to his accident was not relevant to his status as an employee of either Schott or Alliance.

I therefore find that as of the date of Paul Robey’s accident on June 22, 2001, Paul Robey was an employee of Alliance Savings Company, and was working as a covered employee under the Workers’ Compensation Act.

Issue 3. Average Weekly Wage and Rate of Compensation

The employee worked less than two weeks prior to his accident. I therefore find that the employee’s average weekly wage should be computed under Section 287.250.1(5). Since the employee was not working at an agreed hourly wage, Mr. Robey’s average weekly wage should be equivalent to “the average weekly wage prevailing in the same or similar employment at the time of the injury”.

The best evidence of the average weekly wage prevailing in the same or similar employment is the employee’s W-2 for the year 2000 from Big Lake Transport, Inc. During the year prior to his accident the employee worked full time as a truck driver, was paid by the mile, and earned \$25,652.47. This total would not have included any per diem payments, and yields an average weekly wage of \$493.32.

The employee’s dependent’s attorney introduced a payroll register of Schott and Alliance truck drivers. The problem with this exhibit is that it does not differentiate between direct employees who were paid by the mile and owner-operators who were paid based on a percentage of the load. For the week of the employee’s accident the total amount earned by the 24 drivers, including a \$38 per diem, was \$13,743.01, for an average of \$574.74. If the per diem payments of \$5,472.00 are deducted, however, the total paid to the 24 drivers was \$8,321.01, for an average of \$346.71.

The employee's dependent's attorney argues that the per diem allowance of \$38.00 per day should be included as "gross wages" under Section 287.250.2. This provision would require a finding that the per diem falls in the category of "the reasonable value of board, rent, housing, lodging or similar advance received by the employee for the employer".

The employer-insurer's attorney relies on the last sentence of Section 287.250.2, which excludes "any money paid by the employer to the employee to cover any special expenses incurred by the employee because of the nature of his employment...".

As previously noted, a recent Eastern District Missouri Court of Appeals decision provides a comprehensive analysis of this issue. With similar facts, the court of appeals reversed the Administrative Law Judge and Commission's decision to include the employee's per diem in the calculation of his average weekly wage. The court held the employee's per diem payments should be excluded unless the employee can establish that the per diem payments exceeded the actual expenses incurred, thus resulting in a real economic gain to the employee. *Grimes v GAB Business Services, Inc.* 988 S.W.2d 636 (Mo.App.1999).

Based on this decision, I find that the per diem payments were paid to the employees to cover special expenses incurred by the employees because of the nature of their employment. There is no evidence to support a finding that the per diem payments exceeded the actual expenses. The per diem payments must therefore be excluded from the gross wages for purposes of calculating the average weekly wage.

Given the fact that the payroll register includes owner-operator's who were paid based on a percentage of the load, I find that the employee's W-2 from Big Lake Transport from the previous year is the best evidence to determine the average weekly wage in the same or similar employment. I therefore find that the employee's average weekly wage is equal to \$493.32.

Based on this finding, the employee's rate of compensation for temporary total disability and death benefits is equal to \$328.88.

Issue 4. Temporary Total Disability

The parties stipulated that the employee was temporarily totally disabled from June 23, 2001 through September 21, 2001. Based on the findings under issues 1, 2, and 3, I further find that Schott, Alliance and CNA are obligated to pay to the employee's widow, Aileen Robey the sum of \$328.88 per week for 13 1/7 weeks of temporary total disability, for a total award of temporary total disability equal to \$4,322.42.

Issue 5. Medical Expenses

The employee's dependent has requested an award for medical expenses incurred from the date of the employee's accident on June 22, 2001, through the date of his death on September 21, 2001. As noted, the bills of St. Luke's Hospital; St. Joseph Health Center; Southeast Missouri Hospital; Scott R. Gibbs, M.D.; Dr. John M. Hiebert; and Advance Nursing Center are being pursued by the health care providers as requests for direct payment of medical claims, and are not being submitted as part of the employee's underlying claim. The remaining medical bills submitted by the employees' dependent are set forth in employee's exhibit U as follows:

| <u>Number</u> | <u>Health Care Provider</u> | <u>Amount of Bill</u> |
|---------------|--------------------------------|-----------------------|
| U-1 | St. Joseph Anesthesia Services | \$1,674.00 |
| U-2 | Westport Anesthesia Services | 3,286.00 |
| U-3 | Alliance Radiology CRI | 19,190.00 |

| | | |
|------|---|-----------------|
| U-4 | Medical Specialist of SE (Dr. Grishop) | 3,269.00 |
| U-5 | Midwest Pulmonary Consultants | 2,905.00 |
| U-6 | Anesthesia Associates of Cape Girardeau | 1,569.07 |
| U-7 | Neurologic Associates (paid by EI) | 0 |
| U-8 | Surgical Consultants of Kansas City | 1,420.00 |
| U-9 | Carondelet Orthopedic Surgeon | 896.00 |
| U-11 | St. Joseph Emergency Physicians | 207.00 |
| U-12 | SNI Valley Fire Protection District | 495.00 |
| U-14 | Metropolitan Ambulance Services | 3,014.03 |
| U-15 | Pulmonary Physicians of Kansas City | 753.00 |
| U-17 | Ward Parkway Health | 512.00 |
| U-18 | Mid America Gastro Intestinal Services | 940.00 |
| U-19 | The KC Neurosurgery Group, Inc. | 3,448.00 |
| U-20 | Cape Radiology Group, Inc. | 1,287.00 |
| U-22 | Diagnostic Pathology Associates | 220.79 |
| U-23 | Kansas Lifenet | 6,612.00 |
| U-24 | Plaza Internal Medicine | 1,665.00 |
| U-26 | Rehabilitation Services | 160.00 |
| U-27 | Mid America Surgical Specialists | 724.00 |
| U-28 | Dr. Charles R. Kelly | 369.00 |
| U-30 | Internal Medicine Group | 145.00 |
| U-31 | Dr. Jeffrey Colyer & Dr. Gary Hall | <u>8,377.00</u> |
| | TOTAL | \$63,137.89 |

Based on the medical and other evidence admitted and the stipulations of the parties, I find that the medical expenses in employee's exhibit U were medically causally related to the employee's June 21, 2001 accident. I further find that the medical treatment provided by the health care providers identified in employee's exhibit U was medically necessary. The evidence also supports a finding that the amounts billed by the health care providers were reasonable.

The employers and insurer are therefore directed to pay to the employee's widow and dependent, Aileen Robey, the sum of \$63,137.89 for previously incurred medical expenses.

Issue 6. Funeral Expenses

The testimony of Aileen Robey and employee's exhibit V establish that the funeral expenses incurred following the employee's death exceeded the statutory maximum of \$5,000.00. The employers and insurer are therefore directed to pay to the employee's dependent the sum of \$5,000.00 for funeral expenses, as provided in Chapter 287.240(1).

Issue 7. Identification of Dependents

Based on the testimony of Aileen Robey and the other exhibits, I find that Paul Robey and Aileen Robey were married on April 12, 1984, and remained married and were living together as husband and wife at the time of his death on September 21, 2001. As of the date of the hearing, Aileen Robey had not remarried, and therefore, is a conclusively presumed dependent under Section 287.240 RSMo.

Other than the employee's widow, Aileen Robey, I find that the employee was not survived by any other dependents, either total or partial.

Issue 8. Distribution of Death Benefits

Under 287.240(4) RSMo., death benefits are payable to conclusively presumed total dependents “to the exclusion of other total dependents.” As previously determined, the employee’s average weekly wage entitles his dependent to a death benefit of \$328.88 per week. Pursuant to Section 287.240 RSMo., the employers and insurer are therefore directed to pay to Aileen Robey, as the widow and sole dependent of the employee, the sum of \$328.88 per week commencing September 22, 2001, and continuing until Aileen Robey loses her status as a dependent as provided below.

Aileen Robey’s ongoing status as a conclusively presumed dependent shall be determined in accordance with Section 287.240(4)(a). This section provides that the death payment to Aileen Robey, as widow, shall cease upon her death or remarriage. In addition to the weekly death benefits, Section 287.240 also provides that “in the event of remarriage a lump sum payment equal in amount to the benefits due for a period of two years shall be payable to the widow or widower”. Pursuant to this provision, in the event Aileen Robey shall remarry, the employers and insurer shall also make a remarriage lump sum payment to Aileen Robey equal to 104 times the weekly death benefit of \$328.88, for a total payment of \$34,203.52.

As provided under Section 287.240, the payment of compensation by the employers and insurer in accordance with this order shall discharge the employers and insurer from all further obligations as to compensation under this chapter for death benefits. All death benefits shall be paid in installments in the same manner as provided for disability compensation. Pursuant to Section 287.240, Aileen Robey, as widow, shall annually report her marital status to the division.

Issue 9. Liability of the Second Injury Fund

Based on the findings that Schott was a covered employer and that Paul Robey was an employee of Alliance, with resulting coverage by CNA, the employee’s claim against the Second Injury Fund for medical expenses incurred while working for an “uninsured” employer is hereby denied.

ATTORNEY’S FEES

Joseph P. Rice, attorney at law, is allowed a fee of 25% of all sums awarded under the provision of this award for necessary legal services rendered to the employee’s dependent. The amount of this attorney’s fee shall constitute a lien on the amount of compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Mr. Lucas Boling
Acting Director
Division of Workers' Compensation